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and/or change to the risk of an existing hazard as follows:

(1) *Unacceptable*. Categories 1A, 1B, 1C, 1D, 2A, 2B, 2C, 3A, 3B, and 4A are unacceptable. A railroad should not file a petition for special approval with a new hazard, change to existing hazard and/or change to the risk of an existing hazard in this category as FRA will not approve an operation with a partially mitigated or unmitigated hazard that is categorized as unacceptable;

(2) *Acceptable under specific conditions*. Categories 1E, 2D, 3C, 3D, 4B, and 4C are acceptable under specific conditions. A railroad's risk report should describe why the railroad finds the conditions acceptable. A new hazard, change to existing hazard and/or change to the risk of an existing hazard will be acceptable under specific conditions if FRA finds that the one-person operation is as safe or safer than a two or more-person operation; and

(3) *Acceptable*. Categories 2E, 3E, 4D, and 4E are acceptable. FRA will not deny a petition for special approval solely on the basis an appropriately categorized acceptable new hazard, change to existing hazard and/or change to the risk of an existing hazard if the one-person operation is as safe or safer than a two-person minimum operation.

(f) Provide a statement with supporting evidence, that the one-person operation with a fully implemented mitigation plan, is as safe or safer than a two-person minimum operation.

[89 FR 25114, Apr. 9, 2024]

PART 219—CONTROL OF ALCOHOL AND DRUG USE

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AUTHORITY: 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461 note; Div. A, Sec. 412, Pub. L. 110–432, 122 Stat. 4889 (49 U.S.C. 20140 note); Sec. 8102, Pub. L. 115–271, 132 Stat. 3894; and 49 CFR 1.89.

SOURCE: 66 FR 41973, Aug. 9, 2001, unless otherwise noted.

Subpart A—General

§ 219.1 Purpose and scope.

(a) The purpose of this part is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.

(b) This part prescribes minimum Federal safety standards for control of alcohol and drug use. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

[66 FR 41973, Aug. 9, 2001, as amended at 81 FR 37922, June 10, 2016]

§ 219.3 Application.

(a) *General.* This part applies to all railroads and contractors, except as provided in paragraphs (b), (c), and (d) of this section, and except for:

(1) Railroads that operate only on track inside an installation that is not part of the general railroad system of

transportation (*i.e.*, plant railroads, as defined in § 219.5);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation, as defined in § 219.5; or

(3) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) [Reserved]

(c) *Small railroad exception.* (1) Subparts E, G, and K do not apply to small railroads, and a small railroad may not perform the Federal requirements authorized by those subparts. For purposes of this part, a small railroad means a railroad that:

(i) Has a total of 15 or fewer employees who are covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, or who would be subject to the hours of service laws at 49 U.S.C. 21103, 21104, or 21105 if their services were performed in the United States; and

(ii) Does not have joint operations, as defined in § 219.5, with another railroad that operates in the United States, except as necessary for purposes of interchange.

(2) An employee performing only MOW or MECH activities, as defined in § 219.5, does not count towards a railroad's total number of covered employees for the purpose of determining whether it qualifies for the small railroad exception.

(3) A contractor performing MOW or MECH activities exclusively for small railroads also qualifies for the small railroad exception (*i.e.*, is excepted from the requirements of subparts E, G, and K of this part). A contractor is not excepted if it performs MOW or MECH activities for at least one railroad that is required to be in full compliance with this part.

(4) If a contractor is subject to all of part 219 because it performs regulated service for multiple railroads, not all of which qualify for the small railroad exception, the responsibility for ensuring that the contractor complies with subparts E and G of this part is shared between the contractor and any railroad using the contractor that does not qualify for the small railroad exception.

(d) *Foreign railroad.* (1) This part does not apply to the operations of a foreign railroad that take place outside the United States. A foreign railroad is required to conduct post-accident toxicological testing or reasonable suspicion testing only for operations that occur within the United States.

(2) Subparts F, G, and K of this part do not apply to an employee of a foreign railroad whose primary reporting point is outside the United States if that employee is:

(i) Performing train or dispatching service on that portion of a rail line in the United States extending up to 10 route miles from the point that the line crosses into the United States from Canada or Mexico; or

(ii) Performing signal service in the United States.

[81 FR 37922, June 10, 2016, as amended at 87 FR 5733, Feb. 2, 2022]

§219.4 Recognition of a foreign railroad's workplace testing program.

(a) *General.* A foreign railroad may petition the FRA Associate Administrator for Safety for recognition of a workplace testing program promulgated under the laws of its home country as a compatible alternative to the return-to-duty requirements in subpart B of this part and the requirements of subparts E, F, and G of this part with respect to its employees whose primary reporting point is outside the United States but who enter the United States to perform train or dispatching service and with respect to its final applicants for, or its employees seeking to transfer for the first time to, duties involving such service.

(1) To be so considered, the petition must document that the foreign railroad's workplace testing program contains equivalents to subparts B, F, G, and K of this part:

(2) In approving a program under this section, the FRA Associate Administrator for Safety may impose conditions deemed necessary.

(b) *Alternative programs.* (1) Upon FRA's recognition of a foreign railroad's workplace alcohol and drug use program as compatible with the return-to-duty requirements in subpart B of this part and the requirements of subparts F, G, and K of this part, the

foreign railroad must comply with either the specified provisions of §219.4 or with the standards of its recognized program, and any imposed conditions, with respect to its employees whose primary reporting point is outside the United States and who perform train or dispatching service in the United States. The foreign railroad must also, with respect to its final applicants for, or its employees seeking to transfer for the first time to, duties involving such train or dispatching service in the United States, comply with either subpart F of this part or the standards of its recognized program.

(2) The foreign railroad must comply with subparts A (general), B (prohibitions, other than the return-to-duty provisions in §219.104(d)), C (post-accident toxicological testing), D (reasonable suspicion testing), I (annual report requirements), and J (recordkeeping requirements) of this part. Drug or alcohol testing required by these subparts (except for post-accident toxicological testing required by subpart C) must be conducted in compliance with all applicable provisions of the DOT Procedures for Workplace Drug and Alcohol Testing Programs (part 40 of this title).

(c) *Petitions for recognition of a foreign railroad's workplace testing programs.* Each petition for recognition of a foreign workplace testing program shall contain:

(1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the petition;

(2) The requirements of the foreign railroad workplace testing program to be considered for recognition;

(3) Appropriate data or records, or both, for FRA to consider in determining whether the foreign railroad workplace testing program is equivalent to the minimum standards contained in this part and provides at least an equivalent level of safety.

(d) *FEDERAL REGISTER notice.* FRA will publish a notice in the FEDERAL REGISTER concerning each petition under paragraph (c) of this section that it receives.

(e) *Comment.* Not later than 30 days from the date of publication of the notice in the FEDERAL REGISTER concerning a petition under paragraph (c) of this section, any person may comment on the petition.

(1) A comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding.

(2) Any comment on a petition should reference the FRA docket and notice numbers. A commenter may submit a comment and related material by only one of the following methods:

(i) *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments on the Federal Docket Management System electronic docket site.

(ii) *Fax.* 1-202-493-2251.

(iii) *Mail.* U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(iv) *Hand delivery.* Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

(3) The commenter shall certify that a copy of the comment was served on the petitioner. Note that all petitions received will be posted without change to <http://www.regulations.gov> including any personal information provided.

(f) *Disposition of petitions.* (1) If FRA finds that the petition complies with the requirements of this section and that the foreign railroad's workplace testing program is compatible with the minimum standards of this part, the petition will be granted, normally within 90 days of its receipt. If the petition is neither granted nor denied within 90 days, the petition remains pending for decision. FRA may attach special conditions to the approval of any petition. Following the approval of a petition, FRA may reopen consideration of the petition for cause.

(2) If FRA finds that the petition does not comply with the requirements of this section or that the foreign railroad's workplace testing program is not compatible with the minimum

standards of this part, the petition will be denied, normally within 90 days of its receipt.

(3) When FRA grants or denies a petition, or reopens consideration of the petition, written notice is sent to the petitioner and other interested parties.

(g) *Program recognition.* If its program has been recognized, the foreign railroad shall maintain a letter on file indicating that it has elected to extend specified elements of the recognized program to its operations in the United States. Once granted, program recognition remains valid so long as the program retains these elements and the foreign railroad complies with the program requirements.

[69 FR 19286, Apr. 12, 2004, as amended at 74 FR 25172, 25173, May 27, 2009; 81 FR 37923, June 10, 2016; 88 FR 27652, May 2, 2023]

§219.5 Definitions.

As used in this part only—

Accident or incident reportable under part 225 does not include a case that is classified as “covered data” under §225.5 of this chapter (*i.e.*, employee injury/illness cases reportable exclusively because a physician or other licensed health care professional either made a one-time topical application of a prescription-strength medication to the employee's injury or made a written recommendation that the employee: Take one or more days away from work when the employee instead reports to work (or would have reported had he or she been scheduled) and takes no days away from work in connection with the injury or illness; work restricted duty for one or more days when the employee instead works unrestricted (or would have worked unrestricted had he or she been scheduled) and takes no other days of restricted work activity in connection with the injury or illness; or take over-the-counter medication at a dosage equal to or greater than the minimum prescription strength, whether or not the employee actually takes the medication).

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

Associate Administrator means the Associate Administrator for Railroad

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Safety, Federal Railroad Administration, or the Associate Administrator's delegate.

Category of regulated employee means a broad class of covered service, maintenance-of-way, or mechanical employees (as defined in this section). For the purposes of determining random testing rates under §219.625, if an individual performs both covered service and maintenance-of-way activities, or covered service and mechanical activities, he or she belongs in the category of regulated employee that corresponds with the type of regulated service comprising the majority of his or her regulated service.

Class I, Class II, and Class III have the meaning assigned by regulations of the Surface Transportation Board (49 CFR part 1201; General Instructions 1–1).

Contractor means a contractor or subcontractor performing functions for a railroad.

Controlled substance has the meaning assigned by 21 U.S.C. 802, and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301–1316).

Covered employee means an employee (as defined in this section to include an employee, volunteer, or probationary employee performing activities for a railroad or a contractor to a railroad) who is performing covered service under the hours of service laws at 49 U.S.C. 21101, 21104, or 21105 or who is subject to performing such covered service, regardless of whether the person has performed or is currently performing covered service. (An employee is not a “covered employee” under this definition exclusively because he or she is an employee for purposes of 49 U.S.C. 21106.) For the purposes of pre-employment testing only, the term “covered employee” includes a person applying to perform covered service in the United States.

Covered service means service in the United States as a train employee, a dispatching service employee, or a signal employee, as those terms are defined at 49 U.S.C. 21101, but does not include any period the employee is relieved of all responsibilities and is free to come and go without restriction.

Cross-border operation means a rail operation that crosses into the United States from Canada or Mexico.

Domestic railroad means a railroad that is incorporated in the United States.

DOT Agency means an agency (or “operating administration”) of the United States Department of Transportation administering regulations requiring alcohol or controlled substance testing (14 CFR parts 61, 63, 65, 121 and 135; 49 CFR parts 199, 219, 382 and 655) in accordance with part 40 of this title.

DOT, The Department, or DOT agency means all DOT agencies, including, but not limited to, the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Transit Administration (FTA), the National Highway Traffic Safety Administration (NHTSA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), the United States Coast Guard (USCG) (for purposes of part 40 coverage only), and the Office of the Secretary (OST). These terms include any designee of a DOT agency.

DOT-regulated employee means any person who is designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. The term includes individuals currently performing DOT safety-sensitive functions designated in DOT agency regulations and applicants for employment subject to pre-employment testing. For purposes of drug testing conducted under the provisions of 49 CFR part 40, the term employee has the same meaning as the term “donor” as found on the Custody and Control Form and related guidance materials produced by the Department of Health and Human Services.

DOT safety-sensitive duties or DOT-safety sensitive functions means functions or duties designated by a DOT agency, the performance of which makes an individual subject to the drug testing and/or alcohol testing requirements of that DOT agency. For purposes of this part, regulated service has been designated by FRA as a DOT safety-sensitive duty or function.

Drug means any substance (other than alcohol) that has known mind- or

function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

Drug and Alcohol Counselor or *DAC* means a person who meets the credentialing and qualification requirements described in §242.7 of this chapter.

Employee means any individual, (including a volunteer or a probationary employee) performing activities for a railroad, a contractor to a railroad, or a subcontractor to a railroad.

Evacuation means the mandatory or voluntary relocation of at least one person who is not a railroad employee for the purpose of avoiding exposure to a hazardous material release. It does not include the closure of public transportation roadways for the purpose of containing a hazardous material release, unless the closure is accompanied by an evacuation order.

Flagman or Flagger means any person designated by the railroad to direct or restrict the movement of trains past a point on a track to provide on-track safety for maintenance-of-way employees, while engaged solely in performing that function.

Foreign railroad means a railroad that is incorporated outside the United States.

Fouling a track means the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail.

FRA means the Federal Railroad Administration, United States Department of Transportation.

FRA representative means the Associate Administrator for Railroad Safety of FRA and staff, the Associate Administrator's delegate (including a qualified State inspector acting under part 212 of this chapter), the Chief Counsel of FRA, the Chief Counsel's delegate, or FRA's Drug and Alcohol Program oversight contractor.

Hazardous material means a commodity designated as a hazardous material by part 172 of this title.

Highway-rail grade crossing means:

(1) A location where a public highway, road, or street, or a private roadway, including associated sidewalks, crosses one or more railroad tracks at grade; or

(2) A location where a pathway explicitly authorized by a public authority or a railroad carrier that is dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others that crosses one or more railroad tracks at grade. The term "sidewalk" means that portion of a street between the curb line, or the lateral line of a roadway, and the adjacent property line or, on easements of private property, that portion of a street that is paved or improved and intended for use by pedestrians.

Highway-rail grade crossing accident/incident means any impact between railroad on-track equipment and a highway user at a highway-rail grade crossing. The term "highway user" includes pedestrians, as well as automobiles, buses, trucks, motorcycles, bicycles, farm vehicles, and all other modes of surface transportation motorized and un-motorized.

Impact accident, (1) Impact accident means a train accident, as defined in this section, consisting either of—

(i) A head-on or rear-end collision between on-track equipment;

(ii) A side collision, derailment collision, raking collision, switching collision, or "other impact accident," as defined by this section;

(iii) Impact with a deliberately-placed obstruction, such as a bumping post (but not a derail); or

(iv) Impact between on-track equipment and any railroad equipment fouling the track, such as an impact between a train and the boom of an off-rail vehicle.

(2) The definition of "impact accident" does not include an impact with naturally-occurring obstructions such as fallen trees, rock or snow slides, livestock, etc.

Independent with respect to a medical facility, means not under the ownership or control of the railroad and not operated or staffed by a salaried officer or employee of the railroad. The fact that the railroad pays for services rendered by a medical facility or laboratory, selects that entity for performing

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tests under this part, or has a standing contractual relationship with that entity to perform tests under this part or perform other medical examinations or tests of railroad employees does not, by itself, remove the facility from this definition.

Joint operations means rail operations conducted by more than one railroad on the same track (except for minimal joint operations necessary for the purpose of interchange), regardless of whether such operations are the result of contractual arrangements between the railroads, order of a governmental agency or a court of law, or any other legally binding directive. For purposes of this part only, minimal joint operations are considered necessary for the purpose of interchange when:

(1) The maximum authorized speed for operations on the shared track does not exceed 20 mph;

(2) Operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer;

(3) The maximum distance for operations on the shared track does not exceed 3 miles; and

(4) Any operations extending into another railroad's yard are for the sole purpose of setting out or picking up cars on a designated interchange track.

Maintenance-of-way employee or *MOW employee* means a roadway worker as defined in §214.7 of this chapter.

Mechanical employee or *MECH employee* means—

(1) Any employee who, on behalf of a railroad, performs mechanical tests or inspections required by part 215, 221, 229, 230, 232, 238, or 299 of this chapter on railroad rolling equipment, or its components, except for:

(i) An employee who is a member of a train crew assigned to test or inspect railroad rolling equipment that is part of a train or yard movement the employee has been called to operate; or

(ii) An employee who only performs one or more of the following duties:

(A) Cleaning and/or supplying cabooses, locomotives, or passenger cars with ice, food concession items, drinking water, tools, sanitary supplies, or flagging equipment;

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(B) Servicing activities on locomotives such as fueling, replenishing engine oils and engine water, sanding, and toilet discharge and recharge;

(C) Checking lading for pilferage or vandalism; or

(D) Loading, unloading, or shifting car loads.

(2) An employee who only performs work related to the original manufacturing, testing, or inspection of railroad rolling equipment, or its components, on the manufacturer's behalf, is not a mechanical employee or *MECH employee*.

Medical facility means a hospital, clinic, physician's office, or laboratory where post-accident toxicological testing specimens can be collected according to recognized professional standards, and where an individual's post-accident medical needs can be attended to.

Medical practitioner means a physician or dentist licensed or otherwise authorized to practice by the state.

Non-controlled substance means any substance (including prescription medications, over-the-counter products, dietary supplements, and herbal preparations) which is not currently regulated under 21 U.S.C. 801–971 or 21 CFR part 1308.

Non-peer means a supervisor (other than a co-worker), labor organization representative, or family member of a regulated employee.

NTSB means the National Transportation Safety Board.

On-track or fouling equipment means any railroad equipment that is positioned on the rails or that is fouling the track, and includes, but is not limited to, the following: A train, locomotive, cut of cars, single car, motorcar, yard switching train, work train, inspection train, track motorcar, highway-rail vehicle, push car, crane, or other roadway maintenance machine, such as a ballast tamping machine, if the machine is positioned on or over the rails or is fouling the track.

Other impact accident means an accident or incident, not classified as a head-on, rear-end, side, derailment, raking, or switching collision, that involves contact between on-track or fouling equipment. This includes impacts in which single cars or cuts of

cars are damaged during operations involving switching, train makeup, setting out, etc.

Passenger train means a train transporting persons (other than employees, contractors, or persons riding equipment to observe or monitor railroad operations) in intercity passenger service, commuter or other short-haul service, or for excursion or recreational purposes.

Person means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad, such as a service agent performing functions under part 40 of this title; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Positive rate for random drug testing means the number of verified positive results for random drug tests conducted under this part plus the number of refusals of random drug tests required by this part, divided by the total number of random drug tests re-

sults (*i.e.*, positives, negatives, and refusals) under this part.

Possess means to have on one's person or in one's personal effects or under one's control. However, the concept of possession as used in this part does not include control by virtue of presence in the employee's personal residence or other similar location off of railroad property.

Railroad means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, and any person providing such transportation, including—

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad property damage or damage to railroad property means damage to railroad property (specifically, on-track equipment, signals, track, track structure, or roadbed) and must be calculated according to the provisions for calculating costs and reportable damage in the FRA Guide for Preparing Accident/Incident Reports (see §225.21 of this chapter for instructions on how to obtain a copy). Generally, railroad property damage includes labor costs and all other costs to repair or replace in-kind damaged on-track equipment, signals, track, track structures (including bridges and tunnels), or roadbed. (Labor costs that must be accounted for include hourly wages, transportation costs, and hotel expenses.) It does not include the cost of clearing a wreck; however, additional damage to the above-listed items caused while clearing the wreck must be included in the damage estimate. It also includes the cost of rental and/or operation of machinery such as cranes and bulldozers, including the services of contractors, to replace or repair the track right-of-way and associated

structures. Railroad property damage does not include damage to lading. Trailers/containers on flatcars are considered to be lading and damage to these is not to be included in on-track equipment damage. Damage to a flat car carrying a trailer/container, however, is included in railroad property damage. Railroads should refer directly to the FRA Guide for Preparing Accident/Incident Reports for additional guidance on what constitutes railroad property damage.

Raking collision means a collision between parts or lading of a consist on an adjacent track, or with a structure such as a bridge.

Regulated employee means a covered employee, maintenance-of-way employee, or mechanical employee (as defined in this section) who performs regulated service for a railroad subject to the requirements of this part.

Regulated service means activities a covered employee, maintenance-of-way employee, or mechanical employee (as defined in this section) performs that makes such an employee subject to this part.

Reportable injury means an injury reportable under part 225 of this chapter except for an injury that is classified as “covered data” under §225.5 of this chapter (*i.e.*, employee injury/illness cases reportable exclusively because a physician or other licensed health care professional either made a one-time topical application of a prescription-strength medication to the employee’s injury or made a written recommendation that the employee: Take one or more days away from work when the employee instead reports to work (or would have reported had he or she been scheduled) and takes no days away from work in connection with the injury or illness; work restricted duty for one or more days when the employee instead works unrestricted (or would have worked unrestricted had he or she been scheduled) and takes no other days of restricted work activity in connection with the injury or illness; or take over-the-counter medication at a dosage equal to or greater than the minimum prescription strength, whether or not the employee actually takes the medication.

Reporting threshold means the amount specified in §225.19(e) of this chapter, as adjusted from time to time in accordance with appendix B to part 225 of this chapter.

Responsible railroad supervisor means any responsible line supervisor (*e.g.*, a trainmaster or road foreman of engines) or superior official in authority over the regulated employees to be tested.

Rolling equipment means locomotives, railroad cars, and one or more locomotives coupled to one or more railroad cars.

Side collision means a collision when one consist strikes the side of another consist at a turnout, including a collision at a switch or at a railroad crossing at grade.

State means a State of the United States of America or the District of Columbia.

Supervisory employee means an officer, special agent, or other employee of the railroad who is not a co-worker and who is responsible for supervising or monitoring the conduct or performance of one or more employees.

Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.*, there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

Train accident means a rail equipment accident described in §225.19(c) of this chapter involving damage in excess of the current reporting threshold (see §225.19(e) of this chapter), including an accident involving a switching movement. Rail equipment accidents include, but are not limited to, collisions, derailments, and other events involving the operations of on-track or fouling equipment (whether standing or moving).

Train incident means an event involving the operation of railroad on-track or fouling equipment that results in a casualty but in which railroad property damage does not exceed the reporting threshold.

United States means all of the States.

Violation rate for random alcohol testing means the number of 0.04 and above

random alcohol confirmation test results conducted under this part plus the number of refusals of random alcohol tests required by this part, divided by the total number of random alcohol screening tests (including refusals) conducted under this part.

Watchman/lookout means an employee who has been annually trained and qualified to provide warning of approaching trains or on-track equipment. Watchmen/lookouts must be properly equipped to provide visual and auditory warning by such means as a whistle, air horn, white disk, red flag, lantern, or fusee. A watchman/lookout's sole duty is to look out for approaching trains/on-track equipment and provide at least fifteen seconds advanced warning to employees before the arrival of trains/on-track equipment.

[66 FR 41973, Aug. 9, 2001, as amended at 68 FR 10135, Mar. 3, 2003; 68 FR 75463, Dec. 31, 2003; 69 FR 19287, Apr. 12, 2004; 78 FR 14224, Mar. 5, 2013; 81 FR 37923, June 10, 2016; 87 FR 5733, Feb. 2, 2022]

§ 219.7 Waivers.

(a) A person subject to a requirement of this part may petition the FRA for a waiver of compliance with such requirement.

(b) Each petition for waiver under this section must be filed in a manner and contain the information required by part 211 of this chapter. A petition for waiver of the part 40 prohibition against stand down of an employee before the Medical Review Officer has completed the verification must also comply with § 40.21 of this title.

(c) If the FRA Administrator finds that waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any necessary conditions.

(d) *Special dispensation for employees performing train or dispatching service on existing cross-border operations.* If a foreign railroad requests a waiver not later than August 10, 2004, for an existing cross-border operation, subparts E, F, and G of this part shall not apply to train or dispatching service on that operation in the United States performed by an employee of a foreign railroad whose primary reporting point is out-

side the United States, until the railroad's waiver request is acted upon by FRA.

(e) *Waiver requests for employees performing train or dispatching service on new or expanded cross-border operations.* A foreign railroad seeking a waiver from subparts E, F, and G of this part for its employees performing train or dispatching service on a new cross-border operation that proceeds more than 10 route miles into the United States, or a formerly excepted cross-border operation that expands beyond the 10 mile limited haul exception in paragraph (d) of this section, must file a petition not later than 90 days before commencing the subject operation. FRA will attempt to decide on such petitions within 90 days. If no action is taken on the petition within 90 days, the petition remains pending for decision and the cross-border crew assignments on the operation covered by the petition will be subject to subparts E, F, and G until FRA grants the petition should the petitioner commence the proposed operation.

[66 FR 41973, Aug. 9, 2001, as amended at 69 FR 19287, Apr. 12, 2004]

§ 219.9 Responsibility for compliance.

(a) *General.* Although the requirements of this part are stated in terms of the duty of a railroad, when any person, as defined by § 219.5, performs any function required by this part, that person (whether or not a railroad) shall perform that function in accordance with this part.

(b) *Joint operations.* (1) In the case of joint operations, primary responsibility for compliance with subparts C, D, and E of this part rests with the host railroad, and all affected employees must be responsive to direction from the host railroad that is consistent with this part. However, nothing in this paragraph restricts railroads engaged in joint operations from appropriately assigning responsibility for compliance with this part amongst themselves through a joint operating agreement or other binding contract. FRA reserves the right to bring an enforcement action for noncompliance with this part against the host railroad, the employing railroad, or both.

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(2) When an employee of a railroad engaged in joint operations is required to participate in breath or body fluid testing under subpart C, D, or E of this part and is subsequently subject to adverse action alleged to have arisen out of the required test (or alleged refusal thereof), necessary witnesses and documents available to the other railroad engaged in the joint operations must be made available to the employee and his or her employing railroad on a reasonable basis.

(c) *Contractor responsibility for compliance.* As provided by paragraph (a) of this section, any independent contractor or other entity that performs regulated service for a railroad, or any other services under this part or part 40 of this title, has the same responsibilities as a railroad under this part with respect to its employees who perform regulated service or other service required by this part or part 40 of this title for the railroad. The entity's responsibility for compliance with this part may be fulfilled either directly by that entity or by the railroad treating the entity's regulated employees as if they were the railroad's own employees for purposes of this part. The responsibility for compliance must be clearly spelled out in the contract between the railroad and the other entity or in another document. In the absence of a clear delineation of responsibility, FRA may hold the railroad and the other entity jointly and severally liable for compliance.

[81 FR 37926, June 10, 2016]

§219.10 Penalties.

Any person, as defined by §219.5, who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$1,086 and not more than \$35,516 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed \$142,063 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, e.g., §219.105, which is construed to

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qualify the responsibility of a railroad for the unauthorized conduct of a regulated employee that violates §219.101 or §219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See FRA's website at www.fra.dot.gov for a statement of agency civil penalty policy.

[87 FR 5733, Feb. 2, 2022, as amended at 87 FR 15867, Mar. 21, 2022; 88 FR 1127, Jan. 6, 2023; 88 FR 89562, Dec. 28, 2023]

§219.11 General conditions for chemical tests.

(a)(1) Any regulated employee who is subject to performing regulated service for a railroad is deemed to have consented to testing as required in subparts B, C, D, E, F, G, and K of this part.

(2) A regulated employee required to participate in alcohol and/or drug testing under this part must be on duty and subject to performing regulated service when the specimen collection is initiated and the alcohol testing/body fluid specimen collection is conducted (with the exception of pre-employment testing under subpart F of this part).

(b)(1) Each regulated employee must participate in such testing, as required under the conditions set forth in this part and implemented by a representative of the railroad or employing contractor.

(2) In any case where an employee is suffering a substantiated medical emergency and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimen(s). A medical emergency is an acute medical condition requiring immediate medical care. A railroad may require an employee to substantiate a medical emergency by providing verifiable documentation from a credible outside professional (e.g., doctor, dentist, hospital, or law enforcement officer) substantiating the medical emergency within a reasonable period of time.

(3) Failure to remain available following an accident or casualty as required by company rules (i.e., being absent without leave) is considered a refusal to participate in testing, without

regard to any subsequent provision of specimens.

(c) A regulated employee who is required to be tested under subparts C, D, or E of this part and who is taken to a medical facility for observation or treatment after an accident or incident is deemed to have consented to the release to FRA of the following:

(1) The remaining portion of any body fluid specimen taken by the medical facility within 12 hours of the accident or incident that is not required for medical purposes, together with any normal medical facility record(s) pertaining to the taking of such specimen;

(2) The results of any laboratory tests for alcohol or any drug conducted by or for the medical facility on such specimen;

(3) The identity, dosage, and time of administration of any drugs administered by the medical facility before the time specimens were taken by the medical facility or before the time specimens were taken in compliance with this part; and

(4) The results of any breath tests for alcohol conducted by or for the medical facility.

(d) Any person required to participate in body fluid testing under subpart C of this part (post-accident toxicological testing) shall, if requested by a representative of the railroad or the medical facility, evidence consent to the taking of specimens, their release for toxicological analysis under pertinent provisions of this part, and release of the test results to the railroad's Medical Review Officer by promptly executing a consent form, if required by the medical facility. A regulated employee is not required to execute any document or clause waiving rights that the employee would otherwise have against the railroad, and any such waiver is void. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others. Any consent provided consistent with this section may be construed to extend only to those actions specified in this section.

(e)(1) A regulated employee who is notified of selection for testing under this part must cease to perform his or her assigned duties and proceed to the testing site either immediately or as soon as possible without adversely affecting safety.

(2) A railroad must ensure that the absence of a regulated employee from his or her assigned duties to report for testing does not adversely affect safety.

(3) Nothing in this part may be construed to authorize the use of physical coercion or any other deprivation of liberty to compel breath or body fluid testing.

(f) Any employee performing duties for a railroad who is involved in a qualifying accident or incident described in subpart C of this part, and who dies within 12 hours of that accident or incident as the result thereof, is deemed to have consented to the removal of body fluid and/or tissue specimens necessary for toxicological analysis from the remains of such person, and this consent is implied by the performance of duties for the railroad (*i.e.*, a consent form is not required). This consent provision applies to all employees performing duties for a railroad, and not just regulated employees.

(g) Each supervisor responsible for regulated employees (except a working supervisor who is a co-worker as defined in §219.5) must be trained in the signs and symptoms of alcohol and drug influence, intoxication, and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of alcohol, the major drug groups on the controlled substances list, and other impairing drugs. The program must also provide training on the qualifying criteria for post-accident toxicological testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C.

(h) Nothing in this subpart restricts any discretion available to the railroad to request or require that a regulated employee cooperate in additional breath or body fluid testing. However,

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no such testing may be performed on body fluid specimens provided under this part. For purposes of this paragraph (h), all urine from a void or oral fluid from a sampling constitutes a single specimen.

(i) A railroad required or authorized to conduct testing under this part may conduct all such testing in the United States. A foreign railroad required to conduct testing under this part may conduct such tests in its home country, provided that it otherwise complies with the requirements of this part.

[66 FR 41973, Aug. 9, 2001, as amended at 69 FR 19288, Apr. 12, 2004; 81 FR 37926, June 10, 2016; 87 FR 5734, Feb. 2, 2022; 88 FR 27652, May 2, 2023]

§219.12 Hours-of-service laws implications.

(a) A railroad is not excused from performing alcohol or drug testing under subpart C (post-accident toxicological testing) and subpart D (reasonable suspicion testing) of this part because the performance of such testing would violate the hours-of-service laws at 49 U.S.C. ch. 211. If a railroad establishes that a violation of the hours-of-service laws is caused solely because it was required to conduct post-accident toxicological testing or reasonable suspicion testing, FRA will not take enforcement action for the violation if the railroad used reasonable due diligence in completing the collection and otherwise completed it within the time limitations of §219.203(d) (for post-accident toxicological testing) or §219.305 (for reasonable suspicion testing), although the railroad must still report any excess service to FRA.

(b) A railroad may perform alcohol or drug testing authorized under subpart E (reasonable cause testing) of this part even if the performance of such testing would violate the hours-of-service laws at 49 U.S.C. ch. 211. If a railroad establishes that a violation of the hours-of-service laws is caused solely by its decision to conduct authorized reasonable cause testing, FRA will not take enforcement action for the violation if the railroad used reasonable due diligence in completing the collection and otherwise completed it within the time limitations of §219.407, although

the railroad must still report any excess service to FRA.

(c) A railroad must schedule random alcohol and drug tests under subpart G of this part so that sufficient time is provided to complete the test within a covered employee's hours-of-service limitations under 49 U.S.C. ch. 211. However, if a direct observation collection is required during a random test per the requirements of part 40 of this title, then the random test must be completed regardless of the hours-of-service law limitations, although the railroad must still report any excess service to FRA. A railroad may not place a regulated employee on-duty for the sole purpose of conducting a random alcohol or drug test under subpart G of this part.

(d) A railroad must schedule follow-up tests under §219.104 so that sufficient time is provided to complete a test within a covered employee's hours-of-service limitations under 49 U.S.C. ch. 211. If a railroad is having a difficult time scheduling the required number of follow-up tests because a covered employee's work schedule is unpredictable, there is no prohibition against the railroad placing an employee (who is subject to being called to perform regulated service) on duty for the purpose of conducting the follow-up tests; except that an employee may be placed on duty for a follow-up alcohol test only if he or she is required to completely abstain from alcohol by a return-to-duty agreement, as provided by §40.303(b) of this title. A railroad must maintain documentation establishing the need to place the employee on duty for the purpose of conducting the follow-up test and provide this documentation for review upon request of an FRA representative.

[81 FR 37927, June 10, 2016]

§§219.13–219.15 [Reserved]

§219.17 Construction.

Nothing in this part—

(a) Restricts the power of FRA to conduct investigations under sections 20107, 20108, 20111, and 20112 of title 49, United States Code;

(b) Creates a private right of action on the part of any person for enforcement of the provisions of this part or

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for damages resulting from noncompliance with this part; or

(c) Impacts provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

[78 FR 14225, Mar. 5, 2013]

§ 219.19 [Reserved]

§ 219.21 Information collection.

(a) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2130-0526.

(b) The information collection requirements are found in the following sections: 219.7, 219.23, 219.104, 219.201, 219.203, 219.205, 219.207, 219.209, 219.211, 219.213, 219.303, 219.401, 219.403, 219.405, 219.407, 219.501, 219.502, 219.503, 219.601, 219.605, 219.701, 219.801, 219.803, 219.901, and 219.903.

§ 219.23 Railroad policies.

(a) Whenever a breath or body fluid test is required of a regulated employee under this part, the railroad (either through a railroad employee or a designated agent, such as a contracted collector) must provide clear and unequivocal written notice to the employee that the test is being required under FRA regulations and is being conducted under Federal authority. The railroad must also provide the employee clear and unequivocal written notice of the type of test that is required (*e.g.*, reasonable suspicion, reasonable cause, random selection, follow-up, etc.). These notice requirements are satisfied if:

(1) For all FRA testing except mandatory post-accident toxicological testing under subpart C of this part, a railroad uses the mandated DOT alcohol or drug testing form, circles or checks off the box corresponding to the type of test, and shows this form to the employee before testing begins; or

(2) For mandatory post-accident toxicological testing under subpart C of this part, a railroad uses the approved

FRA form and shows this form to the employee before testing begins.

(b) Use of the mandated DOT alcohol or drug testing forms for non-Federal tests or mandatory post-accident toxicological testing under subpart C of this part is prohibited (except for post-accident breath alcohol testing permitted under § 219.203(c)). Use of the approved FRA post-accident toxicological testing form for any testing other than that mandated under subpart C is prohibited.

(c) Each railroad must develop and publish educational materials, specifically designed for regulated employees that clearly explain the requirements of this part, as well as the railroad's policies and procedures with respect to meeting those requirements. The railroad must ensure that a copy of these materials is distributed to each regulated employee hired for or transferred to a position that requires alcohol and drug testing under this part. (This requirement does not apply to an applicant for a regulated service position who either refuses to provide a specimen for pre-employment testing or who has a pre-employment test with a result indicating a violation of the alcohol or drug prohibitions of this part.) A railroad may satisfy this requirement by either—

(1)(i) Continually posting the materials in a location that is easily visible to all regulated employees going on duty at their designated reporting place and, if applicable, providing a copy of the materials to any employee labor organization representing a class or craft of regulated employees of the railroad; or

(ii) Providing a copy of the materials in some other manner that will ensure regulated employees can find and access these materials explaining the critical aspects of the program (*e.g.*, by posting the materials on a company Web site that is accessible to all regulated employees); or

(2) For a minimum of three years after March 4, 2022, also ensuring that a hard copy of these materials is provided to each mechanical employee.

(d) *Required content.* The materials to be made available to regulated employees under paragraph (c) of this section

must, at a minimum, include clear and detailed discussion of the following:

(1) The position title, name, and means of contacting the person(s) the railroad designates to answer employee questions about the materials;

(2) The specific classes or crafts of employee who are subject to the provisions of this part, such as engineers, conductors, MOW employees, MECH employees, signal maintainers, or train dispatchers;

(3) Sufficient information about the regulated service functions those employees perform to make clear that the period of the work day the regulated employee is required to be in compliance with the alcohol prohibitions of this part is that period when the employee is on duty and is required to perform or is available to perform regulated service;

(4) Specific information concerning regulated employee conduct that is prohibited under subpart B of this part (*e.g.*, the minimum requirements of §§ 219.101, 219.102, and 219.103);

(5) The requirement that a railroad utilizing the reasonable cause testing authority provided by subpart E of this part must give prior notice to regulated employees of the circumstances under which they will be subject to reasonable cause testing;

(6) The circumstances under which a regulated employee will be tested under this part;

(7) The procedures used to test for the presence of alcohol and controlled substances, protect the regulated employee and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee;

(8) The requirement that a regulated employee submit to alcohol and drug tests administered in accordance with this part;

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

(10) The consequences for a regulated employee found to have violated subpart B of this part, including the requirement that the employee be removed immediately from regulated

service, and the responsive action requirements of § 219.104;

(11) The consequences for a regulated employee who has a Federal alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04; and

(12) Information concerning the effects of alcohol and drug misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol or drug problem (the employee's or a co-worker's); and available methods of evaluating and resolving problems associated with the misuse of alcohol and drugs, and the names, addresses, and telephone numbers of DACs and counseling and treatment programs.

(e) Optional provisions. The materials supplied to employees may also include information on additional railroad policies with respect to the use or possession of alcohol and drugs, including any consequences for an employee found to have a specific alcohol concentration that are based on the railroad's company authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on the railroad's independent company authority.

[81 FR 37927, June 10, 2016, as amended at 87 FR 5734, Feb. 2, 2022]

§ 219.25 Previous employer drug and alcohol checks.

(a) As required by § 219.701(a) and (b), a railroad must conduct drug or alcohol testing under this part in compliance with part 40 of this title (except for post-accident toxicological testing under subpart C of this part). A railroad must therefore comply with § 40.25 of this title by checking the alcohol and drug testing record of any direct regulated employee (a regulated employee who is not employed by a contractor to the railroad) it intends to use for regulated service before the employee performs such service for the first time. A railroad is not required to check the alcohol and drug testing record of contractor employees performing regulated service on its behalf (the alcohol and drug testing record of those contractor employees must be checked by their direct employers).

(b) When determining whether a person may become or remain certified as a locomotive engineer or a conductor, a railroad must comply with the requirements in §240.119(e) (for engineers) or §242.115(e) (for conductors) of this chapter regarding the consideration of Federal alcohol and drug violations that occurred within a period of 60 consecutive months before the review of the person's records.

[81 FR 37928, June 10, 2016, as amended at 85 FR 81307, Dec. 15, 2020]

Subpart B—Prohibitions

§219.101 Alcohol and drug use prohibited.

(a) *Prohibitions.* Except as provided in §219.103—

(1) No regulated employee may use or possess alcohol or any controlled substance when the employee is on duty and subject to performing regulated service for a railroad.

(2) No regulated employee may report for regulated service, or go or remain on duty in regulated service, while—

(i) Under the influence of or impaired by alcohol;

(ii) Having 0.04 or more alcohol concentration in the breath or blood; or

(iii) Under the influence of or impaired by any controlled substance.

(3) No regulated employee may use alcohol for whichever is the lesser of the following periods:

(i) Within four hours of reporting for regulated service; or

(ii) After receiving notice to report for regulated service.

(4)(i) No regulated employee tested under the provisions of this part whose Federal test result indicates an alcohol concentration of 0.02 or greater but less than 0.04 may perform or continue to perform regulated service for a railroad, nor may a railroad permit the regulated employee to perform or continue to perform regulated service, until the start of the regulated employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(ii) Nothing in this section prohibits a railroad from taking further action under its own independent company authority when a regulated employee tested under the provisions of this part

has a Federal test result indicating an alcohol concentration of 0.02 or greater, but less than 0.04. However, while a Federal test result of 0.02 or greater but less than 0.04 is a positive test and may be a violation of a railroad's operating rules, it is not a violation of this section and cannot be used to decertify an engineer under part 240 of this chapter or a conductor under part 242 of this chapter.

(5) If an employee tested under the provisions of this part has a test result indicating an alcohol concentration below 0.02, the test is negative and is not evidence of alcohol misuse. A railroad may not use a Federal test result below 0.02 either as evidence in a company proceeding or as a basis for subsequent testing under company authority. A railroad may take further action to compel cooperation in other breath or body fluid testing only if it has an independent basis for doing so. An independent basis for subsequent company authority testing will exist only when, after having a negative Federal reasonable suspicion alcohol test result, the employee exhibits additional or continuing signs and symptoms of alcohol use. If a company authority test then indicates a violation of the railroad's operating rules, this result is independent of the Federal test result and must stand on its own merits.

(b) *Controlled substance.* "Controlled substance" is defined by §219.5. Controlled substances are grouped as follows: marijuana, narcotics (such as heroin and codeine), stimulants (such as cocaine and amphetamines), depressants (such as barbiturates and minor tranquilizers), and hallucinogens (such as the drugs known as PCP and LSD). Controlled substances include illicit drugs (Schedule I), drugs that are required to be distributed only by a medical practitioner's prescription or other authorization (Schedules II through IV, and some drugs on Schedule V), and certain preparations for which distribution is through documented over the counter sales (Schedule V only).

(c) *Railroad rules.* Nothing in this section restricts a railroad from imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether

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in furtherance of the purpose of this part or for other purposes.

(d) *Construction.* This section may not be construed to prohibit the presence of an unopened container of an alcoholic beverage in a private motor vehicle that is not subject to use in the business of the railroad; nor may it be construed to restrict a railroad from prohibiting such presence under its own rules.

[66 FR 41973, Aug. 9, 2001, as amended at 81 FR 37928, June 10, 2016]

§ 219.102 Prohibition on abuse of controlled substances.

No regulated employee may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103.

[81 FR 37929, June 10, 2016]

§ 219.103 Prescribed and over-the-counter drugs.

(a) This subpart does not prohibit the use of a controlled substance (on Schedules II through V of the controlled substance list) prescribed or authorized by a medical practitioner, or possession incident to such use, if—

(1) The treating medical practitioner or a physician designated by the railroad has made a good faith judgment, with notice of the employee's assigned duties and on the basis of the available medical history, that use of the substance by the employee at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties;

(2) The substance is used at the dosage prescribed or authorized; and

(3) In the event the employee is being treated by more than one medical practitioner, at least one treating medical practitioner has been informed of all medications authorized or prescribed and has determined that use of the medications is consistent with the safe performance of the employee's duties (and the employee has observed any restrictions imposed with respect to use of the medications in combination).

(b) This subpart does not restrict any discretion available to the railroad to require that employees notify the railroad of therapeutic drug use or obtain prior approval for such use.

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§ 219.104 Responsive action.

(a) *Removal from regulated service.* (1) If a railroad determines that a regulated employee has violated § 219.101 or § 219.102, or the alcohol or controlled substances misuse rule of another DOT agency, the railroad must immediately remove the employee from regulated service and the procedures described in paragraphs (b) through (d) of this section apply.

(2) If a regulated employee refuses to provide a breath or body fluid specimen or specimens when required to by the railroad under a provision of this part, a railroad must immediately remove the regulated employee from regulated service, and the procedures described in paragraphs (b) through (d) of this section apply. This provision also applies to Federal reasonable cause testing under subpart E of this part (if the railroad has elected to conduct this testing under Federal authority).

(b) *Notice.* Before or upon removing a regulated employee from regulated service under this section, a railroad must provide written notice to the employee of the reason for this action. A railroad may provide a regulated employee with an initial verbal notice so long as it provides a follow-up written notice to the employee as soon as possible. In addition to the reason for the employee's withdrawal from regulated service, the written notice must also inform the regulated employee that he may not perform any DOT safety-sensitive duties until he completes the return-to-duty process of part 40.

(c) *Hearing procedures.* (1) Except as provided in paragraph (e)(5) of this section, if a regulated employee denies that a test result or other information is valid evidence of a § 219.101 or § 219.102 violation, the regulated employee may demand and must be provided an opportunity for a prompt post-suspension hearing before a presiding officer other than the charging official. This hearing may be consolidated with any disciplinary hearing arising from the same accident or incident (or conduct directly related thereto), but the presiding officer must make separate findings as to compliance with §§ 219.101 and 219.102.

(2) The hearing must be convened within the period specified in the applicable collective bargaining agreement. In the absence of an agreement provision, the regulated employee may demand that the hearing be convened within 10 calendar days of the employee's suspension or, in the case of a regulated employee who is unavailable due to injury, illness, or other sufficient cause, within 10 days of the date the regulated employee becomes available for the hearing.

(3) A post-suspension proceeding conforming to the requirements of an applicable collective bargaining agreement, together with the provisions for adjustment of disputes under sec. 3 of the Railway Labor Act (49 U.S.C. 153), satisfies the procedural requirements of this paragraph (c).

(4) With respect to a removal or other adverse action taken as a consequence of a positive test result or refusal in a test authorized or required by this part, nothing in this part may be deemed to abridge any procedural rights or remedies consistent with this part that are available to a regulated employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law.

(5) Nothing in this part restricts the discretion of a railroad to treat a regulated employee's denial of prohibited alcohol or drug use as a waiver of any privilege the regulated employee would otherwise enjoy to have such prohibited alcohol or drug use treated as a non-disciplinary matter or to have discipline held in abeyance.

(d) A railroad must comply with the requirements for Substance Abuse Professional evaluations, the return-to-duty process, and follow-up testing contained in part 40 of this title.

(1) *Post-accident toxicology testing exception.* If a regulated employee has a post-accident toxicology test result under subpart C of this part that is positive for a drug not listed in §40.5's definition of "Drugs," a railroad may conduct the employee's return-to-duty and follow-up tests under part 40, or may conduct the employee's return-to-duty and follow-up tests under its own authority to comply with the require-

ments of paragraph (d) of this section, so long as its testing procedures are otherwise identical to those of part 40, and include the specific drug for which the violation occurred, on an expanded drug testing panel.

(e) *Applicability.* (1) This section does not apply to actions based on breath or body fluid tests for alcohol or drugs that are conducted exclusively under authority other than that provided in this part (*e.g.*, testing under a company medical policy, testing for cause wholly independent of the subpart E Federal authority of this part, or testing under a labor agreement).

(2) This section does not apply to Federal alcohol tests indicating an alcohol concentration of less than 0.04.

(3) This section does not apply to a locomotive engineer or conductor who has an off-duty conviction for, or a completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for operating while under the influence of or impaired by alcohol or a controlled substance. (However, this information remains relevant for the purpose of locomotive engineer or conductor certification, according to the requirements of parts 240 or 242 of this chapter.)

(4) This section does not apply to an applicant who declines to be subject to pre-employment testing and withdraws an application for employment before the test begins. The determination of when a drug or alcohol test begins is made according to the provisions found in subparts E and L of part 40 of this title.

(5) Paragraph (c) of this section does not apply to an applicant who tests positive or refuses a DOT pre-employment test.

(6) As provided by §40.25(j) of this title, paragraph (d) of this section applies to any DOT-regulated employer seeking to hire for DOT safety-sensitive functions an applicant who tested positive or who refused a DOT pre-employment test.

[81 FR 37929, June 10, 2016]

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§ 219.105 Railroad's duty to prevent violations.

(a) A railroad may not, with actual knowledge, permit a regulated employee to go or remain on duty in regulated service in violation of the prohibitions of § 219.101 or § 219.102. As used in this section, the actual knowledge imputed to the railroad is limited to that of a railroad management employee (such as a supervisor deemed an "officer," whether or not such person is a corporate officer) or a supervisory employee in the offending regulated employee's chain of command. A railroad management or supervisory employee has actual knowledge of a violation when he or she:

(1) Personally observes a regulated employee use or possess alcohol or use drugs in violation of this subpart. It is not sufficient for actual knowledge if the supervisory or management employee merely observes the signs and symptoms of alcohol or drug use that require a reasonable suspicion test under § 219.301;

(2) Receives information regarding a violation of this subpart from a previous employer of a regulated employee, in response to a background information request required by § 40.25 of this title; or

(3) Receives a regulated employee's admission of prohibited alcohol possession or prohibited alcohol or drug use.

(b) A railroad must exercise due diligence to assure compliance with §§ 219.101 and 219.102 by each regulated employee.

(c) A railroad's alcohol and/or drug use education, prevention, identification, intervention, and rehabilitation programs and policies must be designed and implemented in such a way that they do not circumvent or otherwise undermine the requirements, standards, and policies of this part. Upon FRA's request, a railroad must make available for FRA review all documents, data, or other records related to such programs and policies.

(d) Each year, a railroad's supervisors must conduct and record a number of "Rule G" employee observations at a minimum equal to twice the railroad's total number of regulated employees. Each "Rule G" observation must be made sufficiently close to an

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individual regulated employee to determine whether the employee is displaying signs and symptoms indicative of a violation of the prohibitions of this part.

[81 FR 37930, June 10, 2016]

§ 219.107 Consequences of refusal.

(a) A regulated employee who refuses to provide a breath or body fluid specimen or specimens when required to by the railroad under a provision of this part must be withdrawn from regulated service for a period of nine (9) months. Per the requirements of part 40 of this title, a regulated employee who provides an adulterated or substituted specimen is deemed to have refused to provide the required specimen and must be withdrawn from regulated service in accordance with this section.

(b) *Notice.* Before or upon withdrawing a regulated employee from regulated service under this section, a railroad must provide written notice to the employee of the reason for this action, and the procedures described in § 219.104(c) apply. A railroad may provide a regulated employee with an initial verbal notice so long as it provides a follow-up written notice as soon as possible.

(c) The withdrawal required by this section applies only to an employee's performance of regulated service for any railroad with notice of such withdrawal. During the period of withdrawal, a railroad with notice of such withdrawal must not authorize or permit the employee to perform any regulated service for the railroad.

(d) The requirement of withdrawal for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(e) Upon the expiration of the nine month period described in this section, a railroad may permit an employee to return to regulated service only under the conditions specified in § 219.104(d), and the regulated employee must be subject to return-to-duty and follow-up tests, as provided by that section.

[81 FR 37930, June 10, 2016]

Subpart C—Post-Accident Toxicological Testing

§ 219.201 Events for which testing is required.

(a) *List of events.* Except as provided in paragraph (b) of this section, FRA post-accident toxicological tests must be conducted after any event that involves one or more of the circumstances described in paragraphs (a)(1) through (5) of this section:

(1) *Major train accident.* Any train accident (*i.e.*, a rail equipment accident involving damage in excess of the current reporting threshold) that involves one or more of the following:

(i) A fatality to any person;
(ii) A release of hazardous material lading from railroad equipment accompanied by—

(A) An evacuation; or
(B) A reportable injury resulting from the hazardous material release (*e.g.*, from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of \$1,500,000 or more.

(2) *Impact accident.* Any impact accident (*i.e.*, a rail equipment accident defined as an “impact accident” in § 219.5) that involves damage in excess of the current reporting threshold, resulting in—

(i) A reportable injury; or
(ii) Damage to railroad property of \$150,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to an on-duty employee (as defined in § 219.5) who dies within 12 hours of the incident as a result of the operation of on-track equipment, regardless of whether that employee was performing regulated service.

(4) *Passenger train accident.* Any train accident (*i.e.*, a rail equipment accident involving damage in excess of the current reporting threshold) involving a passenger train and a reportable injury to any person.

(5) *Human-factor highway-rail grade crossing accident/incident.* A highway-rail grade crossing accident/incident when it involves:

(i) A regulated employee who interfered with the normal functioning of a grade crossing signal system, in testing or otherwise, without first taking

measures to provide for the safety of highway traffic that depends on the normal functioning of such system, as prohibited by § 234.209 of this chapter;

(ii) A train crewmember who was, or who should have been, flagging highway traffic to stop due to an activation failure of the grade crossing system, as provided by § 234.105(c)(3) of this chapter;

(iii) A regulated employee who was performing, or should have been performing, the duties of an appropriately equipped flagger (as defined in § 234.5 of this chapter) due to an activation failure, partial activation, or false activation of the grade crossing signal system, as provided by § 234.105(c)(1) and (2), § 234.106, or § 234.107(c)(1)(i) of this chapter;

(iv) A fatality to any regulated employee performing duties for the railroad, regardless of fault; or

(v) A regulated employee who violated an FRA regulation or railroad operating rule and whose actions may have played a role in the cause or severity of the accident/incident.

(b) *Exceptions.* Except for a human-factor highway-rail grade crossing accident/incident described in paragraph (a)(5) of this section, no test may be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a highway/rail grade crossing. No test may be required for an accident/incident the cause and severity of which are wholly attributable to a natural cause (*e.g.*, flood, tornado, or other natural disaster) or to vandalism or trespasser(s), as determined on the basis of objective and documented facts by the railroad representative responding to the scene.

(c) *Good faith determinations.* (1)(i) The railroad representative responding to the scene of the accident/incident must determine whether the accident/incident falls within the requirements of paragraph (a) of this section or is within the exception described in paragraph (b) of this section. It is the duty of the railroad representative to make reasonable inquiry into the facts as necessary to make such determinations. In making such inquiry, the railroad representative must consider the need to obtain specimens as soon as

practical in order to determine the presence or absence of impairing substances reasonably contemporaneous with the accident/incident. The railroad representative satisfies the requirement of this section if, after making reasonable inquiry, the representative exercises good faith judgment in making the required determinations.

(ii) The railroad representative making the determinations required by this section may not be a person directly involved in the accident/incident. This section does not prohibit consultation between the responding railroad representative and higher level railroad officials; however, the responding railroad representative must make the factual determinations required by this section.

(iii) Upon specific request made to the railroad by the Associate Administrator for Safety, FRA (or the Associate Administrator's delegate), the railroad must provide a report describing any decision by a person other than the responding railroad representative with respect to whether an accident/incident qualifies for testing. This report must be affirmed by the decision maker and must be provided to FRA within 72 hours of the request. The report must include the facts reported by the responding railroad representative, the basis upon which the testing decision was made, and the person making the decision.

(iv) Any estimates of railroad property damage made by persons not at the scene must be based on descriptions of specific physical damage provided by the on-scene railroad representative.

(v) In the case of an accident involving passenger equipment, a host railroad may rely upon the damage estimates provided by the passenger railroad (whether present on scene or not) in making the decision whether testing is required, subject to the same requirement that visible physical damage be specifically described.

(2) A railroad must not require an employee to provide blood or urine specimens under the authority or procedures of this subject unless the railroad has made the determinations required by this section, based upon reasonable inquiry and good faith judgment.

A railroad does not act in excess of its authority under this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment, but it is later determined, after investigation, that one or more of the conditions thought to have required testing were not, in fact, present. However, this section does not excuse the railroad for any error arising from a mistake of law (e.g., application of testing criteria other than those contained in this part).

(3) A railroad is not in violation of this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment but nevertheless errs in determining that post-accident testing is not required.

(4) An accident/incident with respect to which the railroad has made reasonable inquiry and exercised good faith judgment in determining the facts necessary to apply the criteria contained in paragraph (a) of this section is deemed a qualifying event for purposes of specimen analysis, reporting, and other purposes.

(5) In the event specimens are collected following an event determined by FRA not to be a qualifying event within the meaning of this section, FRA directs its designated laboratory to destroy any specimen material submitted and to refrain from disclosing to any person the results of any analysis conducted.

[66 FR 41973, Aug. 9, 2001, as amended at 81 FR 37930, June 10, 2016]

§219.203 Responsibilities of railroads and employees.

(a) *Employees tested.* A regulated employee subject to post-accident toxicological testing under this subpart must cooperate in the provision of specimens as described in this part.

(1) *General.* Except as otherwise provided for by this section, following each qualifying event described in §219.201, a regulated employee directly involved in a qualifying event under this subpart must provide blood and urine specimens for toxicological testing by FRA. This includes any regulated employee who may not have been present or on-duty at the time or location of the event, but whose actions may have played a role in its cause or

severity, including, but not limited to, an operator, dispatcher, or signal maintainer.

(2) *Fatalities.* Testing of the remains of an on-duty employee (as defined in § 219.5) who is fatally injured in a qualifying event described in § 219.201 is required, regardless of fault, if the employee dies within 12 hours of the qualifying event as a result of such qualifying event.

(3) *Major train accidents.* For an accident or incident meeting the criteria of a major train accident in § 219.201(a)(1)—

(i) All assigned crew members of all trains or other on-track equipment involved in the qualifying event must be subjected to post-accident toxicological testing, regardless of fault.

(ii) Other surviving regulated employees who are not assigned crew members of an involved train or other on-track equipment (*e.g.*, a dispatcher or a signal maintainer) must be tested if a railroad representative can immediately determine, on the basis of specific information, that the employee may have had a role in the cause or severity of the accident/incident. In making this determination, the railroad representative must consider any such information that is immediately available at the time the qualifying event determination is made under § 219.201.

(4) *Fatal train incidents.* For a fatal train incident under § 219.201(a)(3), the remains of any on-duty employee (as defined in § 219.5) performing duties for a railroad who is fatally injured in the event are always subject to post-accident toxicological testing, regardless of fault.

(5) *Human-factor highway-rail grade crossing accident/incidents.* (i) For a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(i), only a regulated employee who interfered with the normal functioning of a grade crossing signal system and whose actions may have contributed to the cause or severity of the event is subject to testing.

(ii) For a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(ii), only a regulated employee who was a train crew member responsible for flagging highway traffic to stop due to an activation failure of

a grade crossing system (or who was on-site and directly responsible for ensuring that flagging was being performed), but who failed to do so, and whose actions may have contributed to the cause or severity of the event, is subject to testing.

(iii) For a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(iii), only a regulated employee who was responsible for performing the duties of an appropriately equipped flagger (as defined in § 234.5 of this chapter), but who failed to do so, and whose actions may have contributed to the cause or severity of the event is subject to testing.

(iv) For a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(iv), only the remains of any fatally-injured employee(s) (as defined in § 219.5) performing regulated service for the railroad are subject to testing.

(v) For a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(v), only a regulated employee who violated an FRA regulation or railroad operating rule and whose actions may have contributed to the cause or severity of the event is subject to testing.

(6) *Exception.* For a qualifying impact accident, passenger train accident, fatal train incident, or human-factor highway-rail grade crossing accident/incident under § 219.201(a)(2) through (5), a surviving crewmember or other regulated employee must be excluded from testing if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause or severity of the accident/incident. In making this determination, the railroad representative must consider any information that is immediately available at the time the qualifying event determination is made under § 219.201.

(i) This exception is not available for assigned crew members of all involved trains if the qualifying event also meets the criteria for a major train accident under § 219.201(a)(1) (*e.g.*, this exception is not available for an Impact Accident that also qualifies as a major train accident because it results in damage to railroad property of \$1,500,000 or more).

(ii) This exception is not available for any on-duty employee who is fatally-injured in a qualifying event.

(b) *Railroad responsibility.* (1) A railroad must take all practicable steps to ensure that all surviving regulated employees of the railroad who are subject to FRA post-accident toxicological testing under this subpart provide blood and urine specimens for the toxicological testing required by FRA. This includes any regulated employee who may not have been present or on-duty at the time or location of the event, but whose actions may have played a role in its cause or severity, including, but not limited to, an operator, dispatcher, or signal maintainer.

(2) A railroad must take all practicable steps to ensure that tissue and fluid specimens taken from fatally injured employees are subject to FRA post-accident toxicological testing under this subpart.

(3) FRA post-accident toxicological testing under this subpart takes priority over toxicological testing conducted by state or local law enforcement officials.

(c) *Alcohol testing.* Except as provided for in paragraph (e)(4) of this section, if the conditions for mandatory post-accident toxicological testing exist, a railroad may also require an employee to provide breath for testing in accordance with the procedures set forth in part 40 of this title and in this part, if such testing does not interfere with timely collection of required urine and blood specimens.

(d) *Timely specimen collection.* (1) A railroad must make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident, preferably within four hours. Specimens that are not collected within four hours after a qualifying accident or incident must be collected as soon thereafter as practicable. If a specimen is not collected within four hours of a qualifying event, the railroad must immediately notify the FRA Drug and Alcohol Program Manager at 202-493-6313 and provide detailed information regarding the failure (either in conversation or via a voicemail).

(2) The requirements of paragraph (d) of this section must not be construed

to inhibit an employee who is required to be post-accident toxicological tested from performing, in the immediate aftermath of an accident or incident, any duties that may be necessary for the preservation of life or property. Where practical, however, a railroad must utilize other employees to perform such duties.

(3) If a passenger train is in proper condition to continue to the next station or its destination after an accident or incident, the railroad must consider the safety and convenience of passengers in determining whether the crew should be made immediately available for post-accident toxicological testing. A relief crew must be called to relieve the train crew as soon as possible.

(4) A regulated employee who may be subject to post-accident toxicological testing under this subpart must be retained in duty status for the period necessary to make the determinations required by § 219.201 and this section and (as appropriate) to complete specimen collection.

(e) *Recall of employees for testing.* (1) Except as otherwise provided for in paragraph (e)(2) of this section, a regulated employee may not be recalled for testing under this subpart if that employee has been released from duty under the normal procedures of the railroad. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Furthermore, nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (*e.g.*, an employee who is absent without leave). However, subsequent testing does not excuse a refusal by the employee to provide the specimens in a timely manner.

(2) A railroad must immediately recall and place on duty a regulated employee for post-accident drug testing, if—

(i) The employee could not be retained in duty status because the employee went off duty under normal railroad procedures before being contacted by a railroad supervisor and instructed to remain on duty pending completion of the required determinations (*e.g.*, in

the case of a dispatcher or signal maintainer remote from the scene of an accident who was unaware of the occurrence at the time he or she went off duty); and

(ii) The railroad's preliminary investigation (contemporaneous with the determination required by § 219.201) indicates a clear probability that the employee played a role in the cause or severity of the accident/incident.

(3) If the criteria in paragraph (e)(2) of this section are met, a regulated employee must be recalled for post-accident drug testing regardless of whether the qualifying event happened or did not happen during the employee's tour of duty. However, an employee may not be recalled for testing if more than 24 hours have passed since the qualifying event. An employee who has been recalled must be placed on duty for the purpose of accomplishing the required post-accident drug testing.

(4) Urine and blood specimens must be collected from an employee who is recalled for testing in accordance with this section. If the employee left railroad property before being recalled, however, the specimens must be tested for drugs only. A railroad is prohibited from requiring a recalled employee to provide breath specimens for alcohol testing, unless the regulated employee has remained on railroad property since the time of the qualifying event and the railroad has a company policy completely prohibiting the use of alcohol on railroad property.

(5) A railroad must document its attempts to contact an employee subject to the recall provisions of this section. If a railroad is unable, as a result of the non-cooperation of an employee or for any other reason, to obtain specimen(s) from an employee subject to mandatory recall within the 24-hour period after a qualifying event and to submit specimen(s) to FRA as required by this subpart, the railroad must contact FRA and prepare a concise narrative report according to the requirements of paragraph (d)(1) of this section. The report must also document the railroad's good faith attempts to contact and recall the employee.

(f) *Place of specimen collection.* (1) With the exception of Federal breath testing for alcohol (when conducted as

authorized under this subpart), an employee must be transported to an independent medical facility for specimen collection. In all cases, blood may be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional (e.g., a phlebotomist). A collector contracted by a railroad or medical facility may collect and/or assist in the collection of specimens at the medical facility if the medical facility does not object and the collector is qualified to do so.

(2) If an employee has been injured, a railroad must ask the treating medical facility to obtain the specimens. Urine may be collected from an injured employee (conscious or unconscious) who has already been catheterized for medical purposes, but an employee may not be catheterized solely for the purpose of providing a specimen under this subpart. Under § 219.11(a), an employee is deemed to have consented to FRA post-accident toxicological testing by the act of being subject to performing regulated service for a railroad.

(g) *Obtaining cooperation of facility.* (1) In seeking the cooperation of a medical facility in obtaining a specimen under this subpart, a railroad must, as necessary, make specific reference to the requirements of this subpart and the instructions in FRA's post-accident toxicological shipping kit.

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain blood and/or urine specimens after having been informed of the requirements of this subpart, the railroad must immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8802, stating the employee's name, the name and location of the medical facility, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. FRA will then take appropriate measures to assist in obtaining the required specimens.

(h) *Discretion of physician.* Nothing in this subpart may be construed to limit the discretion of a medical professional to determine whether drawing a blood specimen is consistent with the health

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of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

[81 FR 37931, June 10, 2016, as amended at 87 FR 5734, Feb. 2, 2022]

§ 219.205 Specimen collection and handling.

(a) *General.* Urine and blood specimens must be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this subpart and the instructions provided inside the FRA post-accident toxicological shipping kit.

(b) *Information requirements.* Basic information concerning the accident/incident and any treatment administered after the accident/incident is necessary to process specimens, analyze the significance of laboratory findings, and notify railroads and employees of test results. Accordingly, the railroad representative must complete the information required by Form FRA 6180.73 (revised) for shipping with the specimens. Each employee subject to testing must cooperate in completion of the required information on Form FRA 6180.74 (revised) for inclusion in the shipping kit and processing of the specimens. The railroad representative must ask an appropriate representative of the medical facility to complete the remaining portion of the information on each Form 6180.74. A Form 6180.73 must be forwarded in the shipping kit with each group of specimens. A Form 6180.74 must be forwarded in the shipping kit for each employee who provides specimens. A Form 6180.73 and either a Form 6180.74 or a Form 6180.75 (for fatalities) are included in the shipping kit. (See paragraph (c) of this section.)

(c) *Shipping kits.* (1) FRA makes available for purchase a limited number of standard shipping kits for the purpose of routine handling of post-accident toxicological specimens under this subpart. Specimens must be placed in the shipping kit and prepared for shipment according to the instructions provided in the kit.

(2) Standard shipping kits may be ordered by requesting an order form from FRA's Drug and Alcohol Program Manager at 202-493-6313. In addition to the

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standard kit for surviving employees, FRA also has distributed a post-mortem shipping kit to Class I, II, and commuter railroads. The post-mortem kit may not be ordered by other railroads. If a smaller railroad has a qualifying event involving a fatality to an on-duty employee, the railroad should advise the NRC at 1-800-424-8802 of the need for a post-mortem kit, and FRA will send one overnight to the medical examiner's office or assist the railroad in obtaining one from a nearby railroad.

(d) *Shipment.* Specimens must be shipped as soon as possible by pre-paid air express (or other means adequate to ensure delivery within 24 hours from time of shipment) to FRA's post-accident toxicological testing laboratory. However, if delivery cannot be ensured within 24 hours due to a suspension in air express delivery services, the specimens must be held in a secure refrigerator until delivery can be accomplished. In no circumstances may specimens be held for more than 72 hours. Where express courier pickup is available, the railroad must ask the medical facility to transfer the sealed toxicology kit directly to the express courier for transportation. If courier pickup is not available at the medical facility where the specimens are collected or if for any other reason a prompt transfer by the medical facility cannot be assured, the railroad must promptly transport the sealed shipping kit holding the specimens to the most expeditious point of shipment via air express. The railroad must maintain and document a secure chain of custody of the kit(s) from its release by the medical facility to its delivery for transportation.

(e) *Specimen security.* After a specimen kit or transportation box has been sealed, no entity other than FRA's post-accident toxicological testing laboratory may open it. If the railroad or medical facility discovers an error with either the specimens or the chain of custody form after the kit or transportation box has been sealed, the railroad or medical facility must make a contemporaneous written record of that

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error and send it to the laboratory, preferably with the transportation box.

[81 FR 37933, June 10, 2016, as amended at 87 FR 5734, Feb. 2, 2022]

§ 219.206 FRA access to breath test results.

Documentation of breath test results must be made available to FRA consistent with the requirements of this subpart.

[87 FR 5734, Feb. 2, 2022]

§ 219.207 Fatality.

(a) In the case of an employee fatality in an accident or incident described in § 219.201, body fluid and tissue specimens must be obtained from the remains of the employee for toxicological testing. To ensure that specimens are collected in a timely fashion, the railroad must immediately notify the appropriate local authority (such as a coroner or medical examiner) of the fatality and the requirements of this subpart, making available the post-mortem shipping kit and requesting the local authority to assist in obtaining the necessary body fluid or tissue specimens. The railroad must also seek the assistance of the custodian of the remains, if the custodian is someone other than the local authority.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary specimens, the railroad must immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8802 by providing the following information:

(1) Date and location of the accident or incident;

(2) Railroad;

(3) Name of the deceased;

(4) Name and telephone number of custodian of the remains; and

(5) Name and telephone number of local authority contacted.

(c) A coroner, medical examiner, pathologist, or other qualified professional is authorized to remove the required body fluid and tissue specimens from the remains on request of the railroad or FRA pursuant to this part; and in so acting, such person is the delegate of the FRA Administrator under sections 20107 and 20108 of title 49, United States Code (but not the agent

of the Secretary for purposes of the Federal Tort Claims Act (chapter 71 of Title 28, United States Code). A qualified professional may rely upon the representations of the railroad or FRA representative with respect to the occurrence of the event requiring that toxicological tests be conducted and the coverage of the deceased employee under this part.

(d) The instructions included inside the shipping kits specify body fluid and tissue specimens required for toxicological analysis in the case of a fatality.

[66 FR 41973, Aug. 9, 2001, as amended at 81 FR 37933, June 10, 2016; 87 FR 5734, Feb. 2, 2022]

§ 219.209 Reports of tests and refusals.

(a)(1) A railroad that has experienced one or more events for which specimens were obtained must provide prompt telephonic notification summarizing such events. Notification must immediately be provided to the duty officer at the National Response Center (NRC) at (800) 424-8802 and to the Office of Safety, FRA, at (202) 493-6313.

(2) Each telephonic report must contain:

(i) Name of railroad;

(ii) Name, title and telephone number of person making the report;

(iii) Time, date and location of the accident/incident;

(iv) Brief summary of the circumstances of the accident/incident, including basis for testing (*e.g.*, impact accident with a reportable injury); and

(v) Number of employees tested.

(b) If a railroad is unable, as a result of non-cooperation of an employee or for any other reason, to obtain a specimen and provide it to FRA as required by this subpart, the railroad must immediately notify the FRA Drug and Alcohol Program Manager at 202-493-6313 and provide detailed information regarding the failure (either verbally or via a voicemail). The railroad must also provide a concise narrative written report of the reason for such failure and, if appropriate, any action taken in response to the cause of such failure. This report must be appended to the report of the accident/incident required to be submitted under part 225 of this chapter and must also be mailed to the

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FRA Drug and Alcohol Program Manager at 1200 New Jersey Avenue SE., Washington, DC 20590.

[66 FR 41973, Aug. 9, 2001, as amended at 81 FR 37933, June 10, 2016]

§219.211 Analysis and follow-up.

(a) Specimens are analyzed for alcohol, controlled substances, and non-controlled substances specified by FRA under protocols specified by FRA. These substances may be tested for in any form, whether naturally or synthetically derived. Specimens may be analyzed for other impairing substances specified by FRA as necessary to the particular accident investigation.

(b) Results of post-accident toxicological testing for controlled substances conducted under this subpart are reported to the railroad's Medical Review Officer and the employee. The MRO and the railroad must treat the test results and any information concerning medical use or administration of drugs provided under this subpart in the same confidential manner as if subject to subpart H of this part, except where publicly disclosed by FRA or the National Transportation Safety Board. An employer is prohibited from temporarily removing an employee from the performance of regulated service based only on a report from the 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 result.

(c) With respect to a surviving employee, a test reported as positive for alcohol or a controlled substance must be reviewed by the railroad's Medical Review Officer (MRO) with respect to any claim of use or administration of medications (consistent with §219.103) that could account for the laboratory findings. The MRO must promptly report the results of each review by email to *FRA-MROletters.email@dot.gov*. The report must reference the employing railroad, accident/incident date, and location; and state whether the MRO reported the test result to the employing railroad as positive or negative and the basis of any determination that analytes detected by the laboratory derived from authorized use (in-

cluding a statement of the compound prescribed, dosage/frequency, and any restrictions imposed by the authorized medical practitioner). Unless specifically requested by FRA in writing, the MRO may not disclose to FRA the underlying physical condition for which any medication was authorized or administered. The FRA is not bound by the MRO's determination, but that determination will be considered by FRA in relation to the accident/incident investigation and with respect to any enforcement action under consideration.

(d) To the extent permitted by law, FRA treats test results indicating medical use of controlled substances consistent with §219.103 (and other information concerning medically authorized drug use or administration provided incident to such testing) as administratively confidential and withholds public disclosure, except where it is necessary to consider this information in an accident investigation in relation to determination of probable cause. (However, as further provided in this section, FRA may provide results of testing under this subpart and supporting documentation to the National Transportation Safety Board.)

(e) An employee may respond within 45 days of receipt of his or her test results prior to the preparation of any final investigative report concerning the accident or incident by email to *FRA-DrugAlcoholProgram.email@dot.gov*. The employee's response must state the accident date, railroad, and location; the position the employee held on the date of the accident/incident; and any information the employee requests be withheld from public disclosure. FRA will decide whether to honor the employee's request to withhold information.

(f)(1) The toxicology report may contain a statement of pharmacological significance to assist FRA and other parties in understanding the data reported. No such statement may be construed as a finding of probable cause in the accident or incident.

(2) With the exception of post-accident test results for non-controlled substances, the toxicology report is a part of the report of the accident/incident and therefore subject to the limitation of 49 U.S.C. 20903 (prohibiting

use of the report for any purpose in a civil action for damages resulting from a matter mentioned in the report).

(g)(1) It is in the public interest to ensure that any railroad disciplinary actions that may result from accidents and incidents for which testing is required under this subpart are disposed of on the basis of the most complete and reliable information available so that responsive action will be appropriate. Therefore, during the interval between an accident or incident and the date that the railroad receives notification of the results of the toxicological analysis, any provision of collective bargaining agreements establishing maximum periods for charging employees with rule violations, or for holding an investigation, may not be deemed to run as to any offense involving the accident or incident (i.e., such periods must be tolled).

(2) This provision may not be construed to excuse the railroad from any obligation to timely charge an employee (or provide other actual notice) where the railroad obtains sufficient information relating to alcohol or drug use, impairment or possession or other rule violations prior to the receipt to toxicological analysis.

(3) This provision does not authorize holding any employee out of service pending receipt of PAT testing results. It also does not restrict a railroad from taking such action based on the employee's underlying conduct, so long as it is consistent with the railroad's disciplinary policy and is taken under the railroad's own authority.

(h) Except as provided in §219.201 (with respect to non-qualifying events), each specimen (including each split specimen) provided under this subpart is retained for not less than three months following the date of the accident or incident (two years from the date of the accident or incident in the case of a specimen testing positive for alcohol or a controlled substance). Post-mortem specimens may be made available to the National Transportation Safety Board (on request).

(i) An employee may, within 60 days of receipt of the toxicology report, request a retest of his or her PAT testing specimen. A request for retest must be emailed to FRA-

DrugAlcoholProgram.email@dot.gov. The employee's request must specify the railroad, accident date, and location. Upon receipt of the employee's request, FRA will identify and select a qualified referee laboratory that has available an appropriate, validated assay for the specimen type and analyte(s) declared positive. Because some analytes may deteriorate during storage, if the referee laboratory detects levels above its Limit of Detection (as defined in 49 CFR 40.3), FRA will report the retest result as corroborative of the original PAT test result.

[66 FR 41973, Aug. 9, 2001, as amended at 74 FR 25172, May 27, 2009; 78 FR 14225, Mar. 5, 2013; 81 FR 37934, June 10, 2016; 87 FR 5735, Feb. 2, 2022]

§219.213 Unlawful refusals; consequences.

(a) *Disqualification.* An employee who refuses to cooperate in providing breath, blood or urine specimens following an accident or incident specified in this subpart must be withdrawn from regulated service, and must be deemed disqualified for regulated service, for a period of nine (9) months in accordance with the conditions specified in §219.107.

(b) *Procedures.* Prior to or upon withdrawing the employee from regulated service, under this section, the railroad must provide written notice of the reason for this action and an opportunity for hearing before a presiding officer other than the charging official. The employee is entitled to the procedural protection set out in §219.104(d).

(c) *Subject of hearing.* The hearing required by this section must determine whether the employee refused to submit to testing, having been requested to submit, under authority of this subpart, by a representative of the railroad. In determining whether a disqualification is required, the hearing official shall, as appropriate, also consider the following:

(1) Whether the railroad made a good faith determination, based on reasonable inquiry, that the accident or incident was within the mandatory testing requirements of this subpart; and

(2) In a case where a blood test was refused on the ground it would be inconsistent with the employee's health,

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whether such refusal was made in good faith and based on medical advice.

Subpart D—Reasonable Suspicion Testing

SOURCE: 81 FR 37934, June 10, 2016, unless otherwise noted.

§ 219.301 Mandatory reasonable suspicion testing.

(a) Each railroad must require a regulated employee to submit to a breath alcohol test when the railroad has reasonable suspicion to believe that the regulated employee has violated any prohibition of subpart B of this part concerning use of alcohol. The railroad's determination that reasonable suspicion exists to require the regulated employee to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. A Federal reasonable suspicion alcohol test is not required to confirm the on-duty possession of alcohol.

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

(c) Reasonable suspicion observations made under this section must comply with the requirements of § 219.303.

(d) As provided by § 219.11(b)(2), in any case where an employee is suffering a substantiated medical emergency and is subject to alcohol or drug testing under this subpart, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimens. However, when the employee's condition is stabilized, reasonable suspicion testing must be

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completed if within the eight-hour limit provided for in § 219.305.

§ 219.303 Reasonable suspicion observations.

(a) With respect to an alcohol test, the required observations must be made by a responsible railroad supervisor (defined by § 219.5) trained in accordance with § 219.11(g). The supervisor who makes the determination that reasonable suspicion exists may not conduct the reasonable suspicion testing on that regulated employee.

(b) With respect to a drug test, the required observations must be made by two responsible railroad supervisors (defined by § 219.5), at least one of whom must be both on site and trained in accordance with § 219.11(g). If one of the supervisors is off site, the on-site supervisor must communicate with the off-site supervisor, as necessary, to provide him or her the information needed to make the required observation. This communication may be performed via telephone, but not via radio or any other form of electronic communication.

(c) This subpart does not authorize holding any employee out of service pending receipt of toxicological analysis for reasonable suspicion testing, nor does it restrict a railroad from taking such action based on the employee's underlying conduct, provided it is consistent with the railroad's policy and taken under the railroad's own authority.

(d) The railroad must maintain written documentation that specifically describes the observed signs and symptoms upon which the determination that reasonable suspicion exists is based. This documentation must be completed promptly by the trained supervisor.

§ 219.305 Prompt specimen collection; time limitations.

(a) Consistent with the need to protect life and property, testing under this subpart must be conducted promptly following the observations upon which the testing decision is based.

(b) If a test required by this subpart is not administered within two hours following a determination made under

this section, the railroad must prepare and maintain on file a record stating the reasons the test was not administered within that time period. If an alcohol or drug test required by this subpart is not administered within eight hours of a determination made under this subpart, the railroad must cease attempts to administer the test and must record the reasons for not administering the test. The eight-hour requirement is satisfied if the individual has been delivered to the collection site (where the collector is present) and the request has been made to commence collection of the specimens within that period. The records required by this section must be submitted to FRA upon request of the FRA Drug and Alcohol Program Manager.

(c) A regulated employee may not be tested under this subpart if that individual has been released from duty under the normal procedures of a railroad. An individual who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (*i.e.*, who is absent without leave).

Subpart E—Reasonable Cause Testing

SOURCE: 81 FR 37935, June 10, 2016, unless otherwise noted.

§219.401 Authorization for reasonable cause testing.

(a) Each railroad may, at its own discretion, elect to conduct Federal reasonable cause testing authorized by this subpart. If a railroad chooses to do so, the railroad must use only Federal authority for all reasonable cause testing that meets the criteria of §219.403. In addition, the railroad must notify its regulated employees of its decision to use Federal reasonable cause testing authority in the employee educational policy required by §219.23(e)(5). The railroad must also provide written notification of its decision to FRA's Drug and Alcohol Program Manager, 1200 New Jersey Ave. SE., Washington, DC 20590.

(b) If a railroad elects to conduct reasonable cause testing under the authority of this subpart, the railroad may, under the conditions specified in this subpart, require any regulated employee, as a condition of employment in regulated service, to cooperate with breath or body fluid testing, or both, to determine compliance with §§219.101 and 219.102 or a railroad rule implementing the requirements of §§219.101 and 219.102. This authority is limited to testing after observations or events that occur during duty hours (including any period of overtime or emergency service). The provisions of this subpart apply only when, and to the extent that, the test in question is conducted in reliance upon the authority conferred by this section. A railroad may not require an employee to be tested under the authority of this subpart unless reasonable cause, as defined in this section, exists with respect to that employee.

§219.403 Requirements for reasonable cause testing.

Each railroad's decision process regarding whether reasonable cause testing is authorized must be completed before the reasonable cause testing is performed and documented according to the requirements of §219.405. The following circumstances constitute reasonable cause for the administration of alcohol and/or drug tests under the authority of this subpart. For reasonable cause testing based on a rule violation as authorized in paragraph (b) of this section, a railroad that elects to test under FRA authority may only use the rule violations listed in paragraph (b) of this section as bases for reasonable cause testing.

(a) *Train accident or train incident.* A regulated employee has been involved in a train accident or train incident (as defined in §219.5) reportable under part 225 of this chapter, and a responsible railroad supervisor (as defined in §219.5) has a reasonable belief, based on specific, articulable facts, that the individual employee's acts or omissions contributed to the occurrence or severity of the accident; or

(b) *Rule violation.* A regulated employee has been directly involved in

one or more of the following railroad or FRA rule violations or other errors:

(1) Noncompliance with a train order, track warrant, track bulletin, track permit, stop and flag order, timetable, signal indication, special instruction or other directive with respect to movement of railroad on-track equipment that involves—

(i) Occupancy of a block or other segment of track to which entry was not authorized;

(ii) Failure to clear a track to permit opposing or following movements to pass;

(iii) Moving across a railroad crossing at grade without authorization;

(iv) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required); or

(v) Failure to take appropriate action, resulting in the enforcement of a positive train control system.

(2) Failure to protect on-track equipment, including leaving on-track equipment fouling an adjacent track;

(3) Operation of a train or other speedometer-equipped on-track equipment at a speed that exceeds the maximum authorized speed by at least 10 miles per hour or by 50% of such maximum authorized speed, whichever is less;

(4) Alignment of a switch in violation of a railroad rule, failure to align a switch as required for movement, operation of a switch under on-track equipment, or unauthorized running through a switch;

(5) Failure to restore and secure a main track switch as required;

(6) Failure to apply brakes or stop short of a derail as required;

(7) Failure to secure a hand brake or failure to secure sufficient hand brakes, as required;

(8) Entering a crossover before both switches are lined for movement or restoring either switch to normal position before the crossover movement is completed;

(9) Failure to provide point protection by visually determining that the track is clear and giving the signals or instructions necessary to control the movement of on-track equipment when engaged in a shoving or pushing movement;

(10) In the case of a person performing a dispatching function or block operator function, issuance of a mandatory directive or establishment of a route that fails to provide proper protection for on-track equipment;

(11) Interference with the normal functioning of any grade crossing signal system or any signal or train control device without first taking measures to provide for the safety of highway traffic or train operations which depend on the normal functioning of such a device. Such interference includes, but is not limited to, failure to provide alternative methods of maintaining safety for highway traffic or train operations while testing or performing work on the devices or on track and other railroad systems or structures which may affect the integrity of the system;

(12) Failure to perform stop-and-flag duties necessary as a result of a malfunction of a grade crossing signal system;

(13) Failure of a machine operator that results in a collision between a roadway maintenance machine and on-track equipment or a regulated employee;

(14) Failure of a roadway worker-in-charge to notify all affected employees when releasing working limits;

(15) Failure of a flagman or watchman/lookout to notify employees of an approaching train or other on-track equipment;

(16) Failure to ascertain that provision was made for on-track safety before fouling a track;

(17) Improper use of individual train detection in a manual interlocking or control point;

(18) Failure to apply three point protection (fully apply the locomotive and train brakes, center the reverser, and place the generator field switch in the off position) that results in a reportable injury to a regulated employee;

(19) Failure to display blue signals in accordance with §218.25 through §218.30 of this chapter;

(20) Failure to perform a required brake test, or having knowledge that a required brake test was not performed, pursuant to the Class I, Class IA, Class II, or Class III, or transfer train brake

test provisions of part 232, or the running brake test provisions of part 238, of this chapter;

(21) Failure to comply with prohibitions against tampering with locomotive mounted safety devices, or permitting a train to be operated with an unauthorized disabled safety device in the controlling locomotive; or

(22) Failure to have a derailing device in proper position and locked if required in accordance with § 218.109 of this chapter.

[81 FR 37935, June 10, 2016, as amended at 87 FR 5735, Feb. 2, 2022]

§ 219.405 Documentation requirements.

(a) Each railroad must maintain written documentation that specifically describes the basis for each reasonable cause test it performs under Federal authority. This documentation must be completed promptly by the responsible railroad supervisor; although it does not need to be completed before the reasonable cause testing is conducted.

(b) For a rule violation, the documentation must include the type of rule violation and the involvement of each tested regulated employee. For a train accident or train incident reportable under part 225 of this chapter, a railroad must describe either the amount of railroad property damage or the reportable casualty and the basis for the supervisor's belief that the employee's acts or omissions contributed to the occurrence or severity of the train accident or train incident.

§ 219.407 Prompt specimen collection; time limitations.

(a) Consistent with the need to protect life and property, testing under this subpart must be conducted promptly following the observations upon which the testing decision is based.

(b) If a test conducted pursuant to the authority of this subpart is not administered within two hours following the observations upon which the testing decision is based, the railroad must prepare and maintain on file a record stating the reasons the test was not conducted within that time period. If an alcohol or drug test authorized by

this subpart is not administered within eight hours of the event under this subpart, the railroad must cease attempts to administer the test and must record the reasons for not administering the test. The eight-hour time period begins at the time a responsible railroad supervisor receives notice of the train accident, train incident, or rule violation. The eight-hour requirement is satisfied if the employee has been delivered to the collection site (where the collector is present) and the request has been made to commence collection of specimen(s) within that period. The records required by this section must be submitted to FRA upon request of the FRA Drug and Alcohol Program Manager.

(c) A regulated employee may not be tested under this subpart if that individual has been released from duty under the normal procedures of the railroad. An individual who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of a regulated employee who has failed to remain available for testing as required (*i.e.*, who is absent without leave).

§ 219.409 Limitations on authority.

(a) The alcohol and/or drug testing authority conferred by this subpart does not apply with respect to any event that meets the criteria for post-accident toxicological testing required under subpart C of this part.

(b) This subpart does not authorize holding an employee out of service pending receipt of toxicological analysis for reasonable cause testing because meeting the testing criteria is only a basis to inquire whether alcohol or drugs may have played a role in the accident or rule violation. However, this subpart does not restrict a railroad from holding an employee out of service based on the employee's underlying conduct, so long as it is consistent with the railroad's policy and the action is taken under the railroad's own authority.

(c) When determining whether reasonable cause testing is justified, a railroad must consider the involvement of each crewmember in the qualifying

event, not the involvement of the crew as a whole.

Subpart F—Pre-Employment Tests

§ 219.501 Pre-employment drug testing.

(a) Before an individual performs regulated service the first time for a railroad, the railroad must ensure that the individual undergoes testing for drugs in accordance with the regulations of a DOT agency. No railroad may allow a direct employee (a railroad employee who is not employed by a contractor to the railroad) to perform regulated service, unless that railroad has conducted a DOT pre-employment test for drugs on that individual with a result that did not indicate the misuse of controlled substance. This requirement applies both to a final applicant for direct employment and to a direct employee seeking to transfer for the first time from non-regulated service to duties involving regulated service. A regulated employee must have a negative DOT pre-employment drug test for each railroad for which he or she performs regulated service as the result of a direct employment relationship.

(b) Each railroad must ensure that each employee of a contractor who performs regulated service on the railroad's behalf has a negative DOT pre-employment drug test on file with his or her employer. The railroad must also maintain documentation indicating that it had verified that the contractor employee had a negative DOT pre-employment drug test on file with his or her direct employer. A contractor employee who performs regulated service for more than one railroad does not need to have a DOT pre-employment drug test for each railroad for which he or she provides service.

(c) If a railroad has already conducted a DOT pre-employment test resulting in a negative for a regulated service applicant under the rules and regulations of another DOT agency (such as the Federal Motor Carrier Safety Administration), FRA will accept the result of that negative DOT pre-employment test for purposes of the requirements of this subpart.

(d) As used in subpart H of this part with respect to a test required under

this subpart, the term regulated employee includes an applicant for pre-employment testing only. If an applicant declines to be tested and withdraws an application for employment before the pre-employment testing process commences, no record may be maintained of the declination.

(e)(1) The pre-employment drug testing requirements of this section do not apply to:

(i) Covered employees of railroads qualifying for the small railroad exception (see § 219.3(c)) who were performing regulated service for the qualifying railroad, or a contractor or subcontractor of a qualifying railroad, before June 12, 2017;

(ii) Maintenance-of-way employees who were performing regulated service for a railroad, or a contractor or subcontractor of a railroad, before June 12, 2017; or

(iii) MECH employees who were performing regulated service for a railroad, or contractor or subcontractor of a railroad, before March 4, 2022.

(2) An exempted employee under paragraph (e)(1) of this section must have a negative pre-employment drug test before performing regulated service for a new or additional employing railroad, or contractor or subcontractor of a railroad:

(i) On or after June 12, 2017, for exempted covered employees and maintenance-of-way employees, and

(ii) On or after March 4, 2022 for MECH employees.

(f) A railroad, or contractor or subcontractor of a railroad, must comply with 49 CFR 40.25 by performing a records check on any of its MOW or MECH employees who have been exempted from pre-employment testing before the employee first performs regulated service. An employee may not perform regulated service after 30 days from the date on which the employee first performed regulated service, unless this information has been obtained or a good faith effort to obtain this information has been made and documented.

[81 FR 37936, June 10, 2016, as amended at 87 FR 5735, Feb. 2, 2022]

§ 219.502 Pre-employment alcohol testing.

(a) A railroad may, but is not required to, conduct pre-employment alcohol testing under this part. If a railroad chooses to conduct pre-employment alcohol testing, the railroad must comply with the following requirements:

(1) The railroad must conduct a pre-employment alcohol test before the first performance of regulated service by an employee, regardless of whether he or she is a new employee or a first-time transfer to a position involving the performance of regulated service.

(2) The railroad must treat all employees performing regulated service the same for the purpose of pre-employment alcohol testing (*i.e.*, a railroad must not test some regulated 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) If a regulated employee's Federal pre-employment test indicates an alcohol concentration of 0.04 or greater, a railroad may not allow him or her to begin performing regulated service until he or she has completed the Federal return-to-duty process under § 219.104(d).

(b) As used in subpart H of this part with respect to a test authorized under this subpart, the term regulated employee includes an applicant for pre-employment testing only. If an applicant declines to be tested before the testing process commences, no record may be maintained of the declination. The determination of when an alcohol test commences must be made according to the provisions of § 40.243(a) of this title.

[66 FR 41973, Aug. 9, 2001, as amended at 81 FR 37936, June 10, 2016]

§ 219.503 Notification; records.

Each railroad must provide for medical review of drug test results according to the requirements of part 40 of

this title, as provided in subpart H of this part. The railroad must also notify the applicant in writing of the results of any Federal drug and/or alcohol test that is a positive, adulteration, substitution, or refusal in the same manner as provided for employees in part 40 of this title and subpart H of this part. Records must be maintained confidentially and be retained in the same manner as required under subpart J of this part for employee test records, except that such records need not reflect the identity of an applicant who withdrew an application to perform regulated service before the commencement of the testing process.

[81 FR 37937, June 10, 2016]

§ 219.505 Non-negative tests and refusals.

An applicant who has tested positive or refused to submit to pre-employment testing under this section may not perform regulated service for any railroad until he or she has completed the Federal return-to-duty process under § 219.104(d). An applicant may also not perform DOT safety-sensitive functions for any other employer regulated by a DOT agency until he or she has completed the Federal return-to-duty process under § 219.104(d). This section does not create any right on the part of the applicant to have a subsequent application considered; nor does it restrict the discretion of the railroad to entertain a subsequent application for employment from the same person.

[81 FR 37937, June 10, 2016]

Subpart G—Random Alcohol and Drug Testing Programs

SOURCE: 81 FR 37937, June 10, 2016, unless otherwise noted.

§ 219.601 Purpose and scope of random testing programs.

(a) *Purpose.* The purpose of random alcohol and drug testing is to promote safety by deterring regulated employees from misusing drugs and abusing alcohol.

(b) *Regulated employees.* Each railroad must ensure that a regulated employee is subject to being selected for random

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testing as required by this subpart whenever the employee performs regulated service on the railroad's behalf.

(c) *Contractor employees and volunteers.* A regulated employee who is a volunteer or an employee of a contractor to a railroad may be incorporated into the random testing program of more than one railroad if:

(1) The contractor employee or volunteer is not already part of a random testing program that meets the requirements of this subpart and has been accepted by the railroad for which he or she performs regulated service (as described in § 219.609); or

(2) The railroad for which the contractor employee or volunteer performs regulated service is unable to verify that the individual is part of a random testing program acceptable to the railroad that meets the requirements of this subpart.

(d) *Multiple DOT agencies.* (1) If a regulated employee performs functions subject to the random testing requirements of more than one DOT agency, a railroad must ensure that the employee is subject to selection for random drug and alcohol testing at or above the current minimum annual testing rate set by the DOT agency that regulates more than 50 percent of the employee's DOT-regulated functions.

(2) A railroad may not include a regulated employee in more than one DOT random testing pool for regulated service performed on its behalf, even if the regulated employee is subject to the random testing requirements of more than one DOT agency.

§ 219.603 General requirements for random testing programs.

(a) *General.* To the extent possible, each railroad must ensure that its FRA random testing program is designed and implemented so that each employee performing regulated service on its behalf should reasonably anticipate that he or she may be called for a random test without advance warning at any time while on duty and subject to performing regulated service.

(b) *Prohibited selection bias.* A random testing program may not have a selection bias or an appearance of selection bias, or appear to provide an oppor-

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tunity for a regulated employee to avoid complying with this section.

(c) *Plans.* As required by §§ 219.603 through 219.609, each railroad must submit for FRA approval a random testing plan meeting the requirements of this subpart. The plan must address all regulated employees, as defined in § 219.5.

(d) *Pools.* Each railroad must construct and maintain random testing pools in accordance with § 219.611.

(e) *Selections.* Each railroad must conduct random testing selections in accordance with § 219.613.

(f) *Collections.* Each railroad must perform random testing collections in accordance with § 219.615.

(g) *Cooperation.* Each railroad and its regulated employees must cooperate with and participate in random testing in accordance with § 219.617.

(h) *Responsive action.* Each railroad must handle positive random tests and verified refusals to test in accordance with § 219.619.

(i) *Service agents.* Each railroad may use a service agent to perform its random testing responsibilities in accordance with § 219.621.

(j) *Records.* Each railroad must maintain records required by this subpart in accordance with § 219.623.

§ 219.605 Submission and approval of random testing plans.

(a) *Plan submission.* (1) Each railroad must submit for review and approval a random testing plan meeting the requirements of §§ 219.607 and 219.609 by email to *FRA-DrugAlcoholProgram.email@dot.gov*. The submission must include the name of the railroad or contractor in the subject line. A railroad commencing start-up operations must submit its plan no later than 30 days before its date of commencing operations. A railroad that must comply with this subpart because it no longer qualifies for the small railroad exception under § 219.3 (due to a change in operations or its number of covered employees) must submit its plan no later than 30 days after it becomes subject to the requirements of this subpart. A railroad may

not implement a Federal random testing plan or any substantive amendment to that plan before FRA approval.

(2) A railroad may submit separate random testing plans for each category of regulated employees (as defined in § 219.5), combine all categories into a single plan, or amend its current FRA-approved plan to add additional categories of regulated employees, as defined by this part.

(b) *Plan approval notification.* FRA will notify a railroad in writing whether its plan is approved. If the plan is not approved because it does not meet the requirements of this subpart, FRA will inform the railroad of its non-approval, with specific explanations of any required revisions. The railroad must resubmit its plan with the required revisions within 30 days of the date of FRA's written notice. Failure to resubmit the plan with the necessary revisions will be a failure to submit a plan under this part.

(c) *Plan implementation.* Each railroad must implement its random testing plan no later than 30 days from the date of FRA approval.

(d) *Plan amendments.* (1) Each railroad must submit to FRA a substantive amendment to an approved plan at least 30 days before its intended effective date. A railroad may not implement any substantive amendment before FRA approval.

(2) Each railroad must provide a non-substantive amendment to an approved plan (such as the replacement or addition of service providers) to the FRA Drug and Alcohol Program Manager in writing (by letter or email) before its effective date. However, FRA pre-approval is not required.

(e) *Previously approved plans.* A railroad is not required to resubmit a random testing plan that FRA had approved before March 4, 2022, unless the railroad must amend the plan to comply with the requirements of this subpart. A railroad must submit new plans, combined plans, or amended plans incorporating new categories of regulated employees (*i.e.*, mechanical employees) for FRA approval at least 60 days after March 4, 2022.

[81 FR 37937, June 10, 2016, as amended at 87 FR 5736, Feb. 2, 2022]

§ 219.607 Requirements for random testing plans.

(a) *General.* A random testing plan that a railroad submits under this subpart must address and comply with the requirements of this subpart. The railroad must also comply with these requirements in implementing the plan.

(b) *Model random testing plan.* A railroad (or a contractor or service agent that submits a part 219-compliant random testing plan to a railroad for submission as a part of the railroad's random testing plan) may complete, modify if necessary, and submit a plan based on the FRA model random testing plan that can be downloaded from FRA's Drug and Alcohol Program Web site.

(c) *Specific plan requirements.* Each random testing plan must contain the following items of information, each of which must be contained in a separate, clearly identified section:

(1) Total number of covered employees, including covered service contractor employees and volunteers;

(2) Total number of maintenance-of-way employees, including maintenance-of-way contractor employees and volunteers;

(3) Total number of mechanical employees, including mechanical contractor employees and volunteers;

(4) Names of any contractors who perform regulated service for the railroad, with contact information;

(5) Method used to ensure that any regulated service contractor employees and volunteers are subject to the requirements of this subpart, as required by § 219.609;

(6) Name, address, and contact information for the railroad's Designated Employer Representative (DER) and any alternates (if applicable);

(7) Name, address, and contact information for any service providers, including the railroad's Medical Review Officers (MROs), Substance Abuse and Mental Health Services Administration (SAMHSA) certified drug testing laboratory(ies), Drug and Alcohol Counselors (DACs), Substance Abuse Professionals (SAPs), and Consortium/Third Party Administrators (C/TPAs) or collection site management companies. Individual collection sites do not have to be identified;

(8) Number of random testing pools and the proposed general pool entry assignments for each pool. If using a C/TPA, a railroad must identify whether its regulated employees are combined into one pool, contained in separate pools, or combined in a larger pool with other FRA or other DOT agency regulated employees, or both.

(9) Target random testing rates meeting or exceeding the minimum annual random testing rates;

(10) Method used to make random selections, including a detailed description of the computer program or random number table selection process employed;

(11) Selection unit(s) for each random pool (*e.g.*, employee name or ID number, job assignment, train symbol) and whether the individual selection unit(s) will be selected for drugs, alcohol, or both;

(12) If a railroad makes alternate selections, under what limited circumstances these alternate selections will be tested (see § 219.613);

(13) Frequency of random selections (*e.g.*, monthly);

(14) Designated testing window. A designated testing window extends from the beginning to the end of the designated testing period established in the railroad's FRA-approved random plan (see § 219.603), after which time any individual selections for that designated testing window that have not been collected are no longer active; and

(15) Description of how the railroad will notify a regulated employee that he or she has been selected for random testing.

[81 FR 37937, June 10, 2016, as amended at 87 FR 5736, Feb. 2, 2022]

§ 219.609 Inclusion of contractor employees and volunteers in random testing plans.

(a) Each railroad's random testing plan must demonstrate that all of its regulated service contractor employees and volunteers are subject to random testing that meets the requirements of this subpart. A railroad can demonstrate that its regulated service contractor employees and volunteers are in compliance with this subpart by either:

(1) Directly including regulated service contractor employees and volunteers in its own random testing plan and ensuring that they are tested according to that plan; or

(2) Indicating in its random testing plan that its regulated service contractor employees and volunteers are part of a random testing program which is compliant with the requirements of this subpart, *e.g.*, conducted by a contractor or C/TPA ("non-railroad random testing program"). If a railroad chooses this option, the railroad must append to its own random testing plan one or more addenda describing the method it will use to ensure that the non-railroad random testing program is testing its regulated service contractor employees and volunteers according to the requirements of this subpart. A railroad may comply with this requirement by appending the non-railroad random testing program or a detailed description of the program and how it complies with this subpart.

(b) Each railroad's random testing plan(s) and any addenda must contain sufficient detail to fully document that the railroad is meeting the requirements of this subpart for all personnel performing regulated service on its behalf.

(c) If a railroad chooses to use regulated service contractor employees and volunteers who are part of a non-railroad random testing program, the railroad remains responsible for ensuring that the non-railroad program is testing the regulated service contractor employees and volunteers according to the requirements of this subpart.

(d) FRA does not pre-approve contractor or service agent random testing plans, but may accept them as part of its approval process of a railroad's plan.

§ 219.611 Random alcohol and drug testing pools.

(a) *General.* Each railroad must ensure that its random testing pools include all regulated employees who perform regulated service on its behalf, except that a railroad's random testing pools do not have to include regulated employees who are part of a non-railroad random testing program that is

compliant with the requirements of this subpart and that has been accepted by the railroad.

(b) *Pool entries.* Each railroad must clearly indicate who will be tested when a specific pool entry is selected.

(1) Pool entries may be employee names or identification numbers, train symbols, or specific job assignments, although all the entries in a single pool must be of generally consistent sizes and types.

(2) Pool entries must not allow a field manager or field supervisor to have discretion over which employee is to be tested when an entry is selected.

(3) Pool entries must be constructed and maintained so that all regulated employees have an equal chance of being selected for random testing for each selection draw.

(c) *Minimum number of pool entries.* A railroad (including a service agent used by a railroad to carry out its responsibilities under this subpart) may not maintain a random testing pool with less than four pool entries. Placeholder pool entries (entries that do not represent legitimate selections of regulated employees) are not permitted. A railroad or contractor with less than four regulated employees can comply with this requirement by having its regulated employees incorporated into a railroad or non-railroad random testing pool that contains more than four entries.

(d) *Pool construction.* (1) An individual who is not subject to the random testing requirements of FRA or another DOT agency may not be placed in the same pool as a regulated employee.

(2) A railroad may not include a regulated employee in more than one random testing pool established under the regulations of a DOT agency.

(3) A regulated employee may be placed in a random testing pool with employees subject to the random testing requirements of another DOT agency, only if all entries in the pool are subject to testing at the highest minimum random testing rate required by the regulations of a DOT agency for any single member in the pool.

(4) A regulated employee does not have to be placed in separate pools for random drug and random alcohol testing selection.

(5) A regulated employee must be incorporated into a random testing pool as soon as possible after his or her hire or first transfer into regulated service.

(e) *Frequency of regulated service.* (1) A railroad may not place a person in a random testing pool for any selection period in which he or she is not expected to perform regulated service.

(2) A railroad employee who performs regulated service on average less than once a quarter is a de minimis safety concern for random testing purposes, and does not have to be in a random testing program. A railroad that chooses to random test de minimis employees must place them in a separate random testing pool from employees who perform regulated service on a regular basis (e.g., engineers, conductors, dispatchers, and signal maintainers).

(3) A railroad must make a good faith effort to determine the frequency of an employee's performance of regulated service and must evaluate the employee's likelihood of performing regulated service in each upcoming selection period.

(f) *Pool maintenance.* Pool entries must be updated at least monthly, regardless of how often selections are made, and a railroad must ensure that each of its random testing pools is complete and does not contain outdated or inappropriate entries.

(g) *Multiple random testing pools.* A railroad may maintain more than one random testing pool if it can demonstrate that its random testing program is not adversely impacted by the number and types of pools or the construction of pool entries, and that selections from each pool will meet the requirements of this subpart.

§219.613 Random testing selections.

(a) *General.* Each railroad must ensure that each regulated employee has an equal chance of being selected for random testing whenever selections are made. A railroad may not increase or decrease an employee's chance of being selected by weighting an entry or pool.

(b) *Method of selection.* (1) Each railroad must use a selection method that is acceptable to FRA and meets the requirements of this subpart, such as a computer selection program, proper

use of a random number table, or an alternative method which FRA has approved as part of the railroad's random testing plan.

(2) A selection method must be free of bias or apparent bias and employ objective, neutral criteria to ensure that every regulated employee has an equal statistical chance of being selected within a specified time frame. The selection method may not utilize subjective factors that permit a railroad to manipulate or control selections in an effort to either target or protect any employee, job, or operational unit from testing.

(3) The randomness of a selection method must be verifiable, and, as required by § 219.623, any records necessary to document the randomness of a selection must be retained for not less than two years from the date the designated testing window for that selection expired.

(c) *Minimum random testing rate.* (1) Each railroad must distribute random tests reasonably throughout the calendar year and make sufficient selections to ensure that each random testing pool meets the Administrator's minimum annual random testing rates as established according to § 219.625.

(2) Each railroad must continually monitor changes in its workforce to ensure that the required number of selections and tests are conducted each year.

(d) *Selection frequency.* Each railroad must select at least one entry from each of its random testing pools every three months.

(e) *Discarded selection draws.* Each selection draw must identify who will be subject to random testing. A railroad cannot discard a selection draw without an acceptable explanation (*e.g.*, the selection was drawn from an incomplete or inaccurate pool). A railroad must document and retain records for all discarded selection draws, including the specific reason the selection draw was not used, as required by § 219.623.

(f) *Increasing random selections.* A railroad that is unable to complete a collection for each selection made during a designated testing period may increase the number of selections in a subsequent selection period to ensure

that it meets the annual minimum random testing rate for the calendar year.

(g) *Selection snapshots.* Each railroad must capture and maintain an electronic or hard copy snapshot of each random testing pool at the time it makes a testing selection. A railroad must not re-create pool entries from records after the time of the original selection. The railroad must maintain this snapshot for a period of two years, as required by subpart J of this part.

(h) *Multiple DOT agencies.* Each railroad must ensure that each regulated employee who performs functions subject to the random testing requirements of more than one DOT agency is subject to random selection at or above the current minimum annual testing rate set by the DOT agency that regulates more than 50 percent of the employee's DOT-regulated functions.

§ 219.615 Random testing collections.

(a) *Minimum random testing rates.* Each railroad must complete a sufficient number of random alcohol and drug testing collections from each of its random testing pools to meet the Administrator's minimum annual testing rates established in accordance with § 219.625.

(b) *Designated testing window.* Each railroad must complete the collection for a selected pool entry within the FRA-approved designated testing window for that selection. Once a designated testing window has closed, any selections not collected during that window are no longer valid and may not be subject to random testing.

(c) *Collection timing.* (1) A regulated employee may be subject to random testing only while on duty and subject to performing regulated service.

(2) Each railroad's random alcohol and drug testing collections must be unannounced and spread reasonably throughout the calendar year. Collections must also be distributed unpredictably throughout the designated testing window and must reasonably cover all operating days of the week (including operating weekends and holidays), shifts, and locations.

(3) Random alcohol test collections must be performed unpredictably and in sufficient numbers at either end of

an operating shift to attain an acceptable level of deterrence throughout the entire shift. At a minimum, a railroad must perform 10% of its random alcohol tests at the beginning of shifts and 10% of its random alcohol tests at the end of shifts.

(4) If a regulated employee has been selected for both random drug and alcohol testing, a railroad may conduct these tests separately, so long as both required collections can be completed by the end of the employee's shift and the railroad does not inform the employee that an additional collection will occur later.

(d) *Collection scheduling.* While pool entries must be selected randomly, a railroad may schedule each random test collection during a designated testing window according to its approved plan.

(1) A railroad may schedule a collection based on the availability of the selected pool entry, the logistics of performing the collection, and any other requirements of this subpart.

(2) If a selected pool entry does not identify the selection by name (*i.e.*, train crews or job functions), a railroad may not use its scheduling discretion to deliberately target or protect a particular employee or work crew. Unless otherwise approved in a random testing plan, railroad field supervisors or field management personnel may not use discretion to choose or to change collection dates or times if that choice could intentionally alter who is to be tested.

(e) *Notification requirements.* (1) A railroad may notify a regulated employee that he or she has been selected for random testing only during the duty tour in which the collection is to be conducted, and only so far in advance as is reasonably necessary to ensure the employee's presence at the scheduled collection time and place.

(2) A railroad must make collections as soon as possible. Each collection must begin within two hours after the railroad has notified the employee of his or her selection for random testing, unless the railroad has an acceptable reason for the delay. A railroad should monitor each employee after notification and, whenever possible, arrange for the employee to be immediately es-

corted by supervisory or management personnel to the collection location.

(3) A railroad must inform each regulated employee that he or she has been selected for random testing at the time the employee is notified. Completion of the Federal Drug Testing Custody and Control Form (CCF) or the DOT Alcohol Testing Form (ATF) indicating the basis of the test satisfies this requirement, so long as the employee has been shown and directed to sign the CCF or ATF as required by §§40.73 and 40.241 of this title.

(f) *Incomplete collections.* A railroad must use due diligence to ensure that a random testing collection is completed for each selected pool entry, unless it has an acceptable explanation for not conducting the collection. All reasons for incomplete collections must be fully documented and are subject to inspection by FRA upon request.

(g) *Hours-of-service limitations.* (1) Except as provided by paragraph (g)(2) of this section, a railroad must immediately terminate a random collection and may not reschedule it if the collection is not completed within a covered employee's hours-of-service limitations.

(2) If a random collection requires a direct observation collection under §40.67 of this title, the directly observed collection must immediately proceed until completed. A railroad must submit an excess service report, as required by part 228 of this chapter, if completion of the directly observed collection causes the covered employee to exceed his or her hours-of-service limitations.

[81 FR 37937, June 10, 2016, as amended at 87 FR 5736, Feb. 2, 2022]

§219.617 Participation in random alcohol and drug testing.

(a) *Railroad responsibility.* (1) A railroad must, under the conditions specified in this subpart and subpart H of this part, require a regulated employee selected for random testing to cooperate in alcohol and/or drug testing.

(2) If an employee is performing regulated service at the time he or she is notified of his or her selection for random testing, the railroad must ensure that the employee immediately ceases

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to perform regulated service and proceeds to the collection site without adversely affecting safety. A railroad must also ensure that the absence of an employee from his or her assigned duties to report for testing does not adversely affect safety. Once an employee begins the testing process, he or she may not be returned to regulated service until the testing process is complete.

(3) A railroad may excuse a regulated employee who has been notified of his or her selection for random testing only if the employee can substantiate that a medical emergency involving the employee or an immediate family member (*e.g.*, birth, death, or medical emergency) supersedes the requirement to complete the test. A medical emergency is defined in this part as an acute medical condition requiring immediate emergency care. To be eligible for exclusion from random testing, the employee must provide verifiable documentation of the emergency situation from a credible outside professional within a reasonable period of time (*e.g.*, a doctor, dentist, hospital, law enforcement officer, or school authority). A railroad may not test an employee who has been excused from testing under the same random selection.

(b) *Employee responsibility.* (1) A regulated employee subject to the random testing requirements of this subpart must cooperate with the selection and testing process, and must proceed to the testing site upon notification that he or she has been selected for random testing.

(2) A regulated employee must fully cooperate and comply with the body fluid drug collection and/or breath alcohol testing procedures required by subpart H of this part, and provide the required specimen(s), and must, upon request, complete the required paperwork and certifications.

[81 FR 37937, June 10, 2016, as amended at 87 FR 5736, Feb. 2, 2022; 88 FR 27652, May 2, 2023]

§219.619 Positive alcohol and drug test results and refusals; procedures.

Section 219.104 contains the procedures for administrative handling by the railroad or contractor in the event a body fluid specimen provided under

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this subpart is reported as a verified positive by the Medical Review Officer, a breath alcohol specimen is reported at 0.04 or greater by the Breath Alcohol Technician, or a refusal to test has occurred. The responsive action required in §219.104 is not stayed pending the result of the testing of a split body fluid specimen or a challenge to any part of the testing process or procedure.

[81 FR 37937, June 10, 2016, as amended at 88 FR 27652, May 2, 2023]

§219.621 Use of service agents.

(a) A railroad may use a service agent (such as a consortium/third party administrator (C/TPA)) to act as its agent to carry out any role in random testing specifically permitted under subpart Q of part 40 of this title, such as maintaining random pools, conducting random selections, and performing random body fluid drug collections and breath alcohol tests.

(b) A railroad may not use a service agent to notify a regulated employee that he or she has been selected for random testing. A regulated employee who has been selected for random testing must otherwise be notified of the selection by his or her employer. A service agent may also not perform any role that §40.355 of this title specifically reserves to an employer, which, for purposes of this subpart, is defined as a railroad or a contractor performing railroad-accepted testing.

(c) A railroad is primarily responsible for compliance with the random alcohol and drug testing of this subpart, but FRA reserves the right to bring an enforcement action for non-compliance against the railroad, its service agents, its contractors, and/or its employees.

(d) If a railroad conducts random drug and/or alcohol testing through a C/TPA, the number of employees required to be tested may be calculated for each individual railroad belonging to the C/TPA, or may be based on the total number of regulated employees covered by the C/TPA in a larger combined railroad or DOT agency random pool. Selections from combined railroad random pools must meet or exceed the highest minimum annual percentage rate established under this subpart or any DOT agency drug testing rule

that applies to any member of that pool.

[81 FR 37937, June 10, 2016, as amended at 88 FR 27652, May 2, 2023]

§ 219.623 Records.

(a) As provided by § 219.901, each railroad is required to maintain records related to random testing for a minimum of two years.

(b) Contractors and service agents performing random testing responsibilities under this subpart must provide records required by this subpart whenever requested by the contracting railroad or by FRA. A railroad remains responsible for maintaining records demonstrating that it is in compliance with the requirements of this subpart.

§ 219.625 FRA Administrator's determination of random alcohol and drug testing rates.

(a) *Notice.* Each year, the Administrator publishes a FEDERAL REGISTER notice announcing the minimum annual random alcohol and drug testing rates which take effect on January 1 of the following calendar year. These rates are based on the railroad industry's random testing violation rates for the preceding two consecutive calendar years, which are determined using annual railroad alcohol and drug program data required to be submitted to the FRA's Management Information System (MIS) under § 219.800.

(b) *Information.* Data from MIS reports provide the information used for this determination. In order to ensure reliability of the data, the Administrator may consider the quality and completeness of the reported data, obtain additional information or reports from railroads, or make appropriate modifications in calculating the industry positive rate.

(c) *Initial minimum annual random testing rates.* The Administrator has established an initial minimum annual random testing rate of 50 percent for drugs and 25 percent for alcohol for any new category of regulated employees added to those already being tested under this part.

(1) These initial testing rates are subject to amendment by the Administrator in accordance with paragraphs (d) and (e) of this section after at least

two consecutive calendar years of MIS data have been compiled for the category of regulated employee.

(2) The Administrator will determine separate minimum annual random testing rates for each added category of regulated employees for a minimum of three calendar years after that category is incorporated into random testing under this part.

(3) The Administrator may move to combine categories of regulated employees requiring separate determinations into a single determination once the categories' testing rates are identical for two consecutive years.

(d) *Drug testing rate.* The Administrator may set the minimum annual random drug testing rate for the railroad industry at either 50 percent or 25 percent.

(1) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower the rate to 25 percent if the Administrator determines that the MIS data for two consecutive calendar years show that the reported random testing positive rate is less than 1.0 percent.

(2) When the minimum annual percentage rate for random drug testing is 25 percent, and the MIS data for any calendar year show that the reported random testing positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent.

(e) *Alcohol testing rate.* The Administrator may set the minimum annual random alcohol testing rate for the railroad industry at 50 percent, 25 percent, or 10 percent.

(1) When the minimum annual percentage rate for random alcohol testing is 50 percent or 25 percent, the Administrator may lower this rate to 10 percent if the Administrator determines that the MIS data for two consecutive calendar years show that the random testing violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower the rate to 25 percent if the Administrator determines that the MIS data for two consecutive calendar

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years show that the random testing violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(3) When the minimum annual percentage rate for random alcohol testing is 25 percent, and the MIS data for that calendar year show that the random testing violation rate for drugs is equal to or greater than 0.5 percent but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent.

(4) When the minimum annual percentage rate for random alcohol testing is 10 percent or 25 percent, and the MIS data for any calendar year show that the random testing violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent.

[81 FR 37937, June 10, 2016, as amended at 87 FR 5736, Feb. 2, 2022]

Subpart H—Drug and Alcohol Testing Procedures

§219.701 Standards for drug and alcohol testing.

(a) Drug testing required or authorized by subparts B, D, E, F, G, and K (but only for co-worker or non-peer referrals that involve a violation of the prohibitions of this subpart) of this part must be conducted in compliance with all applicable provisions of the Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs (part 40 of this title).

(b) Alcohol testing required or authorized by subparts B, D, E, F, G, and K (but only for co-worker or non-peer referrals that involve a violation of the prohibitions of this subpart) of this part must be conducted in compliance with all applicable provisions of the Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs (part 40 of this title).

[66 FR 41973, Aug. 9, 2001, as amended at 81 FR 37942, June 10, 2016]

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Subpart I—Annual Report

§219.800 Annual reports.

(a) Each railroad that has a total of 400,000 or more employee hours (including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States), must submit to FRA by March 15 of each year a report covering the previous calendar year (January 1–December 31), summarizing the results of its alcohol misuse and drug abuse prevention program. As used in this paragraph, the term “employees of the railroad” includes individuals who perform service for the railroad, including not only individuals who receive direct monetary compensation from the railroad for performing a service for the railroad, but also such individuals as employees of a contractor to the railroad who perform a service for the railroad.

(b) As a railroad, you must use the Management Information System (MIS) form and instructions as required by 49 CFR part 40 (at §40.25 and appendix H to part 40). You may also use the electronic version of the MIS form provided by the DOT. The Administrator may designate means (*e.g.*, electronic program transmitted via the Internet), other than hard-copy, for MIS form submission to FRA. For information on where to submit MIS forms and for the electronic version of the form, see: <http://www.fra.dot.gov/eLib/details/L02639>.

(c) Each railroad shall ensure the accuracy and timeliness of each report submitted.

(d) As a railroad, if you have a regulated employee who performs multi-DOT agency functions (*e.g.*, an employee drives a commercial motor vehicle and performs switchman duties for you), count the employee only on the MIS report for the DOT agency under which he or she is random tested. Normally, this will be the DOT agency under which the employee performs more than 50% of his or her duties. Railroads may have to explain the testing data for these employees in the event of a DOT agency inspection or audit.

(e) A service agent (*e.g.*, a consortium/third party administrator) may prepare the MIS report on behalf of a railroad. However, a railroad official (*e.g.*, a designated employee representative) must certify the accuracy and completeness of the MIS report, no matter who prepares it.

(f) A railroad required to submit an MIS report under this section must submit separate reports for covered employees, MOW employees, and MECH employees.

(g)(1) This subpart does not apply to any contractor that performs regulated service exclusively for railroads with fewer than 400,000 total employee annual work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States.

(2) When a contractor performs regulated service for at least one railroad with 400,000 or more total annual employee work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States, this subpart applies as follows:

(i) A railroad with 400,000 or more total employee annual work hours must comply with this subpart regarding any contractor employees it integrates into its own alcohol and drug program under this part; and

(ii) If a contractor establishes an independent alcohol and drug testing program that meets the requirements of this part and is acceptable to the railroad, the contractor must comply with this subpart if it has 200 or more regulated employees.

[68 FR 75464, Dec. 31, 2003, as amended at 69 FR 19288, Apr. 12, 2004; 81 FR 37942, June 10, 2016; 87 FR 5736, Feb. 2, 2022]

§§ 219.801–219.803 [Reserved]

Subpart J—Recordkeeping Requirements

§219.901 Retention of alcohol and drug testing records.

(a) *General.* (1) In addition to the records part 40 of this title requires keeping, a railroad must also maintain alcohol and drug misuse prevention

program records in a secure location with controlled access under this section's requirements.

(2) A railroad must maintain for two years, rather than one year, the records to which §40.333(a)(4) of this title applies (*i.e.*, records of negative and cancelled drug test results and alcohol test results with a concentration of less than 0.02). A railroad may maintain legible and accessible scanned or electronic copies of these records for the second year.

(b) *Records maintained for a minimum of five years.* Each railroad must maintain the following records for a minimum of five years:

(1) A summary record or the individual files of each regulated employee's test results; and

(2) A copy of the annual report summarizing the results of its alcohol and drug misuse prevention program (if required to submit the report under §219.800(a)).

(c) *Records maintained for a minimum of two years.* Each railroad must maintain the following records for a minimum of two years:

(1) Records related to the collection process:

(i) Collection logbooks, if used;

(ii) Documents relating to the random selection process, including the railroad's approved random testing plan and FRA's approval letter for that plan;

(iii) Documents generated in connection with decisions to administer Federal reasonable suspicion or reasonable cause alcohol or drug tests;

(iv) Documents generated in connection with decisions on post-accident testing; and

(v) Documents verifying the existence of a medical explanation for the inability of a regulated employee to provide an adequate specimen;

(2) Records related to test results:

(i) The railroad's copy of the alcohol test form, including the results of the test;

(ii) The railroad's copy of the drug test custody and control form, including the results of the test;

(iii) Documents related to any regulated employee's refusal to submit to an alcohol or drug test required under this part; and

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(iv) Documents a regulated employee presented to dispute the result of an alcohol or drug test administered under this part;

(3) Records related to other violations of this part; and

(4) Records related to employee training;

(i) Materials on alcohol and drug abuse awareness, including a copy of the railroad's policy on alcohol and drug abuse;

(ii) Documentation of compliance with the requirements of § 219.23; and

(iii) Documentation of training (including attendance records and training materials) the railroad provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for reasonable suspicion or post-accident alcohol and drug testing.

[81 FR 37942, June 10, 2016]

§ 219.903 Access to facilities and records.

(a) Release of regulated employee information contained in records required to be maintained under § 219.901 must be in accordance with part 40 of this title and with this section. (For purposes of this section only, body fluid drug testing records are considered equivalent to breath alcohol testing records.)

(b) Each railroad must grant access to all facilities used to comply with this part to the Secretary of Transportation, United States Department of Transportation, or any DOT agency with regulatory authority over the railroad or any of its regulated employees.

(c) Each railroad must make available copies of all results for its drug and alcohol testing programs conducted under this part and any other information pertaining to the railroad's alcohol and drug misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the railroad or regulated employee.

[81 FR 37942, June 10, 2016, as amended at 88 FR 27652, May 2, 2023]

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§ 219.905 [Reserved]

Subpart K—Referral Programs

SOURCE: 81 FR 37942, June 10, 2016, unless otherwise noted.

§ 219.1001 Requirement for referral programs.

(a) The purpose of this subpart is to help prevent the adverse effects of drug and alcohol abuse in connection with regulated employees.

(b) A railroad must adopt, publish, and implement the following programs:

(1) *Self-referral program*. A program designed to encourage and facilitate the identification of a regulated employee who abuses drugs or alcohol by providing the employee the opportunity to obtain counseling or treatment before the employee's drug or alcohol abuse manifests itself in a detected violation of this part; and

(2) *Co-worker referral program*. A program designed to encourage co-worker participation in preventing violations of this part.

(c) A railroad may adopt, publish, and implement the following programs:

(1) *Non-peer referral program*. A program designed to encourage non-peer participation in preventing violations of this part; and

(2) *Alternate program(s)*. An alternate program or programs meeting the specific requirements of § 219.1003 or complying with § 219.1007, or both.

(d) Nothing in this subpart may be construed to:

(1) Require payment of compensation for any period a regulated employee is restricted from performing regulated service under a voluntary, co-worker, or non-peer referral program;

(2) Require a railroad to adhere to a voluntary, co-worker, or non-peer referral program when the referral is made for the purpose, or with the effect, of anticipating or avoiding the imminent and probable detection of a rule violation by a supervising employee;

(3) Interfere with the subpart D requirement for Federal reasonable suspicion testing when a regulated employee is on duty and a supervisor determines the employee is exhibiting

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signs and symptoms of alcohol and/or drug use;

(4) Interfere with the requirements in §219.104(d) for responsive action when a violation of §219.101 or §219.102 is substantiated; or

(5) Limit the discretion of a railroad to dismiss or otherwise discipline a regulated employee for specific rule violations or criminal offenses, except as this subpart specifically provides.

§219.1003 Referral program conditions.

(a) *General.* A referral program must specify the allowances, conditions, and procedures under which a self-referral, co-worker referral, and, if adopted, a non-peer referral, can occur, as follows:

(1) For a self-referral, a railroad must identify one or more designated DAC contacts (including telephone number and email (if available)) and any expectations regarding when the referral is allowed to take place (such as during non-duty hours, or while the employee is unimpaired, or both, as §219.1005 permits);

(2) For a co-worker referral, a railroad may accept a referral under this subpart only if it alleges that the regulated employee was apparently unsafe to work with or in violation of this part or the railroad's drug and alcohol abuse rules. The employee must waive investigation of the rule charge and must contact the DAC within a reasonable period of time;

(3) For a non-peer referral, a railroad may remove a regulated employee from service only if a railroad representative confirms that the employee is unsafe to work with or in violation of this part or the railroad's drug and alcohol abuse rules. The employee must waive investigation of the rule charge and must contact the DAC within a reasonable period of time.

(b) *Employment maintained.* A regulated employee who is affected by a drug or alcohol abuse problem may maintain an employment relationship with a railroad if:

(1) The employee seeks assistance through the railroad's voluntary referral program for his or her drug or alcohol abuse problem or a co-worker or a non-peer refers the employee for such assistance; and

(2) The employee successfully completes the education, counseling, or treatment program a DAC specifies under this subpart.

(c) *Employment action.* If a regulated employee does not choose to seek assistance through a referral program, or fails to cooperate with a DAC's recommended program, the disposition of the employee's relationship with the railroad is subject to normal employment action.

(d) *Qualified DAC evaluation.* (1) A DAC acceptable to the railroad must evaluate a regulated employee entering a self-referral, co-worker referral, or non-peer referral program;

(2) The DAC must meet any applicable state standards and comply with this subpart; and

(3) The DAC must determine the appropriate level of care (education, counseling, or treatment, or all three) necessary to resolve any identified drug or alcohol abuse problems.

(e) *Removal from regulated service.* A referral program must stipulate that a regulated employee a DAC has evaluated as having an active drug abuse disorder may not perform regulated service until the DAC can report that safety is no longer affected.

(f) *Confidentiality maintained.* Except as provided under paragraph (1) of this section, a railroad must treat a regulated employee's referral and subsequent handling (including education, counseling, and treatment) as confidential. Only personnel who administer the railroad's referral programs may have access to the identities of the individuals in these programs.

(g) *Leave of absence.* A railroad must grant a regulated employee the minimum leave of absence the DAC recommends to complete a primary education, counseling, or treatment program and to establish control over the employee's drug or alcohol abuse problem.

(h) *Return to regulated service.* (1) Except as §§219.1001(d)(4) and 219.1005 may provide, a railroad must return a regulated employee to regulated service upon the DAC's recommendation that the employee has established control over his or her drug or alcohol abuse problem, has a low risk to return to

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drug or alcohol abuse, and has complied with any recommended return-to-service requirements.

(2) The DAC determines the appropriate number and frequency of required follow-up tests. The railroad determines the dates of testing.

(3) The railroad may condition an employee's return to regulated service on successful completion of a return-to-service medical evaluation.

(4) A railroad must return an employee to regulated service within five working days of the DAC's notification to the railroad that the employee is fit to return to regulated service, unless the employee has a disqualifying medical condition. (*i.e.*, the employee is at a low risk to return to drug or alcohol abuse).

(i) *Rehabilitation plan.* No person—whether an employing railroad, managed care provider, service agent, individual, or any person other than the DAC who conducted the initial evaluation—may change in any way the DAC's evaluation or recommendations for assistance. The DAC who made the initial evaluation may modify the employee's initial evaluation and follow-up recommendation(s) based on new or additional information.

(j) *Locomotive engineers and conductors.* Consistent with §§ 240.119(g) and 242.115(g) of this chapter, for a certified locomotive engineer, certified conductor, or a candidate for engineer or conductor certification, the referral program must state that confidentiality is waived (to the extent the railroad receives from a DAC official notice of the active drug abuse disorder and suspends or revokes the certification, as appropriate) if the employee at any time refuses to cooperate in a recommended course of counseling or treatment.

(k) *Contacting a DAC.* If a regulated employee does not contact a DAC within the railroad's specified time limits, the railroad may begin an investigation to assess the employee's cooperation and compliance with its referral program.

(l) *Time requirements for DAC evaluations.* Once a regulated employee has contacted the designated DAC, the DAC's evaluation must be completed within 10 working days. If the em-

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ployee needs more than one evaluation, the evaluations must be completed within 20 working days.

(m) *Time limitations on follow-up treatment, care, or testing.* Any follow-up treatment, care, or testing established under a referral program must not exceed 24 months beyond an regulated employee's initial removal from regulated service, unless the regulated employee's entry into the program involved a substantiated part 219 violation.

[81 FR 37942, June 10, 2016, as amended at 85 FR 81307, Dec. 15, 2020]

§ 219.1005 Optional provisions.

A railroad's referral program may include any of the following provisions at the option of the railroad and with the approval of the labor organization(s) affected:

(a) The program may provide that the rule of confidentiality is waived if:

(1) The regulated employee at any time refuses to cooperate in a DAC's recommended course of education, counseling, or treatment; or

(2) The railroad determines, after investigation, that the regulated employee has been involved in a drug- or alcohol-related disciplinary offense growing out of subsequent conduct.

(b) The program may require successful completion of a return-to-service medical examination as a further condition of reinstatement in regulated service.

(c) The program may provide that it does not apply to a regulated employee whom the railroad has previously assisted under a program substantially consistent with this section.

(d) The program may provide that, in order to invoke its benefits, the regulated employee must report to the railroad's designated contact either:

(1) During non-duty hours (*i.e.*, at a time when the regulated employee is off duty); or

(2) While unimpaired and otherwise in compliance with the railroad's drug and alcohol rules consistent with this subpart.

§ 219.1007 Alternate programs.

(a) Instead of the referral programs required under § 219.1001, a railroad is

permitted to develop, publish, and implement alternate programs that meet the standards established in §219.1001. Such programs must have the written concurrence of the recognized representatives of the regulated employees. Nothing in this subpart restricts a railroad or labor organization from adopting, publishing, and implementing programs that afford more favorable conditions to regulated employees troubled by drug or alcohol abuse problems, consistent with a railroad's responsibility to prevent violations of §§219.101, 219.102, and 219.103.

(b) The concurrence of the recognized representatives of the regulated employees in an alternate program may be evidenced by a collective bargaining agreement or any other document describing the class or craft of employees to which the alternate program applies. The agreement or other document must make express reference to this subpart and to the intention of the railroad and employee representatives that the alternate program applies instead of the program required by this subpart.

(c) The railroad must file the agreement or other document described in paragraph (b) of this section along with the requested alternate program it submits for approval with the FRA Drug and Alcohol Program Manager. FRA will base its approval on whether the alternative program meets the §219.1001 objectives. The alternative program does not have to include each §219.1001 component, but must meet the general standards and intent of §219.1001. If a railroad amends or revokes an approved alternate policy, the railroad must file a notice with FRA of such amendment or revocation at least 30 days before the effective date of such action.

(d) This section does not excuse a railroad from adopting, publishing, and implementing the programs §219.1001 requires for any group of regulated employees not falling within the coverage of an appropriate, approved alternate program.

(e) Consistent with §219.105(c), FRA has the authority to inspect the aggregate data of any railroad alcohol and/or drug use education, prevention, identification, and rehabilitation program or

policy, including alternate peer support programs, to ensure that they are not designed or implemented in such a way that they circumvent or otherwise undermine Federal requirements, including the requirements in this part regarding peer support programs.

PART 220—RAILROAD COMMUNICATIONS

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