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**SUMMARY:** The Federal Transit Administration (FTA) is amending its drug and alcohol testing regulations to allow employers to use the results of post-accident drug and alcohol tests administered by State or local law enforcement personnel when the State and local law enforcement officials have independent authority for the tests and when the employer is able to obtain the results in conformance with State and local law. Under the amendment, the employer will be relieved of administering post-accident drug and alcohol tests in certain limited circumstances. This amendment may ease the burden of employers in testing "safety-sensitive" employees after an accident has occurred; it may also relieve some "safety-sensitive" employees from taking duplicative post-accident drug and alcohol tests.

**EFFECTIVE DATE:** January 7, 1999.

**FOR FURTHER INFORMATION CONTACT:** For program issues: Judy Meade, Director of the Office of Safety and Security (202) 366-2896 (telephone) or (202) 366-795 1 (fax). For legal issues: Michael Connelly, Office of the Chief Counsel (202) 366-401 1 (telephone) or (202) 366-3809 (fax). Electronic access to this and other rules may be obtained through FTA's Transit Safety and Security Bulletin Board at 1-800-231-2061 or through the FTA World Wide Web home page at <http://www.fta.dot.gov>; both services are available seven days a week.

**SUPPLEMENTARY INFORMATION:** On September 30, 1997, FTA published a Notice of Proposed Rulemaking (NPRM) proposing to amend its drug and alcohol testing rules to allow employers to use the results of post-accident drug and alcohol tests administered by State or local law enforcement personnel when the State and local law enforcement officials have independent authority for the tests and the employer obtains the results in conformance with State and local law. FTA received seven comments over a two-month period

ability to assist transit agencies in promoting safety among its safety-sensitive workers. Several commenters, including those in favor of adopting the amendment, raised the following issues:

Nothing that the proposed amendments allowed for use of post-accident test results when those results are "obtained by the employer," two commenters (the National Association of Collection Sites (NACS) and the American Public Transit Association (APTA)) noted the problem of employers receiving test results administered by State or local officials. NACS asserted that obtaining such post-accident results may require a subpoena, while APTA suggested an overall "difficulty" in an employer receiving these results. A third commenter (Atlantic Health Group), while in favor of the amendment, noted the "problem" of getting the results to the correct employer official, and ensuring that such post-accident test results are legally acceptable.

Two commenters (NACS and APTA) interpreted the proposal to mean either that law enforcement officials would be required to conduct Federal post-accident testing, or that transit systems would "rely" on State and local law enforcement authorities to perform Federal post-accident testing.

Two commenters (NACS and Intoximeters) expressed concern that the State and local law enforcement authorities may use faulty testing equipment, and that local testing practices (e.g., no confirmatory test, no DOT chain-of-custody form, no fifteen minute observation period) may result in tests being declared invalid.

**Discussion**

FTA agrees with those commenters that favor allowing employers to use the results of post-accident drug and alcohol tests administered by State and local law enforcement personnel when those officials have independent authority to administer the test and when the employer obtains the test results in conformance with State and local law. The benefits of having properly administered post-accident test, even if that test is not conducted per 49 CFR Part 40, outweigh the concerns of those opposing this amendment.

As a preliminary matter, FTA notes that this amendment would apply in only a small number of instances where the employer is unable to perform a post-accident test according to the FTA drug and alcohol testing regulations but where State or local law enforcement personnel, on their own authority, have conducted post-accident tests. Results

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**DEPARTMENT OF TRANSPORTATION**

**Federal Transit Administration**

49 CFR Parts 653 and 654

[Docket No. FTA-97-29251 - //

RIN 2132-AA56

**Prevention of Prohibited Drug Use in Transit Operations: Prevention of Alcohol Misuse in Transit Operations**

AGENCY: Federal Transit Administration, DOT.

ACTION: Final rule.

**I. Post-Accident Testing**

**Comments**

Of the seven comments received, five commenters generally favored adoption of the proposal; two opposed allowing employers to use the results from post-accident drug and alcohol tests administered by an entity other than collection site personnel observing the collection procedures mandated by 49 CFR Part 40. Those in favor of adopting the amendment lauded its emphasis on obtaining an actual test result (as opposed to requiring an agency to state why it did not conduct a Federally-mandated post-accident test), and its

from tests administered by State or local law enforcement personnel may not be used when the employer could have, but did not, conduct its own test. Rather, this amendment applies exclusively to those few instances where the employer is unable to perform a post-accident test. Employers may not rely on State or local law enforcement personnel to conduct post-accident testing. While this provision does not prohibit duplicative post-accident testing (*i.e.*, the employer testing under FTA regulations and State or local officials testing under their own authority), it does not permit employers to ignore their obligation to test.

As was explicitly noted in the September 30, 1997, NPRM, this amendment imposes no requirement on State or local law enforcement personnel to perform post-accident testing. In fact, employers should not assume State or local law enforcement personnel routinely perform post-accident drug and alcohol testing; nor should employers assume such test results will be readily available to them. The FTA knows of no situation in which State or local law enforcement agencies routinely give employers the results from post-accident testing. If an employer knows that a State or local law enforcement agency has, of its own authority, administered a post-accident test, and the employer would like to obtain the test result because it (the employer) was unable to perform a post-accident test in accordance with Federal regulations, the employer must either obtain those results (through, for example, a subpoena) or prepare and maintain a record stating why a post-accident test was not promptly administered, as required by FTA rules. This amendment does not impose an affirmative obligation on an employer to obtain results of a post-accident drug and/or alcohol test administered by State or local law enforcement officials.

Refusal by a safety-sensitive worker to submit to a law enforcement-administered post-accident test shall not constitute "refusal to submit" as that term is defined at 49 CFR 653.7 and 654.7. In the event both a law enforcement agency and the employer (proceeding under 49 CFR Parts 40, 653 and 654) conduct post-accident tests, the test results obtained by the employer shall take precedence for purposes of compliance with Parts 653 and 654.

The remaining objections to this amendment involve Federal deference to State and local law enforcement, and their post-accident testing methodology. FTA will accept the results from post-accident drug and alcohol tests performed by State or local law

enforcement agencies, under their own authority, in conformity with applicable Federal, State, or local testing requirements, when the employer was unable to conduct a test, even when the test may have been administered in a manner different than that prescribed by 49 CFR Part 40.

## II. Regulatory Analyses and Notices

This is not a significant rule under Executive Order 12866 or under the Department's Regulatory Policies and Procedures. There are no significant Federalism implications to warrant the preparation of a Federalism Assessment. The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities; allowing employers to use the results of a post-accident drug and alcohol test administered by or under the direction of State or local law enforcement personnel is unlikely to significantly increase the costs for employers.

### List of Subjects in 49 CFR Parts 653 and 654

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

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

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

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

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

#### § 653.45 [Amended]

2. Section 653.45 is amended by adding paragraph (d) to read as follows:

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

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

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

**Authority:** 49 U.S.C. 5331; 49 CFR 1.52.

#### § 654.33 [Amended]

4. Section 654.33 is amended by adding paragraph (d) to read as follows:

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

Issued: December 2, 1998.

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

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