FEDERAL REGISTER RULES AND REGULATIONS

PART 382
CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

FEBRUARY 15, 1994
Rulemaking Analyses and Notices

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

The FHWA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866. This rule has been reviewed under this order. It is significant within the meaning of Department of Transportation regulatory policies and procedures, too. It is anticipated that the economic impact of this rulemaking will be substantial; therefore, a full regulatory evaluation is required and has been prepared. The regulatory evaluation is included in the docket.

Executive Order 12875 (Enhancing the Intergovernmental Partnership)

The FHWA has determined that this action’s NPRM published on December 15, 1992 (57 FR 59516) contained a requirement that must be analyzed in accordance with Executive Order 12866. The FHWA has reviewed the final rule under this order. The FHWA has determined that the proposed requirement for random roadside alcohol testing by State and local law enforcement officials would mandate States to perform roadside alcohol testing on commercial motor vehicle drivers. The requirement would not completely reimburse States for the cost of such a mandated program. The FHWA has decided not to mandate roadside alcohol testing as proposed, because of many factors including this Executive Order. See the section “Other Issues—Motor Carrier Safety Assistance Program (MCSTEP)” in Limitations of Alcohol Use by Transportation Workers elsewhere in today’s Federal Register for further discussion of the FHWA’s and the DOT’s analysis of this Executive Order as it relates to this final rule.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601–612), the FHWA has evaluated the effects of this rule on small entities. This final rule will require employers to test drivers for the use of alcohol and controlled substances. It will have a significant economic impact on small entities. The FHWA has assessed the economic impact on small entities by allowing them an additional year to comply with the rule over and above the time given to large employers.

Executive Order 12612 (Federalism Assessment)

This action adds part 382 to the FMCSR’s pertaining to testing for alcohol and controlled substances by drivers of commercial motor vehicles operating in commerce on public roads and highways. These requirements directly affect employers and their drivers, including State and local employers and their drivers. The rule also will regulate employers and drivers who have historically been regulated only by their State of residence or where the employer’s business is located. These requirements preempt State and local laws, regulations, rules, and orders that are inconsistent with the requirements of this rule. The preemption authority for this document was specifically provided for under 49 U.S.C. app. 2717, Section 12020(e)(1) of the Omnibus Transportation Employee Testing Act of 1991.

Under the Motor Carrier Safety Assistance Program, States will not be required to adopt compatible part 382 regulations for drug or alcohol testing as a condition for receiving grant monies under the program.

For the reasons set forth above, the agency is not required to prepare a Federalism Assessment for this proposal.

Executive Order 12372

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities applies to this program.

Paperwork Reduction Act

The information collection requirements in part 382 of this rule have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. Information collection requirements are not effective until Paperwork Reduction Act clearance has been received.

National Environmental Policy Act

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

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Parts 382, 391, 392 and 395

Alcohol testing, Controlled substances testing, Highways and roads, Highway safety, Motor carriers, Motor vehicle safety.


Federico Peña,
Secretary of Transportation.

Rodney E. Slater,
Federal Highway Administrator.

In consideration of the foregoing, the FHWA proposes to amend title 49, CFR subtitile B, chapter III, parts 391, 392, and 395, and add part 382 as set forth below:

1. Chapter III is amended by adding part 382 as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

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Subpart A—General

§ 382.101 Purpose.

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

§ 382.103 Applicability.

(a) This part applies to every person who operates a commercial motor vehicle in interstate or intrastate commerce, and is subject to the commercial driver's license requirements of part 383 of this subchapter.

(b) An employer who employs himself/herself as a driver must comply with both the requirements in this part and the requirements of any employer in the subchapter.

(c) This person shall not apply to employers and their drivers:

(1) Required to comply with the alcohol and/or controlled substances testing requirements of parts 365 and 654 of this title; or

(2) Granted a full waiver from the requirements of the commercial driver's license program; or

(3) Granted an optional State waiver from the requirements of part 363 of this subchapter; or

(4) Of foreign domiciled operations, with respect to any driver whose place of reporting for duty (home terminal) for commercial motor vehicle transportation services is located outside the territory of the United States.

§ 382.105 Testing procedures.

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

§ 382.107 Definitions.

Words or phrases used in this part are defined in §§ 386.2 and 390.5 of this subchapter, and § 40.3 or § 40.73 of this title, except as provided herein—

1. Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.
2. Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part.
3. Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.
4. Commerce means (1) Any trade, traffic or transportation within the jurisdiction of the United States between a place in the State and a place outside of such State, including a place outside of the United States and (2) trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.
5. Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

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

(b) Has a gross vehicle weight rating of 26,001 or more pounds; or

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

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

Confirmation test For alcohol testing means a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration. For controlled substances testing means a second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the screen test and which uses a different technique and chemical principle from that of the screen test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol or controlled substances testing as required by this part, or other DOT alcohol or controlled substances testing rules, and that acts on behalf of the employers.

DOT Agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol and/or drug testing (14 CFR parts 61, 63, 65, 121, and 135; 49 CFR parts 199, 219, 382, 653 and 654), in accordance with part 386 of this title.

Driver means any person who operates a commercial motor vehicle. This includes, but is not limited to: full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent, owner-operator contractors who are either directly employed by or under lease to an employer or who operate a commercial motor vehicle at the direction of or with the consent of an employer. For the purposes of pre-employment/pre-duty testing only, the term driver includes a person applying to an employer to drive a commercial motor vehicle.

Employer means any person (including the United States, a State, District of Columbia or a political subdivision of a State) who owns or leases a commercial motor vehicle or assigns persons to operate such a vehicle. The term employer includes an employer's agents, officers and representatives.

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

Refuse to submit (to an alcohol or controlled substances test) means that a driver (1) Fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement for breath testing in accordance with the provisions of this part, or (2) fails to provide adequate urine for controlled substances testing without a valid medical explanation after he or she has received notice of the requirement for breath testing in accordance with the provisions of this part.
urine testing in accordance with the provisions of this part, or (3) engages in conduct that clearly obstructs the testing process. Safety-sensitive function means any of those on-duty functions set forth in § 395.2 On-duty time, paragraphs (1) through (7) of this chapter.

Screening test (also known as initial test). In alcohol testing, it means an analytical procedure to determine whether a driver may have a prohibited concentration of alcohol in his or her system. In controlled substance testing, it means an immunoassay screen to eliminate “negative” urine specimens from further consideration.

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission) with knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders.

Violation rate means the number of drivers (as reported under § 382.305 of this part) found during random tests given under this part to have an alcohol concentration of 0.04 or greater, plus the number of drivers who refuse a random test required by this part, divided by the total reported number of drivers in the industry given random alcohol tests under this part plus the total reported number of drivers in the industry who refuse a random test required by this part.

§ 382.109 Preemption of State and local laws.
(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:
(1) Compliance with both the State or local requirement and this part is not possible; or
(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

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

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

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

§ 382.115 Starting date for testing programs.
(a) Large employers. Each employer with fifty or more drivers on March 17, 1994, shall implement the requirements of this part beginning on January 1, 1995.

(b) Small employers. Each employer with fewer than fifty drivers on March 17, 1994, shall implement the requirements of this part beginning on January 1, 1996.

(c) All employers shall have alcohol and controlled substances programs that conform to this part by the date in paragraphs (a) or (b) of this section, whichever is applicable, or by the date an employer begins commercial motor vehicle operations, whichever is later.

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

§ 382.204 Alcohol possession.
No driver shall be on duty or operate a commercial motor vehicle while the driver possesses alcohol, unless the alcohol is manifested and transported as part of a shipment. No employer having actual knowledge that a driver possesses unmanifested alcohol may permit the driver to drive or continue to drive a commercial motor vehicle.

§ 382.205 On-duty use.
No driver shall use alcohol while performing safety-sensitive functions.

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

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

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

§ 382.213 Controlled substances use.
(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a physician who has advised the driver that the substance does not adversely affect the driver’s ability to safely operate a commercial motor vehicle.

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

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

§ 382.215 Controlled substances testing.
No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances. No employer having actual knowledge that a driver has tested positive for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.
Subpart C—Tests Required

§ 382.301 Pre-employment testing.
(a) Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for alcohol and controlled substances. No employer shall allow a driver to perform safety-sensitive functions unless the driver has been administered an alcohol test with a result indicating an alcohol concentration less than 0.04, and has received a controlled substances test result from the medical review officer indicating a verified negative test result. If a pre-employment alcohol test result under this section indicates an alcohol content of 0.02 or greater but less than 0.04, the provisions of § 382.505 shall apply.

(b) Exception for pre-employment alcohol testing. An employer is not required to administer an alcohol test required by paragraph (a) of this section if:
(1) The driver has undergone an alcohol test required by this section or the alcohol misuse rule of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than 0.04; and
(2) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the alcohol misuse rule of another DOT agency within the previous six months.

(c) Exception for pre-employment controlled substances testing. An employer is not required to administer a controlled substances test required by paragraph (a) of this section if:
(1) The driver has participated in a drug testing program that meets the requirements of this part within the previous 120 days; and
(2) While participating in that program, either:
(i) Was tested for controlled substances within the past 6 months (from the date of application with the employer) or
(ii) Participated in a random controlled substances testing program for the previous 12 months (from the date of application with the employer); and
(3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substance use rule of another DOT agency within the previous six months.

(d) (1) An employer who exercises either paragraph (b) or (c) of this section shall contact the alcohol and/or controlled substances testing program(s) in which the driver participates or participated and shall obtain from the testing program(s) the following information:
(i) Name(s) and address(es) of the program(s).
(ii) Verification that the driver participates or participated in the program(s).
(iii) Verification that the program(s) conform to part 40 of this title.
(iv) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for alcohol or controlled substances.
(v) The date the driver was last tested for alcohol and controlled substances.
(vi) The results of any tests taken within the previous six months and any other violations of subpart B of this part.
(2) An employer who uses, but does not employ, a driver more than once a year must assure itself once every six months that the driver participates in an alcohol and controlled substances testing program(s) that meets the requirements of this part.

§ 382.303 Post-accident testing.
(a) As soon as practicable following an accident involving a commercial motor vehicle, each employer shall test for alcohol and controlled substances each surviving driver.
(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; and
(2) Who receives a citation under State or local law for a moving traffic violation arising from the accident.
(b) (1) Alcohol tests. If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FHWA upon request of the Associate Administrator.
(2) Controlled substance tests. If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FHWA upon request of the Associate Administrator.

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

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

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

§ 382.305 Random testing.
(a) (1) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of the average number of driver positions.
(2) The minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.
(b) The FHWA Administrator's decision to increase or decrease the minimum annual percentage rate for alcohol testing is based on the reported violation rate for the entire industry. All information used in this determination is drawn from the alcohol management information system reports required by § 382.403 of this part. In order to ensure reliability of the data, the FHWA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the FHWA Administrator will publish in the Federal Register the minimum annual percentage rate for random alcohol testing of drivers. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.
(c) (1) When the minimum annual percentage rate for random alcohol
testing is 25 percent or more, the FHWA Administrator may lower this rate to 10 percent of all drivers if the FHWA Administrator determines that the data received under the reporting requirements of §382.403 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent or greater, the FHWA Administrator may lower this rate to 25 percent of all drivers if the FHWA Administrator determines that the data received under the reporting requirements of §382.403 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

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

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

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

(1) The employer shall randomly select a sufficient number of drivers for alcohol testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the FHWA Administrator. For controlled substances testing, the employer shall randomly select a sufficient number of drivers for controlled substances testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate of 50 percent of drivers. If the employer conducts random testing for alcohol and/or controlled substances through a consortium, the number of drivers to be tested may be based on the total number of drivers covered by the consortium who are subject to random alcohol and/or controlled substances testing at the same minimum annual percentage rate under this part or any DOT alcohol or controlled substances testing rules.

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

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

(i) A driver shall only be tested for alcohol while on duty if the driver is performing safety-sensitive functions, or just after the driver has ceased performing such functions.

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

(k) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same required minimum annual percentage rate; or

(2) Randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject.

§382.307 Reasonable suspicion testing.

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol, except for §382.204. The employer’s determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

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

(c) The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with §382.603 of this part. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

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

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

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

(i) An alcohol test measure.

(ii) Twenty-four hours have passed since the last test was conducted.

(iii) The driver is sober as evidenced by a breath test.

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

(f) A written record shall be made of the observations leading to a controlled substance reasonable suspicion test, and signed by the supervisor or company official who made the observations, within 24 hours of the observed behavior or before the results of the controlled substances test are released, whichever is earlier.

§ 382.209 Return-to-duty testing.

(a) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by the provisions of subpart B of this part concerning alcohol, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(b) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning controlled substances, the driver shall undergo a return-to-duty controlled substances test with a result indicating a verified negative result for controlled substances use.

§ 382.311 Follow-up testing.

(a) After a determination under § 382.605(b) that a driver is in need of assistance in resolving problems associated with alcohol misuse and/or use of controlled substances, each employer shall ensure that the driver is subject to unannounced follow-up alcohol and/or controlled substances testing as directed by a substance abuse professional in accordance with the provisions of § 382.605(c)(2)(iii).

(b) Follow-up alcohol testing shall be conducted only when the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing safety-sensitive functions.

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

§ 382.401 Retention of records.

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

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

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

(i) Records of driver alcohol test results with results indicating an alcohol concentration of 0.02 or greater.

(ii) Records of driver verified positive controlled substances test results.

(iii) Documentation of refusals to take required alcohol and/or controlled substances tests.

(iv) Calibration documentation.

(v) Driver evaluation and referrals shall be maintained for a minimum of five years.

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

(2) Two years. Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices) and training shall be maintained for a minimum of two years.

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

§ 382.311 Types of records. The following specific records shall be maintained:

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Calibration documentation for evidential breath testing devices.

(iv) Documentation of breath alcohol technician training.

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests.

(vi) Documents generated in connection with decisions to post-accident alcohol or controlled substances tests.

(vii) Documents verifying existence of a medical explanation of the inability of a driver to provide adequate breath or to provide a urine specimen for testing; and

(viii) Consolidated annual calendar year summaries as required by § 382.402.

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

(i) The employer's copy of the alcohol test form, including the results of the test.

(ii) The employer's copy of the controlled substances test chain of custody and control form.

(iii) Documents sent by the medical review officer to the employer, including those required by § 382.407(a).

(iv) Documents related to the refusal of any driver to submit to an alcohol or controlled substances test required by this part; and

(v) Documents presented by a driver to dispute the result of an alcohol or controlled substances test administered under this part.

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

(4) Records related to evaluations:

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

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

(5) Records related to education and training:

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

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

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

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

(6) Records related to drug testing:

(i) Agreements with collection sites, facilities, laboratories, medical review officers, and consortia;
§ 382.403 Reporting of results in a management information system.

(a) An employer shall prepare and maintain an annual calendar year summary of the results of its alcohol and controlled substances testing programs performed under this part. By March 15 of each year, all employers shall complete the annual summary covering the previous calendar year.

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

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

(1) Number of drivers subject to part 382;

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

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

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

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

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

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

(8) Number of drivers who refused to submit to an alcohol or controlled substances test required under this subpart;

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

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

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

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

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

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

(13) Number of drivers who were returned to duty (having complied with the recommendations of a substance abuse professional as described in §§ 382.503 and 382.505), in this reporting period, who previously:

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

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

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

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

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

(1) Number of drivers subject to part 382;

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

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

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

(5) Number of drivers who refused to submit to an alcohol or controlled substances test required under this subpart;

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

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

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

(8) Number of drivers who were returned to duty (having complied with the recommendations of a substance abuse professional as described in §§ 382.503 and 382.505), in this reporting period, who previously:

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

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

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

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

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

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

(c) Each employer shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

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

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

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

(g) An employer may disclose information required to be maintained under this part pertaining to a driver, the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol and/or controlled substance test administered under this part, or from the employer’s determination that the driver engaged in conduct prohibited by subpart B of this part (including, but not limited to, a worker’s compensation, unemployment compensation, or other proceeding relating to a benefit sought by the driver.)

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

§ 382.407 Medical review officer notifications to the employer.

(a) The medical review officer may report to the employer using any communications device, but in all instances a signed, written notification must be forwarded within three business days of completion of the medical review officer’s review, pursuant to part 40 of this title. A medical review officer shall report to an employer clearly:

(1) That the controlled substances test being reported was in accordance with part 40 of this title and this part;

(2) The name of the individual for whom the test results are being reported;

(3) The type of test indicated on the test results report (i.e. random, post-accident, etc.);

(4) The date and location of the test collection;

(5) The identities of the persons or entities performing the test.

(b) A medical review officer shall report to the employer that the medical review officer has made reasonable efforts to contact the driver as provided in §40.32(c) of this title. The employer shall, as soon as practicable, request that the driver contact the medical review officer prior to dispatching the driver or within 24 hours, whichever is earlier.

§ 382.408 Medical review officer record retention for controlled substances.

(a) A medical review officer shall maintain all dated records and notifications, identified by individual, for a period of five years for each positive controlled substances test result.

(b) A medical review officer shall maintain all dated records and notifications, identified by individual, for a period of two years for any negative and canceled controlled substances test results.

(c) No person may obtain the individual controlled substances test results retained by a medical review officer, and no medical review officer shall release the individual controlled substances test results of any driver to any person, without first obtaining a specific, written authorization from the tested driver. Nothing in this paragraph shall prohibit a medical review officer from releasing, to the employer or to officials of the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances testing program under this part, the information delineated in §382.407(a) of this subpart.

§ 382.411 Employer notifications.

(a) An employer shall notify a driver of the results of a pre-employment controlled substances test conducted under this part, if the driver requests such results within 30 calendar days of being notified of the disposition of the employment application. An employer shall notify a driver of the results of random, reasonable suspicion and post-accident tests for controlled substances conducted under this part if the test results are verified positive. The employer shall also inform the driver which controlled substance or substances were verified as positive.

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

(c) The designated management official shall immediately notify the medical review officer that the driver has been notified to contact the medical review officer within 24 hours.

§ 382.413 Release of alcohol and controlled substances test information by previous employers.

(a) An employer may obtain, pursuant to a driver’s written consent, any of the information concerning the driver which is maintained under this part by the driver’s previous employers.

(b) An employer shall obtain, pursuant to a driver’s consent, information on the driver’s alcohol and/or controlled substances test results, and refusal to test, within the preceding two years, which are maintained by the driver’s previous employers under §382.401(b)(1)(i) through (iii).

(c) The information in paragraph (b) of this section must be obtained and
reviewed by the employer no later than 14 calendar days after the first time a driver performs safety-sensitive functions for an employer, if it is not feasible to obtain the information prior to the driver performing safety-sensitive functions. An employer may not permit a driver to perform safety-sensitive functions after 14 days without obtaining the information.

(d) If the driver stops performing safety-sensitive functions for the employer before expiration of the 14 day period or before the employer has obtained the information in paragraph (b) of this section, the employer must still obtain the information.

(e) The prospective employer must provide to each of the driver's employers within the two preceding years the driver's specific, written authorization for release of the information in paragraph (b).

(f) The employer makes any inquiry under this part may take the form of personal interviews, telephone interviews, letters, or any other method of obtaining information that ensures confidentiality. Each employer must maintain a written, confidential record with respect to each past employer contacted.

(g) An employer may not use a driver to perform safety-sensitive functions if the employer obtains information on the driver's alcohol test with a concentration of 0.04 or greater, verified positive controlled substances test result, or refusal to be tested, by the driver, without obtaining information on a subsequent substance abuse professional evaluation and/or determination under §382.401(c)(4) and compliance with §382.309.

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

§382.501 Removal from safety-sensitive function.

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

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

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

§382.503 Required evaluation and testing.

No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of §382.605. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of §382.605.

§382.505 Other alcohol-related conduct.

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

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against a driver based on a driving a commercial motor vehicle, unless the driver has met the requirements of this part from taking any action otherwise consistent with law.

§382.507 Penalties.

Any employer or driver who violates the requirements of this part shall be subject to the penalty provisions of 49 U.S.C. §521(b).

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

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

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

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

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

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

(1) The identity of the person designated by the employer to answer driver questions about the materials;

(2) The categories of drivers who are subject to the provisions of this part;

(3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the work day the driver is required to be in compliance with this part;

(4) Specific information concerning conduct that is prohibited by this part;

(5) The circumstances under which a driver will be tested for alcohol and/or controlled substances under this part;

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

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

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

(9) The consequences for drivers found to have violated subpart B of this part, including the requirement that the driver be removed immediately from safety-sensitive functions, and the procedures under §382.607.

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

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

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

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

§ 382.603 Training for supervisors.

(a) Each employer shall ensure that persons designated to determine whether reasonable suspicion exists to require a driver to undergo testing under § 382.601(b) be required to participate in at least 60 minutes of training on alcohol misuse and receive at least an additional 60 minutes of training on controlled substances use. The training shall cover the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances.

§ 382.605 Referral, evaluation, and treatment.

(a) Each driver who has engaged in conduct prohibited by subpart B of this part shall be advised by the employer of the resources available to the driver in evaluating and resolving problems associated with the misuse of alcohol and use of controlled substances, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(b) Each driver who engages in conduct prohibited by subpart B of this part shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse and controlled substances use.

(c) (1) Before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the driver shall undergone a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02 if the conduct involved alcohol, or a controlled substances test with a verified negative result if the conduct involved a controlled substance.

(2) In addition, each driver identified as needing assistance in resolving problems associated with alcohol misuse or controlled substances use,

(i) Shall be evaluated by a substance abuse professional to determine that the driver has properly followed any rehabilitation program prescribed under paragraph (b) of this section, and

(ii) Shall be subject to unannounced follow-up alcohol and controlled substances tests administered by the employer following the driver's return to duty. The number and frequency of such follow-up testing shall be as directed by the substance abuse professional, and consist of at least six tests in the first 12 months following the driver's return to duty. The employer may direct the driver to undergo return-to-duty and follow-up testing for both alcohol and controlled substances, if the substance abuse professional determines that return-to-duty and follow-up testing for both alcohol and controlled substances is necessary for that particular driver. Any such testing shall be performed in accordance with the requirements of 49 CFR part 40. Follow-up testing shall not exceed 60 months from the date of the driver's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

(d) Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice of substance abuse professional and assignment of costs shall be made in accordance with employer/driver agreements and employer policies.

(e) The employer shall ensure that a substance abuse professional who determines that a driver requires assistance in resolving problems with alcohol misuse or controlled substances use does not refer the driver to the substance abuse professional's private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring a driver for assistance provided through—

(1) A public agency, such as a State, county, or municipality;

(2) The employer or a person under contract to provide treatment for alcohol or controlled substance problems on behalf of the employer;

(3) The sole source of therapeutically appropriate treatment under the driver's health insurance program; or

(4) The sole source of therapeutically appropriate treatment reasonably accessible to the driver.

(f) The requirements of this section with respect to referral, evaluation and rehabilitation do not apply to applicants who refuse to submit to a pre-employment alcohol or controlled substances test or who have a pre-employment alcohol test with a result indicating an alcohol concentration of 0.04 or greater or a controlled substances test with a verified positive test result.

PART 391—QUALIFICATION OF DRIVERS

4. The authority citation for part 391 continues to read as follows:

Authority: 49 U.S.C. 2505; 49 U.S.C. 504 and 3102; 49 CFR 1.48

5. Section 391.93 is revised to read as follows:

§ 391.93 Implementation schedule.

(a) All motor carriers shall have a drug testing program that conforms to this subpart and 49 CFR part 40 by the date a motor carrier begins motor carrier operations.

(b) All motor carriers shall require all collection personnel to implement the split-sample collection procedures required under §40.25(f)(10) of this title by August 15, 1994.

(c) An employer may begin complying with the requirements of paragraph (b) of this section on or after March 17, 1994.

6. Section 391.125 is added to Subpart H to read as follows:

§ 391.125 Termination schedule of this subpart.

(a) Large employers. Each motor carrier with fifty or more drivers on March 17, 1994, shall terminate compliance with this subpart and shall implement the requirements of part 382 of this subchapter beginning on January 1, 1995.

(b) Small employers. Each motor carrier with fewer than fifty drivers on March 17, 1994, shall terminate compliance with this subpart and shall implement the requirements of part 382 of this subchapter beginning on January 1, 1996.

(c) All motor carriers shall terminate compliance with this subpart on January 1, 1996.

PART 392—DRIVING OF MOTOR VEHICLES

7. The authority citation for part 392 continues to read as follows:


8. Section 392.5 is amended by revising the heading of the section,
paragraphs (a)(1) through (a)(3) and (b)(2) to read as follows:

§ 392.5 Alcohol prohibition.
(a) No driver shall—
(1) Use alcohol, as defined in § 382.107 of this subchapter, or be under the influence of alcohol, within 4 hours before going on duty or operating, or having physical control of, a commercial motor vehicle; or
(2) Use alcohol, be under the influence of alcohol, or have any measured alcohol concentration or detected presence of alcohol, while on duty, or operating, or in physical control of a commercial motor vehicle; or
(3) Be on duty or operate a commercial motor vehicle while the driver possesses an alcoholic beverage.

However, this does not apply to possession of alcohol which is manifested and transported as part of a shipment.

(5) * * *

(2) Be on duty or operate a commercial motor vehicle if, by the driver’s general appearance or conduct or by other substantiating evidence, the driver appears to have used alcohol within the preceding four hours.

§ 395.2 Definitions.
9. In § 395.2, the definition of On-duty time is amended by redesignating paragraphs (8) and (9) as (9) and (10), and adding a new paragraph (8) to read as follows:

On-duty time * * *

(8) All time spent providing a breath sample or urine specimen, including travel time to and from the collection site, in order to comply with the random, reasonable suspicion, post-accident, or follow-up testing required by part 382 or part 391, subpart H, of this subchapter, whichever is applicable, when directed by a motor carrier.

* * *

Note: The following appendix will not appear in the Code of Federal Regulations

Appendix to Preamble—Information Systems Data Collection Forms

BILLING CODE 4910-23-P
ILLUSTRATION I

DRUG AND ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS)
DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug and alcohol testing information sought by the Federal Highway Administration (FHWA) and the U.S. Department of Transportation (DOT) in the Drug and Alcohol Testing MIS Data Collection Form. These instructions explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii-iv (for drug results) and v-vi (for alcohol results) as an example to facilitate the process of completing the form correctly.

This reporting form is comprised of four sections. Collectively, these sections address the data elements required in the FHWA and the DOT drug and alcohol testing regulations. The four sections, the page number for the instructions, and the page location on the reporting form are shown below.

<table>
<thead>
<tr>
<th>Section</th>
<th>Instructions Page</th>
<th>Reporting Form Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. MOTOR CARRIER EMPLOYER INFORMATION</td>
<td>i</td>
<td>1</td>
</tr>
<tr>
<td>B. COVERED EMPLOYEES</td>
<td>i</td>
<td>1</td>
</tr>
<tr>
<td>C. DRUG TESTING INFORMATION</td>
<td>ii-iv</td>
<td>2</td>
</tr>
<tr>
<td>D. ALCOHOL TESTING INFORMATION</td>
<td>iv-vi</td>
<td>3</td>
</tr>
</tbody>
</table>

Page 1 MOTOR CARRIER EMPLOYER INFORMATION (Section A) requires the company name for which the report is completed, a current address, the U.S. DOT number, and the ICC number (if applicable). A signature, date, and current telephone (including the area code) must be entered by the person certifying to the correctness and completeness of the report.

Page 1 COVERED EMPLOYEES (Section B) requires a count for each driver that must be tested under DOT regulations. There is only one category of covered employees for FHWA regulated employers, and that is “Drivers.” The most likely source for this information is the employer’s personnel department. These counts should be based on the company records for the calendar year being reported. An employee who is hired twice or more in the reported year must be counted as a single employee.

Additional information must be completed if your company employs personnel who perform duties covered by the drug and alcohol rules of more than one DOT operating administration. NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION, requires that you identify the number of drivers, who are covered employees, under the appropriate additional operating administration(s). The employees covered by more than one DOT operating administration must be counted under all appropriate operating administrations.
DRUG TESTING INFORMATION (Section C) requires information for drug testing by category of testing. These categories include: (1) pre-employment, (2) random, (3) post-accident/non-fatal, (4) post-accident/fatal, (5) reasonable suspicion, (6) return to duty, and (7) follow-up testing. All numbers entered into this table should be for applicants or company employees in a covered position only (i.e. "Drivers"). Each part of this table must be completed for each category of testing. These numbers do not include refusals for testing.

Section C is used to summarize the drug testing results for applicants and covered employees. There are seven categories of testing to be completed. The first part of the table is where you enter the data on pre-employment testing. The following six parts are for entering drug testing data on random, post-accident/non-fatal, post-accident/fatal, reasonable suspicion, return to duty, and follow-up testing, respectively. Items necessary to complete these tables include:

1) the number of specimens collected in each testing category;
2) the number of specimens tested which were verified negative and verified positive for any drug(s); and
3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample table with detailed instructions is provided for the first part, PRE-EMPLOYMENT TESTING INFORMATION. The format and explanations used for the sample table apply to all seven parts of the table in Section C.

Information on actions taken with those persons testing positive is required at the end of Section C. Specific instructions for providing this latter information are given after the instructions for completing the table in Section C.

Three types of information are necessary to complete the left side of this table. The first column ("NUMBER OF SPECIMENS COLLECTED"), requires a count for all collected specimens. It should not include refusals to test. The second column ("NUMBER OF SPECIMENS VERIFIED NEGATIVE"), requires a count for all completed tests that were verified negative by your Medical Review Officer (MRO).

The third column ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS"), refers to the number of specimens provided by job applicants or employees that were verified positive. "Verified positive" means the results were verified by your MRO.

The right hand portion of the table ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG"), requires counts of positive tests for each of the five drugs for which tests were completed, (i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines). The number of positive specimens for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant or employee tested positive for more than one drug, for example, both marijuana and cocaine, that person's positive results should be included once in each of the appropriate columns (marijuana and cocaine).

A sample table is provided on page iii with example numbers.
Below the table for drug testing information is a box ("Number of persons denied a position as a covered employee following a verified positive drug test"). This is a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

Also following the table that summarizes DRUG TESTING INFORMATION, you must provide counts for employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FHWA rule. This information should be available from the personnel office and/or drug program manager.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section C, DRUG TESTING INFORMATION, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses "Pre-Employment" testing to illustrate the correct procedures for completing the form.

Urine specimens were collected for 157 job applicants for driver positions during the reporting year. This information is entered in the first column of the table in the row marked "PRE-EMPLOYMENT".

The Medical Review Officer (MRO) for your company reported that 153 of those 157 specimens from applicants for driver positions were negative (i.e., no drugs were detected). Enter this information in the second column of the table in the row marked "PRE-EMPLOYMENT".

The MRO for your company reported that 4 of those 157 specimens from applicants for driver positions were positive (i.e., a drug or drugs were detected). Enter this information in the third column of the table in the row marked "PRE-EMPLOYMENT".

With the 4 specimens that tested positive, the following drugs were detected:

<table>
<thead>
<tr>
<th>Specimen</th>
<th>Drugs</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>Marijuana</td>
</tr>
<tr>
<td>#2</td>
<td>Amphetamines</td>
</tr>
<tr>
<td>#3</td>
<td>Marijuana and Cocaine (Multi-drug specimen)</td>
</tr>
<tr>
<td>#4</td>
<td>Marijuana</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type of Test</th>
<th>Number of Specimens Collected</th>
<th>Number of Specimens Verified Negative</th>
<th>Number of Specimens Verified Positive for One or More of the Five Drugs</th>
<th>Number of Specimens Verified Positive for Each Type of Drug</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRE-EMPLOYMENT</td>
<td>157</td>
<td>153</td>
<td>4</td>
<td>Marijuana (Tetrahydrocannabinol) Cocaine Phencyclidine (PCP) Opiates Amphetamines</td>
</tr>
</tbody>
</table>

With the 4 specimens that tested positive, the following drugs were detected:

<table>
<thead>
<tr>
<th>Specimen</th>
<th>Drugs</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>Marijuana</td>
</tr>
<tr>
<td>#2</td>
<td>Amphetamines</td>
</tr>
<tr>
<td>#3</td>
<td>Marijuana and Cocaine (Multi-drug specimen)</td>
</tr>
<tr>
<td>#4</td>
<td>Marijuana</td>
</tr>
</tbody>
</table>
Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Since two different drugs were detected in specimen #3 (multi-drug), entries are made in both the marijuana and the cocaine columns for this specimen. Information on multi-drug specimens must also be entered in the table; SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG.

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all categories of testing in the table in Section C.

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG requires information on specimens that contained more than one drug. First, indicate the NUMBER OF VERIFIED POSITIVES. Then, specify the combination of drugs reported as positive by placing the number in the appropriate columns. For example, if marijuana and cocaine were detected in 3 specimens, then you would write "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 specimens, then you would write "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required by FHWA regulation.

DRUG TRAINING/EDUCATION requires information on the number of supervisory personnel who have received the required drug training during the current reporting period.

ALCOHOL TESTING INFORMATION (Section D) requires information for alcohol testing by category of testing. These categories include: (1) pre-employment, (2) random, (3) post-accident/non-fatal, (4) post-accident/fatal, (5) reasonable suspicion, (6) return to duty, and (7) follow-up testing. All numbers entered into this table should be for applicants or company employees in covered positions only (i.e., "Drivers"). Each part of this table must be completed for each category of testing. These numbers do not include refusals for testing. A sample table is provided on page vi with example numbers.

Four types of information are necessary to complete this table. The first column ("NUMBER OF SCREENING TESTS"), requires a count of all screening alcohol tests performed. It should not include refusals to test. The second column ("NUMBER OF CONFIRMATION TESTS") requires a count of all confirmation alcohol tests performed.

The third column ("NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04"), refers to the number of test results equal to or greater than 0.02, but less than 0.04.
The fourth column ("NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04"), refers to the number of specimens with a result equal to or greater than 0.04. Note: For return to duty testing, a confirmation test result equal to or greater than 0.02 is a violation of the alcohol rule. Therefore, if the number of results equal to or greater than 0.04 is unknown, you may report all results in the third column of the table.

Below the table for alcohol testing information is a box ("Number of persons denied a position as a covered employee following an alcohol test indicating an alcohol concentration of 0.04 or greater"). This is a count of those persons who were not placed in a covered position because their alcohol test indicated an alcohol concentration of 0.04 or greater.

Also following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide a count of the "Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FHWA regulations)". This information should be available from the personnel office and/or drug and alcohol program manager.

**SAMPLE APPLICANT TEST RESULTS TABLE**

The following example is for ALCOHOL TESTING INFORMATION, which summarizes pre-employment testing results. The procedures detailed here also apply to the other reasons for testing in the table which require you to summarize testing results for employees. This example will use "Pre-Employment" testing to illustrate the procedures for completing the form.

Screening tests were performed on 157 job applicants for driver positions during the reporting year. This information is entered in the first blank column of the table in the row marked "PRE-EMPLOYMENT".

Confirmation tests were necessary for 6 of the 157 applicants for driver positions. Enter this information in the second blank column of the table in the row marked "PRE-EMPLOYMENT". The confirmation test results for these 6 applicants were the following:

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Confirmation Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>0.06</td>
</tr>
<tr>
<td>#2</td>
<td>0.01</td>
</tr>
<tr>
<td>#3</td>
<td>0.11</td>
</tr>
<tr>
<td>#4</td>
<td>0.04</td>
</tr>
<tr>
<td>#5</td>
<td>0.03</td>
</tr>
<tr>
<td>#6</td>
<td>0.02</td>
</tr>
</tbody>
</table>

The confirmation test results for 2 of the applicants for driver positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the third blank column of the table in the row marked "PRE-EMPLOYMENT".

The confirmation test results for 3 of the applicants for driver positions were equal to or greater than 0.04. Enter this information in the fourth blank column of the table in the row marked "PRE-EMPLOYMENT".
<table>
<thead>
<tr>
<th>TYPE OF TEST</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 8.84</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRE-EMPLOYMENT</td>
<td>157</td>
<td>1</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>A</td>
<td>B</td>
<td>C</td>
<td>D</td>
</tr>
</tbody>
</table>

Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, "NUMBER OF CONFIRMATION TESTS". These numbers may differ since some confirmation test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all categories of testing in the table in Section D.

Page 3  
Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater, requires that a count of all such employees be entered in the indicated box.

Page 3  
VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION, requires information on the NUMBER OF COVERED EMPLOYEES committing such a violation, a description of the VIOLATION committed (e.g., pre-duty alcohol use, on duty alcohol use, on duty alcohol possession), and a description of the ACTION TAKEN in response to the violation.

Page 3  
EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FHWA regulation.

Page 3  
ALCOHOL TRAINING/EDUCATION requires information on the number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FHWA alcohol testing regulations during the current reporting period.
FHWA DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM OMB No. 2125-0543

A. MOTOR CARRIER EMPLOYER INFORMATION

Company ____________________________ Year Covered by This Report: ____________
Principal Place of Business for Safety:

Physical Address _____________________ Mailing Address ______________________

U.S. DOT Number ____________________ ICC Number ______________________

I, the undersigned, certify that the information provided on this Federal Highway Administration Drug Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature __________________________ Date of Signature ____________
Title ______________________________ Phone Number ________________

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Highway Administration estimates that the average burden for this report form is 2 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Director, Office of Motor Carrier Standards (MCS-1); Federal Highway Administration; 400 7th St., S.W.; Washington, DC 20590; OR Office of Management and Budget, Paperwork Reduction Project (2125-0543); Washington, DC 20503.

B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF FHWA COVERED EMPLOYEES</th>
<th>NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drivers</td>
<td></td>
<td>FAA</td>
</tr>
</tbody>
</table>

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the current reporting period only (for example, January 1, 1994 - December 31, 1994).
2. This report is only for testing REQUIRED BY THE FEDERAL HIGHWAY ADMINISTRATION (FHWA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT):
   - Results should be reported only for employees in COVERED POSITIONS as defined by FHWA/DOT drug and alcohol testing regulations.
   - The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, amphetamines, and alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.
3. Information on refusals for testing should only be reported in the tables entitled "EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG (or AN ALCOHOL) TEST." Do not include refusals for testing in other sections of this report.
4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.
5. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

FHWA Form No. MCS-154 (Rev. 1:94)
### C. DRUG TESTING INFORMATION

<table>
<thead>
<tr>
<th>Type of Test</th>
<th>Number of Specimens Collected</th>
<th>Number of Specimens Verified Negative</th>
<th>Number of Specimens Verified Positive for One or More of the Five Drugs</th>
<th>Number of Specimens Verified Positive for Each Type of Drug</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Employment</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Random</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Post-Accident/Non-Fatal</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Post-Accident/Fatal</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reasonable Suspicion</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Return to Duty</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Follow-Up</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Number of persons denied a position as a covered employee following a verified positive drug test:

Number of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FHWA rule:

### SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG

<table>
<thead>
<tr>
<th>Number of Verified Positives</th>
<th>Marijuana (THC)</th>
<th>Cocaine</th>
<th>Phencyclidine (PCP)</th>
<th>Opiates</th>
<th>Amphetamines</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST

Covered employees who refused to submit to a random drug test required under the FHWA regulation:

Covered employees who refused to submit to a non-random drug test required under the FHWA regulation:

### DRUG TRAINING/EDUCATION

Number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by FHWA drug testing regulations:

---

2
### D. ALCOHOL TESTING INFORMATION

<table>
<thead>
<tr>
<th>TYPE OF TEST</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRE-EMPLOYMENT</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RANDOM</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>POST-ACCIDENT/NON-FATAL</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>POST-ACCIDENT/FATAL</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>REASONABLE SUSPICION</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RETURN TO DUTY</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FOLLOW-UP</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Number of persons denied a position as a covered employee following an alcohol test indicating an alcohol concentration of 0.04 or greater.

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FHWA regulations).

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater.

### VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION

<table>
<thead>
<tr>
<th>NUMBER OF COVERED EMPLOYEES</th>
<th>VIOLATION</th>
<th>ACTION TAKEN</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Driver used alcohol while performing safety-sensitive function</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Driver used alcohol within 4 hours of performing safety-sensitive function</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Driver used alcohol before taking a required post-accident alcohol test</td>
<td></td>
</tr>
</tbody>
</table>

### EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST

<table>
<thead>
<tr>
<th></th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Covered employees who refused to submit to a random alcohol test required under the FHWA regulation:</td>
<td></td>
</tr>
<tr>
<td>Covered employees who refused to submit to a non-random alcohol test required under the FHWA regulation:</td>
<td></td>
</tr>
</tbody>
</table>

### ALCOHOL TRAINING/EDUCATION

<table>
<thead>
<tr>
<th></th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FHWA alcohol testing regulations:</td>
<td></td>
</tr>
</tbody>
</table>
ILLUSTRATION II

DRUG AND ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS)
"EZ" DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the Federal Highway Administration (FHWA) and the U.S. Department of Transportation (DOT) Drug and Alcohol Testing MIS "EZ" Data Collection Form. This form should only be used if there are no positive drug tests and no alcohol misuse to be reported by your company. These instructions explain the information requested and indicate the probable sources for this information. This reporting form includes four sections. These sections address the data elements required in the FHWA and DOT drug and alcohol testing regulations.

SECTION A - MOTOR CARRIER EMPLOYER INFORMATION requires the company name for which the report is completed, a current address, the U.S. DOT number, and the ICC number (if applicable). A signature and title, date, and current telephone (including the area code) must be entered by the person certifying the correctness and completeness of the report.

SECTION B - COVERED EMPLOYEES requires a count for each employee category that must be tested under FHWA regulations. There is only one category of covered employees for FHWA, and that is "Drivers". The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the calendar year being reported. An employee who is hired twice or more in the reported year must be counted as a single employee.

Additional information must be completed if your company employs personnel who perform duties covered by the drug and alcohol rules of more than one DOT operating administration.

NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION, requires that you identify the number of employees in each employee category under the appropriate additional operating administration(s). The employees covered by more than one DOT operating administration must be counted under all appropriate operating administrations.

SECTION C - DRUG TESTING INFORMATION requires information for drug testing, refusals for testing, and training/education. The first table requests information on the NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE in each category for testing. These categories include: (1) pre-employment, (2) random, (3) post-accident/ non-fatal, (4) post-accident/fatal, (5) reasonable suspicion, (6) return to duty, and (7) follow-up testing. All numbers entered into this table should be for applicants or company employees in a covered position only (i.e. "Drivers"). Each part of this table must be completed for each category of testing. These numbers do not include refusals for testing. "COLL" requires the number of specimens collected for each category of testing. "NEG" requires a count for all completed tests that were verified negative by your Medical Review Officer (MRO). Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the categories.
Following the table for drug testing data you must provide counts for drivers returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FHWA rule. This information should be available from the personnel office and/or drug program manager.

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required under the FHWA regulation.

DRUG TRAINING/EDUCATION requires information on the number of supervisory personnel who have received the required drug training during the current reporting period.

SECTION D - ALCOHOL TESTING INFORMATION requires information for alcohol testing, refusals for testing, and training/education. The first table requests information on the NUMBER OF SCREENING TESTS CONDUCTED in each category of testing. These categories include: (1) pre-employment, (2) random, (3) post-accident/non-fatal, (4) post-accident/fatal, (5) reasonable suspicion, (6) return to duty, and (7) follow-up testing. All numbers entered into this table should be for applicants or company employees in covered positions only (i.e., "Drivers"). Enter the number of alcohol screening tests conducted for each category of testing. These numbers do not include refusals for testing.

Following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide a count of the "Number of drivers who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FHWA regulations)". This information should be available from the personnel office and/or drug and alcohol program manager.

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FHWA regulation.

ALCOHOL TRAINING/EDUCATION requires information on the number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FHWA alcohol testing regulations during the current reporting period.
FHWA DRUG AND ALCOHOL TESTING MIS "EZ" DATA COLLECTION FORM  OMB No. 2125-0543

A. MOTOR CARRIER EMPLOYER INFORMATION

Company ____________________________ Year Covered by This Report: ____________

Principal Place of Business for Safety:

Physical Address _____________________ Mailing Address _______________________

U.S. DOT Number _____________________ ICC Number ______________________

I, the undersigned, certify that the information provided on the attached Federal Highway Administration Drug and Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature __________________________ Date of Signature ______________________

Title _______________________________ Phone Number ______________________

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Highway Administration estimates that the average burden for this report form is 30 minutes. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Director, Office of Motor Carrier Standards (HCS-1); Federal Highway Administration; 400 7th St., S.W.; Washington, D.C. 20590; or Office of Management and Budget, Paperwork Reduction Project (2125-0543); Washington, D.C. 20503.

B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF FHWA COVERED EMPLOYEES</th>
<th>NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drivers</td>
<td></td>
<td>FAA</td>
</tr>
</tbody>
</table>

C. DRUG TESTING INFORMATION

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PRE-EMPLOYMENT</td>
</tr>
<tr>
<td></td>
<td>COLL</td>
</tr>
<tr>
<td>Drivers</td>
<td>COLL</td>
</tr>
</tbody>
</table>

Number of drivers returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FHWA rule.
DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
49 CFR Part 382
[FHWA Docket No. MC-83-3]
RIN 2125-AO11

Controlled Substances and Alcohol Use and Testing; Foreign-Based Motor Carriers and Drivers

AGENCY: Federal Highway Administration (FHWA), DOT.
ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FHWA is proposing to extend the applicability of rules regarding controlled substance and alcohol use and testing to include foreign-based drivers of motor carriers operating in the United States. The goal of alcohol and controlled substances testing is to detect and deter misuse of alcohol and controlled substances by drivers of commercial motor vehicles, thereby enhancing U.S. highway safety by reducing accidents.

DATES: Written, signed comments must be received on or before April 18, 1994.

ADDRESSES: Submit written, signed comments to FHWA Docket No. MC-83-3, room 4232, Office of the Chief Counsel, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 5:00 p.m., e.t., Monday through Friday, except legal Federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding program issues: Mr. David Miller, Office of Motor Carrier Standards, (202) 366-2981. For information regarding legal issues: Mr. David Sett, Office of the Chief Counsel, (202) 366-0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal Federal holidays.

SUPPLEMENTARY INFORMATION:
I. Background

On November 21, 1988, the FHWA, along with certain other agencies within the Department of Transportation (the Department), adopted regulations requiring pre-employment/use, periodic, post-accident, reasonable cause and random drug testing of commercial motor vehicle drivers. The FHWA rule applies to all covered drivers while operating in the United States, regardless of whether they are based in a foreign country or the United States. The rule provided, however, that it would not apply to any person for whom compliance would violate the domestic laws or policies of another country. The rule as originally published further provided that in any event it would not be effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of the rules raises questions of compatibility with that country’s laws or policies. See 53 FR 47134, codified at 49 CFR 391.81 et seq.

The FHWA has delayed the effective date of drug testing requirements for foreign-based employees of foreign-based motor carriers on four occasions. See 54 FR 39546, September 27, 1989; 54 FR 53294, December 27, 1989; 56 FR 18994, April 24, 1991; 57 FR 31277, July 14, 1992. The last of these established January 2, 1995, as the date for compliance.

Meanwhile, on October 28, 1991, the Omnibus Transportation Employees Testing Act of 1991 (Omnibus Act) was enacted. 49 U.S.C. 2717. The Omnibus Act requires the Secretary of Transportation to issue regulations requiring drug and alcohol testing of commercial motor vehicle drivers. Proposed rules implementing such testing were published December 15, 1992. See 57 FR 59516 for alcohol and 57 FR 59567 for drugs. These new rules would replace the current drug testing rule in 49 CFR part 391 and would institute alcohol testing. The final rule implementing the Omnibus Act is being published elsewhere in today’s Federal Register.

The Omnibus Act applies to foreign-based motor carriers and drivers on its face, with the proviso that the new rules be “consistent with the international obligations of the United States, and * * * into consideration any applicable laws and regulations of foreign countries.” 49 U.S.C. 2717(e)(3). Thus, foreign-based drivers are required to be covered by the statute, but the Secretary is granted the authority to deem the requirement satisfied by the testing laws of foreign nations.

On December 15, 1992, the FHWA published an advance notice of proposed rulemaking (ANPRM) to obtain specific information from interested parties. Now, based upon comments received, the FHWA seeks comments on this NPRM.

II. Comments

There were fifteen comments to the docket. All specific references to a foreign nation were to Canada. Two commenters noted they had no knowledge of the drug and alcohol testing laws or practices of Mexico. No other nations were mentioned in the comments as being a base from which drivers or motor carriers operate in the United States.

A. Applicability

Of the fifteen comments, nine expressed support for extending coverage of testing and misuse regulations to foreign-based drivers. Two commenters were opposed to extension. Another commenter, the Owner-Operator Independent Drivers Association (OOIDA), opposed all testing of drivers, except upon a probable cause determination of a law enforcement official. The OOIDA stated, however, that if United States-based drivers are tested, then foreign drivers should be tested to the same extent. Finally, the Canadian Embassy suggested that unilateral implementation of testing of Canadian drivers should be avoided in favor of continuing bilateral negotiations aimed at mutual recognition of existing United States regulations and Canadian regulations under development.

The most common rationale offered in support of coverage was fairness. Several commenters pointed to the competitive advantage enjoyed by foreign motor carriers which need not incur the substantial cost of testing. Comments in support also focused on the safety benefit to be derived from extended testing.

The commenters opposed to coverage provided a variety of reasons for excluding foreign-based drivers. The Canadian Owner-Operator Drivers Association (COODA) stated it was discriminatory to require testing of Canadian drivers because Canada has no laws authorizing such testing. The International Brotherhood of Teamsters argued that requiring testing of Canadian drivers was a violation of Canadian sovereignty, and unnecessary due to the absence of a demonstrated substance abuse problem in the industry. The Canadian Embassy referred to principles of comity, as embodied in the bilateral negotiations, and the difficulty of enforcing a unilateral prescription. The embassy noted that rules requiring pre-employment, reasonable cause, follow-up, and post-accident testing of commercial vehicle operators for controlled substances and alcohol are currently under development in Canada.

FHWA Response. The FHWA disagrees with the notion that requiring foreign-based drivers to be drug and alcohol tested as a condition of operating in the United States is
violation of the sovereignty of Canada, or any other nation. Foreign drivers only need be tested if they operate in the United States. In no way is it being suggested that transportation occurring solely outside the borders of the United States, or that part of a cross border movement taking place on foreign soil, be subject to drug testing rules. Moreover, compliance with the testing rules may be entirely accomplished within the borders of the United States, foreclosing any concerns of conflict with laws of other nations which might prohibit, for instance, certain activities such as random testing.

Drug and alcohol testing is merely one of the many Federal requirements with which foreign, and domestic, drivers and motor carriers are obliged to comply while operating in the United States. That another sovereignty does not place such requirements on motor carriers and drivers is immaterial. There are, after all, motor carrier safety standards in Canada and Mexico which do not exist in this country or are inconsistent with United States standards, but nevertheless apply to United States carriers operating in those countries. In other words, United States national standards might be different from those in other countries, but they are applied evenly across the board to all carriers and drivers operating in the United States. Because of this equality of national treatment, there is no discrimination against foreign carriers or drivers. Moreover, as a number of commenters stated, it may well be discriminatory against domestic carriers not to require testing of foreign operators.

Though there are no international legal obstacles to application of the rules to foreign-based drivers, the FHWA recognizes the efficacy of applying the principles of “comity” (recognition of another nation’s laws and judicial decisions) expressed by the Canadian Embassy. As the embassy stated, the Department and its Canadian counterpart have been discussing this issue and the need for common standards since publication of the original drug testing rule. The discussions can further be viewed in the context of wider ranging trilateral, structured negotiations between Canada, Mexico, and the United States aimed at achieving greater harmonization of the national motor carrier safety standards of the three nations. These negotiations resulted, for example, in a Memorandum of Understanding in which the United States agreed to recognize certain commercial driver’s licenses issued in Mexico and Canada. Though negotiations have produced no similar “international obligations” regarding drug and alcohol testing, it would be prudent to structure foreign-based applicability in such a way as to be consistent with the negotiations, allow rule development in other countries to proceed, and explore opportunities for reciprocal agreements.

B. Compliance

In addition to raising the threshold applicability issue, the ANPRM posed a number of questions on the mechanics of compliance. In general, the comments identified no serious difficulties in applying the rules to foreign-based carriers. Several implementation strategies were offered.

Most commenters believed the rule could and should be administered in Canada, rather than requiring compliance activities to be performed solely in the United States. For example, the COODA recommended using Canadian doctors as Medical Review Officers and arranging for certification of Canadian laboratories. Imperial Oil Limited noted that two Canadian laboratories are certified by the U.S. Department of Health and Human Services and that a similar Canadian system of certification could be developed. While not disagreeing with allowing such activities to be performed in foreign nations, National MRO, Inc. stated that it was possible that all testing services, including collection, laboratory analysis, medical review, and substance abuse counseling could be done in the United States, and estimated an increase in cost of up to 10 percent for additional communications services.

The American Trucking Associations, Inc. suggested that foreign-based drivers be required to join and participate in a United States or a consortium within 30 days of entry into the United States, and that drivers be subject to review of participation at the border upon subsequent entry. Pinnacle Transport Services, Inc. suggested use of a compliance-certification card which could be presented at the border upon entry. National Solid Waste Management Association stated that testing could be performed at ports of entry.

FHWA response. The FHWA agrees that the rule as written can be complied with by foreign-based carriers either totally in the United States or totally in foreign nations, or by some combination of both. The FHWA also believes that the various suggestions regarding compliance in Canada, certification of Canadian laboratories, and mutual recognition of reciprocal standards may offer benefits in efficiency, cost, and comity and should be explored further.

III. Proposal

The applicability section of the final controlled substances and alcohol testing rule is being amended to include coverage of foreign-based drivers of foreign-based carriers. To accomplish this, §382.103(c)(4), which excludes foreign-based carriers, would be deleted. Based on the comments about the efficacy and progress of the negotiations aimed at achieving compatibility and reciprocity of testing standards, the implementation date will be delayed to provide maximum opportunity for the process to be completed successfully. However, if the process is not completed successfully, the requirements of 49 CFR parts 40 and 382 are proposed to go into effect on January 1, 1996. Accordingly, a section would be added, §382.119, which would provide that foreign-based carriers will be required to implement the rule by January 1, 1996.

The FHWA requests comments on this proposal to require foreign-based employees of foreign-domiciled employers to be tested for the use of controlled substances and alcohol.

Rulemaking Analyses and Notices

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

The FHWA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866 and significant within the meaning of Department of Transportation regulatory policies and procedures. The FHWA has prepared a regulatory evaluation for this proposal and the evaluation indicates that the rule will have a small positive impact of $8.5 million discounted over ten years. A copy of the regulatory evaluation is included in the docket for this NPRM.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), the FHWA has evaluated the effects of this rule on small entities. Based on the regulatory evaluation, the FHWA believes that the impact on small entities will be minimal. Furthermore, it should be noted the Omnibus Act mandates alcohol and controlled substances testing irrespective of the size of the entities.

For these reasons, the FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.
Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 382

Alcohol testing, Controlled substances testing, Highway safety, Highways and roads, Motor carriers, Motor vehicle safety.


Federico Pena, Secretary of Transportation.

Rodney E. Slater, Federal Highway Administrator.

In consideration of the foregoing, the FHWA proposes to amend 49 CFR, subtitle B, chapter III, part 382 as set forth below:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

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


2. In §382.103, paragraph (c)(4) is removed and paragraph (c)(3) is revised to read as follows:

§382.103 Applicability.

... (c) ... (3) Who have been granted a State option waiver from the requirements of part 383 of this subchapter.

3. Part 382, subpart A is amended by adding a new §382.119 to read as follows:

§382.119 Starting date for controlled substances and alcohol testing programs of foreign-domiciled employers.

All foreign-domiciled employers conducting transportation operations, by motor vehicle, in the United States shall have implemented controlled substances and alcohol testing programs that conform to this part and part 40 of this title by January 1, 1996. Voluntary compliance may be effected at an earlier date.