FEDERAL REGISTER

PART 40 - PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING

FEBRUARY 15, 1994

These procedures are current and apply unless they conflict with rules and regulations described in Attachment E.
coordination among the OAs, the Office of Drug Enforcement and Program Compliance (DEPC), and the Office of General Counsel.

Regulatory Analyses and Notices

Because of substantial public interest and substantial impacts on a wide range of private and public sector organizations, the Department has determined that this rule—in conjunction with the operating administration alcohol and drug testing rules—is significant under Executive Order 12866. The rule has been reviewed under this Order. It is also significant under the Department’s regulatory policies and procedures. The Department has prepared a regulatory evaluation for part 40, which we have included in the docket. The costs of the application of part 40 procedures to the programs of the various OAs are estimated in each of the OAs’ regulatory evaluations for their drug and alcohol rules being published today.

This rule, in conjunction with the operating administration drug and alcohol testing rules, is likely to have a significant economic impact on a substantial number of small entities. These impacts are assessed in the OAs’ regulatory evaluations. The Federalism impacts of this rule are either minimal or required by statute; for these reasons, we have not prepared a Federalism assessment.

This rule also contains collection of information requirements. The Department has submitted these requirements to the Office of Management and Budget for review and approval under the Paperwork Reduction Act (44 U.S.C. 350, et. seq.). Please see the Common Preamble on the status of Paperwork Reduction Act approvals.

List of Subjects in 49 CFR Part 40

Drug testing, Reporting and recordkeeping requirements, Safety, Transportation.

Issued This 25th day of January, 1994, at Washington, D.C.

Federico Peña,
Secretary of Transportation.

David R. Hinson,
Administrator, Federal Aviation Administration.

Rodney E. Slater,
Administrator, Federal Highway Administration.

Jolene M. Malottis,
Administrator, Federal Railroad Administration.

Gordon J. Linton,
Administrator, Federal Transit Administration.

Ana Sel Gutierrez,
Acting Administrator, Research and Special Programs Administration.

Adm. J. William Kim,
Commandant, United States Coast Guard.

For the reasons set forth in the preamble, the Department of Transportation amends Title 49, Code of Federal Regulations, part 40, as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

1. The authority citation for Part 40 is revised to read as follows:


2. §§ 40.1 through 40.19 are designated as subpart A and revised to read as follows:

Subpart A—General

40.1 Applicability.

40.3 Definitions.

40.4—40.19 [Reserved]

Subpart A—GENERAL

§ 40.1 Applicability.

This part applies, through regulations that reference it issued by agencies of the Department of Transportation, to transportation employers, including self-employed individuals, required to conduct drug and/or alcohol testing programs by DOT agency regulations and to such transportation employers’ officers, employees, agents and contractors (including, but not limited to, consortia). Employers are responsible for the compliance of their officers, employees, agents and/or contractors with the requirements of this part.

§ 40.3 Definitions.

The following definitions apply to this part:

Air blank: A reading by an EBT of ambient air containing no alcohol, (In
EBTs using gas chromatography technology, a reading of the device's internal circuitry.

**Alcohol.** The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols including methyl or isopropyl alcohol.

**Alcohol concentration.** The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part.

**Alcohol use.** The consumption of any beverage, mixture or preparation, including any medication, containing alcohol.

**Aliquot.** A portion of a specimen used for testing.

**Blind sample or blind performance test specimen.** A urine specimen submitted to a laboratory for quality control test purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from employee specimens, and which is spiked with known quantities of specific drugs or which is blank, containing no drugs.

**Breath Alcohol Technician (BAT).** An individual who instructs and assists individuals in the alcohol testing process and operates an EBT.

**Canceled or invalid test.** In drug testing, a drug test that has been declared invalid by a Medical Review Officer. A canceled test is neither a positive nor a negative test. For purposes of this part, a sample that has been rejected for testing by a laboratory is treated the same as a canceled test. In alcohol testing, a test that is deemed to be invalid under §40.79. It is neither a positive nor a negative test.

**Chain of custody.** Procedures to account for the integrity of each urine or blood specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen or drug testing.

**Collection container.** A container into which the employee urinates to provide the urine sample used for a drug test.

**Collection site.** A place designated by the employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

**Collection site person.** A person who instructs and assists individuals at a collection site and who receives and makes a screening examination of the urine specimen provided by those individuals.

**Confirmation (or confirmatory) test.** In drug testing, a second analytical procedure to identify the presence of a specific drug or metabolite that is independent of the screening test and that uses a different technique and chemical principles from that of the screening 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.) In alcohol testing, a second test, following a screening test with a result of 0.02 or greater, that provides quantitative date of alcohol concentration.

**DHHS.** The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.

**DOT agency.** An agency of the United States Department of Transportation administering regulations related to drug or alcohol testing, including the United States Coast Guard (for drug testing purposes only), the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Federal Transit Administration, the Research and Special Programs Administration, and the Office of the Secretary.

**Employee.** An individual designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. As used in this part “employee” includes an applicant for employment, “Employee” and “Individual” or “individual to be tested” have the same meaning for purposes of this part.

**Employer.** An entity employing one or more employees that is subject to DOT agency regulations requiring compliance with this part. As used in this part, “employer” includes an industry association or joint enterprise comprised of two or more employing entities.

**EBT (or evidential breath testing device).** An EBT approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA's “Conforming Products List of Evidential Breath Measurement Devices” (CLP).

**Medical Review Officer (MRO).** A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

**Screening test (or initial test).** In drug testing, an immunoassay screen to eliminate "negative" urine specimens from further analysis. In alcohol testing, an analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath specimen.

**Secretary.** The Secretary of Transportation or the Secretary's designee.

**Shipping container.** A container capable of being secured with a tamper-evident seal that is used for transfer of one or more urine specimen(s) and associated documentation from the collection site to the laboratory.

**Specimen bottle.** The bottle that, after being labeled and sealed according to the procedures in this part, is used to transmit a urine sample to the laboratory.

§§ 40.5—40.19 [Reserved]

2. §§ 40.21 through 40.39 are designated subpart B.

**Subpart B—Drug Testing**

40.21 The drugs.

40.22 Preparation for testing.

40.23 Specimen collection procedures.

40.27 Laboratory personnel.

40.29 Laboratory analysis procedures.

40.31 Quality assurance and quality control.

40.33 Reporting and review of results.

40.35 Protection of employee records.

40.37 Individual access to test and laboratory certification.


3. In §40.25, paragraph (f)(10) is revised to read as follows:

§ 40.25 Specimen collection procedures.

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(10) The collection site person shall instruct the employee to provide at least 45 ml of urine under the split sample method of collection or 30 ml of urine under the single sample method of collection.

(A) Employers with employees subject to drug testing only under the drug testing rules of the Research and Special Programs Administration and/or Coast Guard may use the "split sample" method of collection or may collect a single sample for those employees.

(B) Employers with employees subject to drug testing under the drug testing rules of the Federal Highway Administration, Federal Railroad
Administration, Federal Transit Administration, or Federal Aviation Administration shall use the “split sample” method of collection for those employees, (ii) Employers using the split sample method of collection shall follow the procedures in this paragraph (f)(10)(ii): (A) The donor shall urinate into a collection container or a specimen bottle capable of holding at least 60 ml. (B) If a collection container is used, the collection site person, in the presence of the donor, pours the urine into two specimen bottles. Thirty (30) ml shall be poured into one bottle, to be used as the primary specimen. At least 15 ml shall be poured into the other bottle, to be used as the split specimen. (C) If a single specimen bottle is used as a collection container, the collection site person shall pour 30 ml of urine from the specimen bottle into a second specimen bottle (to be used as the primary specimen) and retain the remainder (at least 15 ml) in the collection bottle (to be used as the split specimen). (D) Both bottles shall be shipped in a single shipping container, together with copies 1.2, and the split specimen copy of the chain of custody form, to the laboratory. (E) If the test result of the primary specimen is positive, the employee may request that the MRO direct the split specimen be tested in a different DHHS-certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the primary specimen. The MRO shall honor such a request if it is made within 72 hours of the employee having been notified of a verified positive test result. (F) When the MRO informs the laboratory in writing that the employee has requested a test of the split specimen, the laboratory shall forward, to a different DHHS-approved laboratory, the split specimen bottle, with seal intact, a copy of the MRO request, and the split specimen copy of the chain of custody form with appropriate chain of custody entries. (G) The result of the test of the split specimen is transmitted by the second laboratory to the MRO. (H) Action required by DOT agency regulations as the result of a positive drug test (e.g., removal from performing a safety-sensitive function) is not stayed pending the result of the test of the split specimen. (i) If the result of the test of the split specimen fails to confirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, the MRO shall cancel the test, and report the cancellation and the reasons for it to the DOT, the employer, and the employee. (ii) Employers using the single sample collection method shall follow the procedures in paragraph: (A) The collector may choose to direct the employee to urinate either directly into a specimen bottle or into a separate collection container. (B) If a separate collection container is used, the collection site person shall pour at least 30 ml of the urine from the collection container into the specimen bottle in the presence of the employee. (iv) In either collection methodology, upon receiving the specimen from the individual, the collection site person shall determine if it has at least 30 milliliters of urine for the primary or single specimen bottle and, where the split specimen collection method is used, an additional 15 ml of urine for the split specimen bottle. If the individual is unable to provide such a quantity of urine, the collection site person shall instruct the individual to drink not more than 24 ounces of fluids and, after a period of up to two hours, again attempt to provide a complete sample using a fresh collection container. The original insufficient specimen shall be discarded. If the employee is still unable to provide an adequate specimen, the insufficient specimen shall be discarded, testing discontinued, and the employer so notified. The MRO shall refer the individual for a medical evaluation to develop pertinent information concerning whether the individual's inability to provide a specimen is genuine or constitutes a refusal to test. (In preemployment testing, if the employer does not wish to hire the individual, the MRO is not required to make such a referral.) Upon completion of the examination, the MRO shall report his or her conclusions to the employee in writing. * * * * * 4. In § 40.29, paragraph (b)(2) is revised and paragraph (b)(3) is added, as follows: § 40.29 Laboratory analysis procedures. * * * * * (b) * * * * * (2) In situations where the employer uses the split sample collection method, the laboratory shall log in the split specimen, with the split specimen bottle seal remaining intact. The laboratory shall store this sample securely (see paragraph (c) of this section). If the result of the test of the primary specimen is negative, the laboratory may discard the split specimen. If the result of the test of the primary specimen is positive, the laboratory shall retain the split specimen in frozen storage for 60 days from the date on which the laboratory acquires it (see paragraph (b) of this section). Following the end of the 60-day period, if not informed by the MRO that the employee has requested a test of the split specimen, the laboratory may discard the split specimen. (3) When directed in writing by the MRO to forward the split specimen to another DHHS-certified laboratory for analysis, the second laboratory shall analyze the split specimen by GC/MS to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen. Such GC/MS confirmation shall be conducted without regard to the cutoff levels of § 40.29(f). The split specimen shall be retained in long-term storage for one year by the laboratory conducting the analysis of the split specimen (or longer if litigation concerning the test is pending). * * * * * 6. In § 40.33 paragraphs (e), (f) and (g) are revised; paragraph (b) is redesignated as paragraphs (i), and a new paragraph (b) is added, as follows: § 40.33 Reporting and review of results. * * * * * (e) In a situation in which the employer has used the single sample method of collection, the MRO shall notify each employee who has a confirmed positive test that the employee has 72 hours in which to request a reanalysis of the original specimen, if the test is verified positive. If requested to do so by the employee within 72 hours of the employee’s having been informed of a verified positive test, the Medical Review Officer shall direct, in writing, a reanalysis of the original sample. The MRO may also direct, in writing, such a reanalysis if the MRO questions the accuracy or validity of any test result. Only the MRO may authorize such a reanalysis, and such a reanalysis may take place only at laboratories certified by DHHS. If the reanalysis fails to reconfirm the presence of the drug or drug metabolite, the MRO shall cancel the test and report the cancellation and the reasons for it to the DOT, the employer and the employee. (f) In situations in which the employer uses the split sample method of collection, the MRO shall notify each employee who has a confirmed positive test that the employee has 72 hours in which to request a test of the split specimen, if the test is verified as positive. If the employee requests an analysis of the split specimen within 72 hours of having been informed of a verified positive test, the MRO shall
direct, in writing, the laboratory to provide the split specimen to another DHHS-certified laboratory for analysis. If the analysis of the split specimen fails to confirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, or if the split specimen is unavailable, inadequate for testing or untestable, the MRO shall cancel the test and report cancellation and the reasons for it to the DOT, the employer, and the employee.

(g) If an employee has not contacted the MRO within 72 hours, as provided in paragraphs (e) and (f) of this section, the employee may present to the MRO information documenting that serious illness, injury, inability to contact the MRO, lack of actual notice of the verified positive test, or other circumstances unavoidably prevented the employee from timely contacting the MRO. If the MRO concludes that there is a legitimate explanation for the employee’s failure to contact the MRO within 72 hours, the MRO shall direct that the reanalysis of the primary specimen or analysis of the split specimen, as applicable, be performed.

(h) When the employer uses the split sample method of collection, the employee is not authorized to request a reanalysis of the primary specimen as provided in paragraph (e) of this section.

7. A new subpart C is added to part 40, to read as follows:

Subpart C—Alcohol Testing

§ 40.51 The breath alcohol technician.

(a) The breath alcohol technician (BAT) shall be trained to proficiency in the operation of the EBT he or she is using and the provision of breath testing procedures of this part.

(b) Proficiency shall be demonstrated by successful completion of a course of instruction which, at a minimum, provides training in the principles of EBT methodology, operation, and calibration checks; the fundamentals of breath analysis for alcohol content; and the procedures required in this part for obtaining a breath sample, and interpreting and recording EBT results.

(c) Only courses of instruction for operation of EBTs that are equivalent to the Department of Transportation model course, as determined by the National Highway Traffic Safety Administration (NHTSA), may be used to train BATs to proficiency. On request, NHTSA will review a BAT instruction course for equivalency.

(d) The course of instruction shall provide documentation that the BAT has demonstrated competence in the operation of the specific EBT(s) he/she will use.

(e) Any BAT who will perform an external calibration check of an EBT shall be trained to proficiency in conducting the check on the particular model of EBT, to include practical experience and demonstrated competence in preparing the breath alcohol simulator or alcohol standard, and in maintenance and calibration of the EBT.

(f) The BAT shall receive additional training, as needed, to ensure proficiency, including new or additional devices or changes in technology that he or she will use.

(g) The employer or its agent shall establish documentation of the training and proficiency test of each BAT it uses to test employees, and maintain the documentation as provided in § 40.83.

(h) A BAT-qualified supervisor of an employee may conduct the alcohol test for that employee only if another BAT is unavailable to perform the test in a timely manner. A supervisor shall not serve as a BAT for the employee in any circumstance prohibited by a DOT operating administration regulation.

(i) Law enforcement officers who have been certified by state or local governments to conduct breath alcohol testing are deemed to be qualified as BATs. In order for a test conducted by such an officer to be accepted under Department of Transportation alcohol testing requirements, the officer must have been certified by a state or local government to use the EBT that was used for the test.

§ 40.53 Devices to be used for breath alcohol tests.

(a) For screening tests, employers shall use only EBTs. When the employer uses for a screening test an EBT that does not meet the requirements of paragraphs (b) (1) through (3) of this section, the employer shall use a log book in conjunction with the EBT (see § 40.59(d)).

(b) For confirmation tests, employers shall use EBTs that meet the following requirements:

(1) EBTs shall have the capability of providing, independently or by direct link to a separate printer, a printed result in triplicate (or three consecutive identical copies) of each breath test and of the operations specified in paragraphs (b) (2) and (3) of this section.

(2) EBTs shall be capable of assigning a unique and sequential number to each completed test, with the number capable of being read by the BAT and the employees before each test and being printed out on each copy of the result.

(3) EBTs shall be capable of printing out, on each copy of the result, the manufacturer’s name for the device, the device’s serial number, and the time of the test.

(4) EBTs shall be able to distinguish alcohol from acetone at the 0.02 alcohol concentration level.

(5) EBTs shall be capable of the following operations:

(i) Testing an air blank prior to each collection of breath; and

(ii) Performing an external calibration check.

§ 40.55 Quality assurance plans for EBTs.

(a) In order to be used in either screening or confirmation alcohol testing subject to this part, an EBT shall have a quality assurance plan (QAP) developed by the manufacturer.

(b) The plan shall designate the method or methods to be used to perform external calibration checks of the device, using only calibration devices on the NHTSA “Conforming Products List of Calibrating Units for Breath Alcohol Tests.”

(c) The plan shall specify the minimum intervals for performing external calibration checks of the device. Intervals shall be specified for different frequencies of use, environmental conditions (e.g., temperature, altitude, humidity), and contexts of operation (e.g., stationary or mobile use).

(d) The plan shall specify the tolerances on an external calibration check within which the EBT is regarded to be in proper calibration.

(e) The plan shall specify inspection, maintenance, and calibration...
(d) In unusual circumstances (e.g., when it is essential to conduct a test outdoors at the scene of an accident), a test may be conducted at a location that does not fully meet the requirements of paragraph (a) of this section. In such a case, the employer or BAT shall provide visual and aural privacy to the employee to the greatest extent practicable.

(e) The BAT shall supervise only one employee’s use of the EBT at a time. The BAT shall not leave the alcohol testing location while the testing procedure for a given employee (see §§ 40.51 through 40.65) is in progress.

§ 40.59 The breath alcohol testing form and log book.

(a) Each employer shall use the breath alcohol testing form prescribed under this part. The form is found in appendix A to this subpart. Employers may not modify or revise this form, except that a form directly generated by an EBT may omit the space for affixing a separate printed result to the form.

(b) The form shall provide triplicate (or three consecutive identical) copies. Copy 1 (white) shall be retained by the BAT. Copy 2 (green) shall be provided to the employee. Copy 3 (blue) shall be transmitted to the employer. Except for a form generated by an EBT, the form shall be 8 1/2 by 11 inches in size.

(c) A log book shall be used in conjunction with any EBT used for screening tests that does not meet the requirements of § 40.53(b)(1) through (3). There shall be a log book for each such device, that is not used in conjunction with any other device and that is used to record every test conducted on the device. The log book shall include the test number, date of the test, name of the BAT, location of the test, quantified test result, and initials of the employee taking each test.

§ 40.61 Preparation for breath alcohol testing.

(a) When the employee enters the alcohol testing location, the BAT will require him or her to provide positive identification (e.g., through use of a photo I.D. card or identification by an employer representative). On request by the employee, the BAT shall provide positive identification to the employee.

(b) The BAT shall explain the testing procedure to the employee.

§ 40.63 Procedures for screening tests.

(a) The BAT shall complete Step 1 on the Breath Alcohol Testing Form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test.

(b) An individually-sealed mouthpiece shall be opened in view of the employee and BAT and attached to the EBT in accordance with the manufacturer’s instructions.

(c) The BAT shall instruct the employee to blow forcefully into the mouthpiece for at least 5 seconds or until the EBT indicates that an adequate amount of breath has been obtained.

(d)(1) If the EBT does not meet the requirements of § 40.53(b)(1) through (3), the BAT and the employee shall take the following steps:

(i) Show the employee the result displayed on the EBT. The BAT shall record the displayed result, test number, testing device, serial number of the testing device, time and quantified result in Step 3 of the form.

(ii) Record the test number, date of the test, name of the BAT, location, and quantified test result in the log book. The employee shall initial the log book entry.

(2) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).

(3) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(e)(1) In any case in which the result of the screening test is a breath alcohol concentration of less than 0.02, the BAT shall date the form and sign the certification in Step 3 of the form. The employee shall sign the certification and fill in the date in Step 4 of the form.

(2) If the employee does not sign the certification in Step 4 of the form or does not initial the log book entry for a test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee’s failure to sign or initial in the “Remarks” section of the form.

(3) If a test result printed by the EBT (see paragraph (d)(2) or (d)(3) of this section) does not match the displayed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with § 40.79, the test is invalid and the employee and employer shall be so advised.

(4) No further testing is authorized. The BAT shall transmit the result of less than 0.02 to the employer in a
confidential manner, and the employer shall receive and store the information so as to ensure that confidentiality is maintained as required by § 40.81.

(f) If the result of the screening test is an alcohol concentration of 0.02 or greater, a confirmation test shall be performed as provided in § 40.65.

(g) If the confirmation test will be conducted by a different BAT, the BAT who conducts the screening test shall complete and sign the form and log book entry. The BAT will provide the employee with Copy 2 of the form.

§ 40.65 Procedures for confirmation tests.

(a) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall follow the procedures of § 40.63.

(b) The BAT shall instruct the employee not to eat, drink, put any object or substance in his or her mouth, and, to the extent possible, not belch during a waiting period before the confirmation test. This time period begins with the completion of the screening test and shall not be less than 15 minutes. The confirmation test shall be conducted within 20 minutes of the completion of the screening test. The BAT shall explain to the employee the reason for this requirement (i.e., to prevent any accumulation of mouth alcohol leading to an artificially high reading) and the fact that it is for the employee’s benefit. The BAT shall also explain that the test will be conducted at the end of the waiting period, even if the employee has disregarded the instruction. If the BAT becomes aware that the employee has not complied with this instruction, the BAT shall so note in the “Remarks” section of the form.

(c) (1) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall initiate a new Breath Alcohol Testing form. The BAT shall complete Step 1 on the form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test. The BAT shall note in the “Remarks” section of the form that a different BAT conducted the screening test.

(2) In all cases, the procedures of §§ 40.63 (a), (b), and (c) shall be followed. A new mouthpiece shall be used for the confirmation test.

(d) Before the confirmation test is administered for each employee, the BAT shall ensure that the EBT registers 0.00 on an air blank. If the reading is greater than 0.00, the BAT shall conduct one more air blank. If the reading is greater than 0.00, testing shall not proceed using that instrument. However, testing may proceed on another instrument.

(e) Any EBT taken out of service because of failure to perform an air blank accurately shall not be used for testing until a check of external calibration is conducted and the EBT is found to be within tolerance limits.

(f) In the event that the screening and confirmation test results are not identical, the confirmation test result is deemed to be the final result upon which any action under operating administration rules shall be based.

(g) (1) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).

(2) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(b) (1) Following the completion of the test, the BAT shall date the form and sign the certification in Step 3 of the form. The employee shall sign the certification and fill in the date in Step 4 of the form.

(2) If the employee does not sign the certification in Step 4 of the form or does not initial the log book entry for a test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee’s failure to sign or initial in the “Remarks” section of the form.

(3) If a test result printed by the EBT (see paragraph (g)(1) or (g)(2) of this section) does not match the displayed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with § 40.79, the test is invalid and the employer and employee shall be so advised.

(4) The BAT shall conduct an air blank. If the reading is greater than 0.00, the test is invalid.

(i) The BAT shall transmit all results to the employer in a confidential manner.

(1) Each employer shall designate one or more employer representatives for the purpose of receiving and handling breath alcohol testing results in a confidential manner. All communications by BATs to the employer concerning the alcohol testing results of employees shall be to a designated employer representative.

(2) Such transmission may be in writing, in person or by telephone or electronic means, but the BAT shall ensure immediate transmission to the employer of results that require the employer to prevent the employee from performing a safety-sensitive function.

(3) If the initial transmission is not in writing (e.g., by telephone), the employer shall establish a mechanism to verify the identity of the BAT providing the information.

(4) If the initial transmission is not in writing, the BAT shall follow the initial transmission by providing to the employer the employer’s copy of the breath alcohol testing form. The employer shall store the information so as to ensure that confidentiality is maintained as required by § 40.81.

§ 40.67 Refusals to test and uncompleted tests.

(a) Refusal by an employee to complete and sign the breath alcohol testing form (Step 2), to provide breath, to provide an adequate amount of breath, or otherwise to cooperate with the testing process in a manner that prevents the completion of the test, shall be noted by the BAT in the remarks section of the form. The testing process shall be terminated and the BAT shall immediately notify the employer.

(b) If a screening or confirmation test cannot be completed, or if an event occurs that would invalidate the test, the BAT shall, if practicable, begin a new screening or confirmation test, as applicable, using a new breath alcohol testing form with a new sequential test number (in the case of a screening test conducted on an EBT that meets the requirements of § 40.53(b) or in the case of a confirmation test).

§ 40.69 Inability to provide an adequate amount of breath.

(a) This section sets forth procedures to be followed in any case in which an employee is unable, or alleges that he or she is unable, to provide a valid breath test because of a medical condition.

(b) The BAT shall again instruct the employee to attempt to provide an adequate amount of breath. If the employee refuses to make the attempt, the BAT shall immediately inform the employer.

(c) If the employee attempts and fails to provide an adequate amount of breath, the BAT shall so note in the remarks section of the breath alcohol testing form and immediately inform the employer.

(d) If the employee attempts and fails to provide an adequate amount of breath, the employer shall proceed as follows:
(2) The employer shall direct the employee to obtain, as soon as practical after the attempted provision of breath, an evaluation from a licensed physician who is acceptable to the employer concerning the employee’s medical ability to provide an adequate amount of breath.

(ii) If the physician determines, in his or her reasonable medical judgment, that a medical condition has, or with a high degree of probability, could have, precluded the employee from providing an adequate amount of breath, the employee’s failure to provide an adequate amount of breath shall not be deemed a refusal to take a test. The physician shall provide to the employer a written statement of the basis for his or her conclusion.

(3) If the licensed physician, in his or her reasonable medical judgment, is unable to make the determination set forth in paragraph (d)(2)(i) of this section the employee’s failure to provide an adequate amount of breath shall be regarded as a refusal to take a test. The licensed physician shall provide a written statement of the basis for his or her conclusion to the employer.

§ 40.71—40.77 [Reserved]

§ 40.79 Invalid tests.

(a) A breath alcohol test shall be invalid under the following circumstances:

(1) The next external calibration check of an EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this event, every test result of 0.02 or above obtained on the device since the last valid external calibration check shall be invalid;

(2) The BAT does not observe the minimum 15-minute waiting period prior to the confirmation test, as provided in § 40.85(b);

(3) The BAT does not perform an air blank of the EBT before a confirmation test, or an air blank does not result in a reading of 0.00 prior to or after the administration of the test, as provided in § 40.65;

(4) The BAT does not sign the form as required by §§ 40.53 and 40.65;

(5) No BAT has failed to note on the remarks section of the form that the employee has failed or refused to sign the form following the recording or printing on or attachment to the form of the test result;

(6) An EBT fails to print a confirmation test result; or

(7) On a confirmation test and, where applicable, on a screening test, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result.

(b) [Reserved]

§ 40.81 Availability and disclosure of alcohol testing information about individual employees.

(a) Employers shall maintain records in a secure manner, so that disclosure of information to unauthorized persons does not occur.

(b) Except as required by law or expressly authorized or required in this section, no employer shall release covered employee information that is contained in the records required to be maintained by this part or by DOT agency alcohol misuse rules.

(c) An employee subject to testing is entitled, upon written request, to obtain copies of any records pertaining to the employee’s use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee’s records shall not be contingent upon payment for records other than those specifically requested.

(d) Each employer shall permit access to all facilities utilized in complying with the requirements of this part and DOT agency alcohol misuse rules to the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations).

(e) When requested by the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations), each employer shall make available copies of all results for employer alcohol testing conducted under the requirements of this part and any other information pertaining to the employer’s alcohol misuse prevention program. The information shall include name-specific alcohol test results, records and reports.

(f) When requested by the National Transportation Safety Board as part of an accident investigation, an employer shall disclose information related to the employer’s administration of any post-accident alcohol tests administered following the accident under investigation.

(g) An employer shall make records available to a subsequent employer upon receipt of a written request from a covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee’s written request.

(h) An employer may disclose information required to be maintained under this part pertaining to a covered employee to that employee or to 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 test administered under the requirements of this part, or from the employer’s determination that the employee engaged in conduct prohibited by a DOT agency alcohol misuse regulation (including, but not limited to, a worker’s compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

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

§ 40.82 Maintenance and disclosure of records concerning EBTs and BATs.

(a) Each employer or its agent shall maintain the following records for two years:

(1) Records of the inspection and maintenance of each EBT used in employee testing;

(2) Documentation of the employer’s compliance with the QAP for each EBT it uses for alcohol testing under this part;

(3) Records of the training and proficiency testing of each BAT used in employee testing;

(4) The log books required by § 40.59(c);

(b) Each employer or its agent shall maintain for five years records pertaining to the calibration of each EBT used in alcohol testing under this part, including records of the results of external calibration checks.

(c) Records required to be maintained by this section shall be disclosed on the same basis as provided in § 40.81.

Appendix A to Subpart C of Part 40—The Breath Alcohol Testing Form
# U.S. Department of Transportation (DOT) Breath Alcohol Testing Form

*THE INSTRUCTIONS FOR COMPLETING THIS FORM ARE ON THE BACK OF COPY 1*

## STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

<table>
<thead>
<tr>
<th>A. Employee Name</th>
<th>(PRINT) (First, M.I., Last)</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. SSN or Employee ID No.</td>
<td></td>
</tr>
<tr>
<td>C. Employer Name</td>
<td>Address &amp; Telephone No.</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Telephone Number</td>
</tr>
<tr>
<td>D. Reason for Test:</td>
<td>Pre-employment Random Reasonable Suspicion/Cause Post-accident Return to Duty Follow-up</td>
</tr>
</tbody>
</table>

## STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

<table>
<thead>
<tr>
<th>Signature of Employee</th>
<th>Date</th>
<th>Month</th>
<th>Day</th>
<th>Year</th>
</tr>
</thead>
</table>

## STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

- **Screening Test:** Complete only if the testing device is not designed to print the following.
  - Test No.
  - Testing Device Name
  - Testing Device Serial Number
  - Time: AM PM

- **Confirmation Test:** Confirmation test results **MUST** be affixed to the back of each copy of this form.

<table>
<thead>
<tr>
<th>Remarks:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(PRINT) Breath Alcohol Technician's Name (First, M.I., Last)</th>
<th>Signature of Breath Alcohol Technician</th>
<th>Date</th>
<th>Month</th>
<th>Day</th>
<th>Year</th>
</tr>
</thead>
</table>

## STEP 4: TO BE COMPLETED BY EMPLOYEE

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

<table>
<thead>
<tr>
<th>Signature of Employee</th>
<th>Date</th>
<th>Month</th>
<th>Day</th>
<th>Year</th>
</tr>
</thead>
</table>

**COPY 1 - ORIGINAL - BREATH ALCOHOL TECHNICIAN RETAINS**

OMB No. 2105-0529
U.S. Department of Transportation (DOT) Breath Alcohol Testing Form

[THE INSTRUCTIONS FOR Completing THIS FORM ARE ON THE BACK OF COPY 3]

**STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN**

A. Employee Name__________________________
   (PRINT) (First, M.I., Last)

B. SSN or Employee ID No__________________________

C. Employer Name__________________________
   Address, &
   Telephone No__________________________

D. Reason for Test: □ Pre-employment □ Random □ Reasonable Suspicion/Cause □ Post-accident □ Return to Duty □ Follow-up

**STEP 2: TO BE COMPLETED BY EMPLOYEE**

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

Signature of Employee__________________________

Date ___________ Month ___________ Day ___________

**STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN**

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

Screening test: Complete only if the testing device is not designed to print the following.

<table>
<thead>
<tr>
<th>Test No.</th>
<th>Testing Device Name</th>
<th>Testing Device Serial Number</th>
<th>Time AM/PM</th>
<th>Result</th>
</tr>
</thead>
</table>

Confirmation test: Confirmation test results MUST be affixed to the back of each copy of this form.

Remarks: ________________________________________________________________

(PRINT) Breath Alcohol Technician's Name (First, M.I., Last) ____________________________

Signature of Breath Alcohol Technician__________________________

Date ___________ Month ___________ Day ___________

**STEP 4: TO BE COMPLETED BY EMPLOYEE**

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

Signature of Employee__________________________

Date ___________ Month ___________ Day ___________

COPY 2 - EMPLOYEE RETAINS

OMB No. 2105-0529
AFFIX SCREENING TEST RESULTS HERE
(IF APPLICABLE)
USE TAMPER-EVIDENT TAPE

AFFIX CONFIRMATION TEST RESULTS HERE
USE TAMPER-EVIDENT TAPE

Privacy Act Statement
(applicable in those cases where respondents are retained in a Federal Privacy Act system of records)

Except for your Social Security Number (SSN), submission of the information on the front side of this form is mandatory. Incomplete submission of the information, failure to provide an adequate breath specimen for testing without a valid medical explanation, engaging in conduct that clearly obstructs the testing process, or failure to sign the certification statement on the front side of this form may result in delay or denial of your application for employment/appointment; your inability to resume performing safety-sensitive duties, removal from a safety-sensitive position, or other disciplinary actions.

The authority for obtaining the breath specimen required by the U.S. Department of Transportation is the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143, Title V. The principal purpose for which the information sought is to be used is to ensure that you have submitted to breath alcohol testing and to ensure that you are promptly notified in the event of noncompliance with the U.S. Department of Transportation breath alcohol testing requirements.

Submission of your SSN is not required by law and is voluntary. If you object to the use of your SSN in this form, you will not be denied any right, benefit, or privilege provided by law; a substitute number or other identifier will be assigned.

The information provided on this form may be disclosed, as a routine use, to a Federal, State, or local agency for authorized investigative or enforcement purposes or to a court or an administrative tribunal when the Government or one of its agencies is a party to a judicial proceeding before the court or involved in administrative proceedings before the tribunal.

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.11)
Public reporting burden for this collection of information is estimated for each respondent to average 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may write to the U.S. Department of Transportation, Drug Enforcement and Program Compliance, Room 4004, 400 Seventh St., NW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3514, 725 Seventeenth St., NW, Washington, D.C. 20503.
U.S. Department of Transportation (DOT)
Breath Alcohol Testing Form

(The instructions for completing this form are on the back of copy 3)

STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

A. Employee Name: ____________________________
   (PRINT) (First, M.I., Last)

B. SSN or Employee ID No.: ______________________

C. Employer Name: ____________________________
Address & Telephone No.: ________________________

   ( ) Telephone Number

D. Reason for Test: □ Pre-employment □ Random □ Reasonable Suspicion/Cause □ Post-accident □ Return to Duty □ Follow-up

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

__________________________________________
Signature of Employee

/ / / Year
Date Month Day

STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

Screening test: Complete only if the testing device is not designed to print the following.

<table>
<thead>
<tr>
<th>Test No.</th>
<th>Testing Device Name</th>
<th>Testing Device Serial Number</th>
<th>Time</th>
<th>Result</th>
</tr>
</thead>
</table>

Confirmation test: Confirmation test results MUST be affixed to the back of each copy of this form.

Remarks: ________________________________________________________________

__________________________________________
(PRINT) Breath Alcohol Technician’s Name (First, M.I., Last)
Signature of Breath Alcohol Technician

/ / / Year
Date Month Day

STEP 4: TO BE COMPLETED BY EMPLOYEE

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

__________________________________________
Signature of Employee

/ / / Year
Date Month Day

COPY 3 - FORWARD TO THE EMPLOYER

OMB No. 2105-0539
INSTRUCTIONS FOR COMPLETING THE U.S. DEPARTMENT OF TRANSPORTATION BREATH ALCOHOL TESTING FORM

NOTE: Use a ballpoint pen, press hard, and check all copies for legibility.

STEP 1 The Breath Alcohol Technician (BAT) completes the information required in this step. Be sure to print the employee's name and check the box identifying the reason for the test.

NOTE: If the employee refuses to provide SSN or I.D. number, be sure to indicate this in the remarks section in STEP 3. Proceed with STEP 2.

STEP 2 Instruct the employee to read, sign, and date the employee certification statement in STEP 2.

NOTE: If the employee refuses to sign the certification statement, do not proceed with the alcohol test.

Contact the designated employer representative.

STEP 3 The Breath Alcohol Technician (BAT) completes the information required in this step. After conducting the alcohol screening test, do the following (as appropriate):

If the breath testing device used in conducting the screening test is not capable of printing the screening test information located on the front of this form (test number, testing device name, testing device serial number, time of test and results), complete this information in the space provided on the front of this form.

NOTE: Be sure to enter the result of the test exactly as it is indicated on the breath testing device, i.e.,

0.00, 0.02, 0.04, etc.

OR, if the breath testing device used in conducting the screening test is capable of printing the screening test information located on the front of this form, affix the printed information in the space provided above. Be sure to use tamper-evident tape.

If the results of the screening test are less than 0.02, print, sign your name, and enter today's date in the space provided. Go to STEP 4.

If the results of the screening test are 0.02 or greater, a confirmation test must be administered in accordance with DOT regulations. An EVIDENTIARY BREATH TESTING device that is capable of printing confirmation test information must be used in conducting this test.

After conducting the alcohol confirmation test, affix the printed information in the space provided above. Be sure to use tamper-evident tape.

Print, sign your name, and enter the date in the space provided. Go to STEP 4.

STEP 4 Instruct the employee to read, sign, and date the employee certification statement in STEP 4. If the employee refuses to sign the certification statement in STEP 4, be sure to indicate this in the remarks section in STEP 3.

Retain Copy 1 (white page) for BAT records.
Give Copy 2 (green page) to the employee.
Forward Copy 3 (blue page) to the employer.

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.11)

Public reporting burden for this collection of information is estimated for each respondent to average 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may request review of this burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug Enforcement and Program Compliance, Room 6244, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3514, 725 Seventeenth St., NW, Washington, D.C. 20503.

COPY 3 - FORWARD TO THE EMPLOYER

[FR Doc. 94-2030 Filed 2-3-94; 1:00 pm]
BILLING CODE 4910-02-3