Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-1 **Date**: October 18, 1995

Applicability:

- ☐ Antidrug Program
- ☒ Alcohol Misuse Prevention Program
- ☐ Both

CFR Reference(s):

- ☒ 14 CFR part 121, Appendix J
- ☐ 49 CFR part 40
- ☐ None

Subject: Pre-employment Alcohol Tests

Issue

How does the suspension of pre-employment alcohol testing affect aviation employers?

Background

When the 14 CFR part 121-certificate holders, 14 CFR part 135-certificate holders with 50 or more covered employees, and covered air traffic control facilities implemented alcohol testing on January 1, 1995, pre-employment alcohol tests were required. On May 10, 1995, pre-employment alcohol testing was suspended.

Legislation has been introduced in Congress that would make pre-employment alcohol testing discretionary with employers. This legislation would clarify that employers are not required to conduct such testing, but have the option of doing so under the authority of Federal law. Future rulemakings will report the status of this proposal.

Policy Position

Employers regulated by the FAA that implemented pre-employment alcohol testing under 14 CFR part 121, appendix J are neither required nor permitted to continue such testing. Employers that were scheduled to begin pre-employment alcohol testing under appendix J at a later date (e.g., July 1, 1995, and January 1, 1996) are neither required nor permitted to do so. Any employer may conduct pre-employment alcohol testing under its own authority;

however, because of the decision of the Court of Appeals for the Fourth U.S. Circuit and the May 10 suspension of testing, employers that wish to conduct such testing may not claim a basis in Federal law or regulation for doing so. In addition, employers may not use the Department of Transportation's (DOT) breath alcohol testing form when conducting non-DOT pre-employment alcohol tests.

This position applies only to pre-employment alcohol testing. The other types of alcohol testing and all types of drug testing are unaffected.

References/Sources

14 CFR part 121, Appendix J, Sec. III, subsection A, (60 FR 24765) May 10, 1995, Final Rule.

14 CFR part 121, Preamble language, (60 FR 24765) May 10, 1995, Final Rule.

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-4 **Date**: November 6, 1995

Applicability:

- ☐ Antidrug Program
- ☒ Alcohol Misuse Prevention Program
- ☐ Both

CFR Reference(s):

- ☒ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: Alcohol retests following an alcohol confirmation test result of 0.02-0.039

Issues

a. How often may an employer conduct alcohol retests on an employee who has tested at 0.02-0.039?

b. How are alcohol retests recorded on the breath alcohol testing forms?

c. Are alcohol retests reported in the annual MIS reports?

d. What type of testing equipment should be used for alcohol retests?

e. If the employee refuses to be retested for alcohol, is it a refusal to submit to required testing?

Background

There are six types of testing associated with the FAA's alcohol regulations: random, post-accident, reasonable suspicion, return to duty, follow-up, and retests. The last type of test is not an independent category of test, however, but rather a procedure that may be followed after conducting any of the other types of tests, except return to duty tests.

If an employee has an alcohol confirmation test result of 0.02-0.039, he or she must be removed from the performance of safety-sensitive functions until the beginning of his or her next regularly scheduled shift (as long as it is at least 8 hours after the initial test). However, the

employer may request an alcohol retest if it wishes to return that employee to the performance of safety-sensitive functions within the 8-hour timeframe. If the alcohol retest result is below 0.02, the employee may return to work immediately. If an alcohol retest is not conducted, the employee may return to duty after 8 hours has passed without any more testing.

Policy Position

a. An employer may conduct as many alcohol retests as it wishes within the 8-hour timeframe after an initial test.

b. The fact that an alcohol retest has been conducted should be recorded in the remarks section of the breath alcohol testing form that was used for the original screen and confirmation test.

If the EBT prints results directly on the breath alcohol testing form, a retest result should be printed on a separate form which is then stapled to the form that was used for the original screen and confirmation test. If the EBT provides a separate printout of the results, the retest result is attached to the back of the original form using tamper evident tape, making sure not to obscure the initial test results.

c. Since alcohol retests are not required tests, they should not be reported in the annual report. Only the original screen and confirmation test results should be reported.

d. An evidential breath testing device that meets the requirements for confirmation testing must be used for alcohol retests.

e. An alcohol retest is not a required test; therefore, the employee cannot be considered as refusing to submit to testing if he or she does not submit to an alcohol retest. The employer’s policy should clearly state that an employer’s conduct of retests is permitted, but not required by the FAA’s regulation and that submission to a retest or multiple retests is strictly voluntary on the part of an employee.

References/Sources

14 CFR part 121, Appendix J, Sec. III, subsection G, (59 FR 7392) February 15, 1994, Final Rule.

14 CFR Preamble, (59 FR 7385) February 15, 1994, Final Rule.

49 CFR part 40, Common Preamble (59 FR 7330), February 15, 1994.

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-8 **Date**: October 31, 1995
Applicability:

- ☐ Antidrug Program
- ☒ Alcohol Misuse Prevention Program
- ☐ Both

CFR Reference(s):

- ☐ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: Programming Alcohol Testing Devices to Read 0.00 if the Actual Test Result is Less Than 0.02

Subtopic(s): Printout Results of Air Blanks

Issue

May employers have their alcohol testing devices programmed to read 0.00 if the actual test result is below 0.02?

Background

The Department of Transportation requires precision and accuracy at the 0.02 and above breath alcohol concentration level for testing devices used in its alcohol testing program.

Because of the concern that employees whose test results are 0.001 to 0.019 might be unfairly stigmatized as misusing alcohol, and the preference for zero tolerance in the alcohol industry, some employers want to portray alcohol test results that are "negative" (below 0.02) as 0.00 on the printout.

Policy Position

Employers may have the manufacturer of approved alcohol testing devices program these devices to read/print a 0.00 result in the event of a result below 0.02; however, an air blank must be conducted prior to any confirmation test and it is mandatory that the air blank reads and prints the actual result.

Therefore, the device may be programmed to read and print 0.00 for any administered test result below 0.02 if, and only if, the device is capable of reading and printing an actual result for air blanks.

Employers that are using such devices may be requested to demonstrate the devices' differentiating capabilities during an FAA inspection.

References/Sources

49 CFR part 40 (59 FR 7348/7357; February 15, 1994) Final Rule.

DOT Common Preamble (59 FR 7315; February 15, 1994).

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-9 **Date**: October 5, 1995
Applicability:

- ☐ Antidrug Program
- ☒ Alcohol Misuse Prevention Program
- ☐ Both

CFR Reference(s):

- ☐ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: Blood Alcohol Testing Under Company Policy

Subtopic(s):

Issue

May aviation employers conduct a blood alcohol test on covered employees under their company policy?

Background

In a final rule published on December 2, 1994, DOT decided not to subject employees to invasive testing procedures and not to incur the other disadvantages of adding blood alcohol testing to their program. DOT therefore withdrew the proposed authorization of the use of blood in some post-accident and reasonable suspicion test situations.

Policy Position

Blood alcohol testing is neither authorized nor permitted under any circumstances under the DOT/FAA regulations.

We cannot prohibit any aviation employer from instituting a blood alcohol testing program. Any such program, however, would have to be unequivocally established under the employer's independent authority and would be subject to any applicable state law or labor-management agreement. Employees subject to testing would have to be clearly advised that the blood alcohol test was not a part of the FAA's required program.

Further, although the employer may wish to have a blood alcohol test result to assist in defending against an employee's claim of wrongful termination, the outcome of a blood alcohol test can have absolutely no bearing on the consequences required under the FAA's rule. If an employee has a test result of 0.02 or greater on a breath alcohol test, the employee must be removed from performing his or her safety-sensitive function. If the test result is 0.04 or greater, the employee cannot return to his or her job until the required substance abuse professional evaluations, rehabilitation (if indicated), and other return to duty steps have been completed regardless of the result of a blood alcohol test.

Aviation employers are required to adhere to the consequences required by the FAA's rule based on the breath alcohol test; therefore, they should use caution in deciding whether to introduce blood alcohol testing, especially if the process they wish to establish would include any period of delay between the breath and blood tests. Unless the employee was in the absorption phase after alcohol use (*i.e.,* while the alcohol is still entering the employee's system), the blood test will almost inevitably result in a lower alcohol concentration as alcohol metabolizes from the system at a rate of, on average, 0.15 g/L/hr.

FAA is requiring all aviation employers who submit Management Information System reports in the year 1996/7/8 for calendar years 1995/6/7 to include certain information regarding whether a blood test could have been conducted when a reasonable suspicion or post-accident breath test could not be accomplished. This information will be used to assess whether DOT-mandated blood testing should be reconsidered.

References/Sources

14 CFR part 121 (FR 59 62234; December 2, 1994) Final Rule

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-12 **Date:** November 7, 1995

Applicability:

- ☐ Antidrug Program
- ☒ Alcohol Misuse Prevention Program
- ☐ Both

CFR Reference(s):

- ☐ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: Confidentiality of Information and Maintenance of Records/Breath Alcohol Testing Form

Subtopic(s): BAT Supervisors and/or Billing Personnel

Issue: Do BAT Supervisors and/or Billing Personnel Have Access to Breath Alcohol Forms?

Background: If there is one or more Breath Alcohol Technicians (BAT) working for a company, does the BAT supervisor have the right to review (have access to) the Breath Alcohol Testing Forms for purposes of supervisory control? Likewise, can this form be passed along by the BAT or the employer to billing personnel?

Policy Position: The rule holds employers responsible for implementation of the total program. This includes confidentiality of information and maintenance of records (including BAT and MRO records). Individuals such as supervisors of BATs and billing personnel with a “need to know” are considered authorized company personnel and are permitted to have access to breath alcohol testing documentation. Access to information would be for a specific purpose and necessary for the employer’s successful implementation of the program. This would include review of the forms for completion, obtaining specific billing data from the forms, filing the forms, etc. Individuals with access to these forms are under the same regulatory requirements for maintaining confidentiality of these records as are employers and BATs. Breath Alcohol Testing Forms should not be duplicated for purposes of supervision

or billing as this would create additional “data bases” or files with potential problems of disclosure of confidential information. Access to these records by unauthorized personnel would be difficult to control. This does not preclude use of input forms filled out by the BAT or other personnel that would contain appropriate billing data and which could be maintained as backup documentation.

When the employer uses a consortium or third-party administrator (C/TPA) to act as the agent of the employer then that C/TPA could have access to the Breath Alcohol Testing Form or the authority to obtain a copy of the form. Likewise, the employer’s copy of the form may be submitted to the C/TPA by the employer or by the BAT when the employer has directed the BAT in writing to do so. In all cases of positive results at or above the .02 BAC level, the employer must be notified immediately, and prior to notification of the C/TPA. Positive results can not be sent from the BAT to the C/TPA and then submitted to the employer.

References/Sources

49 CFR part 40, Section 40.63(e)(2)states ”...the employer shall receive and store the information (Breath Alcohol Testing Form) so as to ensure that confidentiality is maintained...” Section 40.81(a) states “...Employers shall maintain records (Breath Alcohol Testing Forms) in a secure manner, so that disclosure of information to unauthorized persons does not occur.” [OST guidance interpretations]

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-15 **Date: November 14, 1995**

Applicability:

- ☐ Antidrug Program
- ☒ Alcohol Misuse Prevention Program
- ☐ Both

CFR Reference(s):

- ☐ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: Screening Test Technicians Conducting Alcohol Screening Tests on Evidential Breath Testing Devices.

Issue: May a screening test technician (STT) become trained to proficiency on an evidential breath testing device (EBT) solely for the purpose of conducting alcohol screening tests on that device?

Background: Section 40.93 ("The screening test technician.") only authorizes the STT to operate an alcohol screening device (ASD); it does not authorize the STT to operate an EBT. This was by design. Likewise, the STT training manual does not address the use of an EBT by the STT. This is in contrast with the training manual for the BAT which concentrates solely on the EBT; in fact, an entire unit in the BAT training manual is devoted to "EBT Methodology." Additionally, the proficiency requirements for the ASD, as contained in the STT manual, are different from the proficiency requirements for the EBT, as contained in the BAT manual.

Policy Position: When an EBT is used to conduct a DOT alcohol test, the operator must be a fully qualified BAT. An STT is limited to conducting only the alcohol screening test, and the only instrument the STT can use is an ASD. Of course, the same individual may be trained as both an STT and a BAT and perform the respective types of testing using the appropriate devices. [*OST Guidance Interpretations*]

References/Sources: *49 CFR part 40 (60 FR 19680; April 20, 1995) Final Rule.*

49 CFR part 40 (59 FR 7357; February 15, 1994) Final Rule.

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-17 **Date: November 7, 1995**

Applicability:

- ☐ Antidrug Program
- ☒ Alcohol Misuse Prevention Program
- ☐ Both

CFR Reference(s):

- ☐ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: Inability to Provide an Adequate Breath Sample for Alcohol Testing

Issues: How many attempts may an employee make to provide an adequate breath sample for alcohol testing?

Background: 49 CFR part 40, §40.69(b) ensures that the employee will have at least two attempts to provide an adequate breath sample, on either a screening or confirmation test, by stating: "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."

The Office of the Secretary of Transportation (OST) has provided further guidance on this issue in a letter to Intoximeters, Inc., dated January 26, 1995.

Policy Position: An employee will always have at least two attempts to provide an adequate breath sample for a screening or confirmation alcohol test.

In the situation where the BAT, in his or her best judgment, feels that the employee is making a true effort to comply with the breath testing process but is unable to blow hard enough or long enough to get an adequate sample in the EBT's "automatic mode," the BAT does have the option (under part 40) to attempt to accomplish the test using the EBT's "manual mode." This option would fall under the provisions of §40.67(b), where the BAT believes that it would be practicable to complete the process by beginning a new

screening or confirmation test. Naturally, the BAT must be trained to proficiency in operating the EBT in the "manual mode."

In a situation in which the BAT did not believe that the employee was making a true effort to blow hard enough or long enough to obtain an adequate sample, then it would not be practical for the BAT to use the provisions of §40.67(b). This situation may constitute a refusal to test, and the BAT would immediately inform the employer.

OST has issued further guidance stating that the Department of Transportation rules do not mandate that the employer remove an individual who is unable to provide an adequate breath sample from safety-sensitive functions until the medical evaluation is complete. However, the rules do not interfere with employers who, acting under their own authority, choose to "stand down" an employee pending the result of the medical evaluation.

References/Sources: *49 CFR part 40 (59 FR 7359; February 15, 1994) Final Rule*

OST letter to Intoximeters, Inc. dated January 26, 1995

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-19 **Date:** January 24, 1996

Applicability:

- ☐ Antidrug Program
- ☒ Alcohol Misuse Prevention Program
- ☐ Both

CFR Reference(s):

- ☐ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: ***Permanent*** Medical Inability to Provide an Adequate Breath Sample for Alcohol Testing

Issue: What procedures should be followed when an employee has a ***permanent*** medical condition that precludes the ability to provide an adequate breath sample?

Background: If an employee is unable to provide an amount of breath sufficient to permit a valid breath test because of a medical condition, the employee must obtain 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.

Policy Position: If the physician determines that the employee has a medical condition that prevents the employee from providing sufficient breath for an alcohol screening or confirmation breath test, and it is a permanent condition, the employee does not have to be removed from the performance of a safety-sensitive function. The employer may choose to continue the employee in the performance of a safety-sensitive function without requiring the employee to undergo such testing. This policy avoids subjecting the employee to repeated medical evaluations to disclose the employee's already recognized medical inability to produce an adequate breath. The policy assumes, of course, that such a condition has been properly documented.

An employee's inability to provide an adequate breath does not, however, relieve the employer of the obligation to comply with other aspects of the alcohol misuse prevention

program (e.g., ensuring the employee has received the required educational materials, removing the individual from duties if the employer has actual knowledge that the employee has misused alcohol, etc.).

References/Sources: 49 CFR part 40 (59 FR 7359, February 15, 1994; Final Rule)

AAM-800 letter to American Airlines, dated January 5, 1995

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-37 Date: January 24, 1996

Applicability:

- ☐ Antidrug Program
- ☒ Alcohol Misuse Prevention Program
- ☐ Both

CFR Reference(s):

- ☐ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: Employee Does Not Provide Sufficient Breath During a Required Alcohol Test, But Does Not Allege a Medical Condition

Issue: If an employee is unable to provide an amount of breath sufficient to permit a valid breath test, but does not allege that such an inability is due to a medical condition, what actions must follow?

Background: The rules prohibit a covered employee from refusing to submit to required alcohol tests. Post-accident, random, reasonable suspicion, or follow-up tests must be taken when those tests are required. 49 CFR 40.69 sets forth the procedures to be followed when an employee is unable to provide an adequate amount of breath.

Policy Position: Although the provisions of §40.69 expressly apply when the employee claims a particular medical condition is creating the problem to provide breath, by interpretation DOT has established that they also apply to the employee who claims to have no idea as to the cause of the inability, or to the employee who says nothing at all. If a medical condition is not found that precluded the provision of an adequate amount of breath, however, the employee will be deemed to have refused to submit to testing. (OST Guidance Interpretation)

References/Sources: 49 CFR part 40 §40.69(a)

Office of Drug Enforcement and Program Compliance Interpretation of 49 CFR part 40 (1995)

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 96-PP-2 Date: August 7, 1996

Applicability:

- ☐ Antidrug Program
- ☒ Alcohol Misuse Prevention Program
- ☐ Both

CFR Reference(s):

- ☐ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: External Calibration Checks on Evidential Breath Testing Devices

Issue: What are the requirements to qualify a breath alcohol technician (BAT) or other individual to perform external calibration checks on evidential breath testing devices (EBT)?

Background: Inspection, maintenance, and **calibration** of each EBT must be performed by the manufacturer or a maintenance representative certified by the device's manufacturer or a state health agency or other appropriate state agency. Calibration in this context is the actual calibration of the device and should not be confused with external calibration checks. An external calibration check is a process through which an EBT analyzes a known alcohol standard. By comparing the EBT's reading of the standard to the expected result, the technician can tell whether the EBT is properly calibrated.

Policy Position: The model BAT course includes training on the principles of EBT methodology, operation, and calibration checks. However, it does not necessarily include training in the actual conduct of external calibration checks (i.e., it is theory as opposed to practice). The requirements for training someone who will perform external calibration checks are separately set forth in the regulation and are in addition to the basic BAT training requirements. If the BAT is going to perform external calibration checks, the BAT needs to be trained to do so before he or she performs any checks. This training must include any preparation of the calibration standard (e.g., wet-bath simulator), as well as the operation of the

calibration equipment. The BAT must demonstrate proficiency in performing those external calibration checks on the particular device that the BAT will be using. Finally, the certification statement provided by the instructor should reflect the BAT's ability in this area.

The training can occur either during the model course or subsequently, and can be provided by the BAT training instructor, the manufacturer, or the manufacturer's representative.

References/Sources: *49 CFR part 40.55(b)(3); 49 CFR 40.51(a)(4); 49 CFR 40.51(a)(1)*

Office of Drug Enforcement and Program Compliance 49 CFR part 40 Guidance Interpretation (1995)