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Industry Drug & Alcohol Testing

Compliance Ahead

New Requirements for Foreign Repair Station Maintenance Personnel

On December 18, 2024, FAA published a final rule (89 FR 103416) that requires certificated repair stations located outside the territory of the United States whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft to conduct alcohol and controlled substance testing in a manner acceptable to the FAA Administrator and consistent with the applicable laws of the country in which the repair station is located. The rule directs the repair stations to comply with the requirements of 14 CFR part 120 and 49 CFR part 40, as proposed.

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Recognizing the sovereignty of foreign nations and potential for conflicts between the foreign laws and FAA regulations, the final rule allows foreign governments, on behalf of certificated repair stations within their territories, and individual foreign repair stations subject to the rule to obtain the Administrator's recognition of a compatible alternative program that meets minimum compliance criteria, standards, and components of the Drug and Alcohol Testing Program.

The rule became effective on January 17, 2025, and compliance is required beginning December 20, 2027. The FAA's Drug Abatement Division is working on guidance and procedures to help those impacted by the new rule. Subscribe to our website so you don't miss it!

In This Issue

What To Expect During an FAA Inspection

A critical component of FAA's drug and alcohol oversight is conducting inspections to review testing, employment, and company records that prove an employer's compliance with the federal drug and alcohol testing rules. Employers are obligated under 49 CFR § 40.331 to provide DOT representatives, including FAA's Drug and Alcohol Compliance and Enforcement Inspectors, access to their facility and records for review. If an FAA-regulated employer is notified of an inspection, it is important for the Designated Employer Representative (DER) to work with the FAA inspector during the planning stage, the inspection, and after the inspection. As we explain in our Frequently Asked Questions, we will send an employer a letter of notification (LON) that includes a point of contact form to return, and a list of

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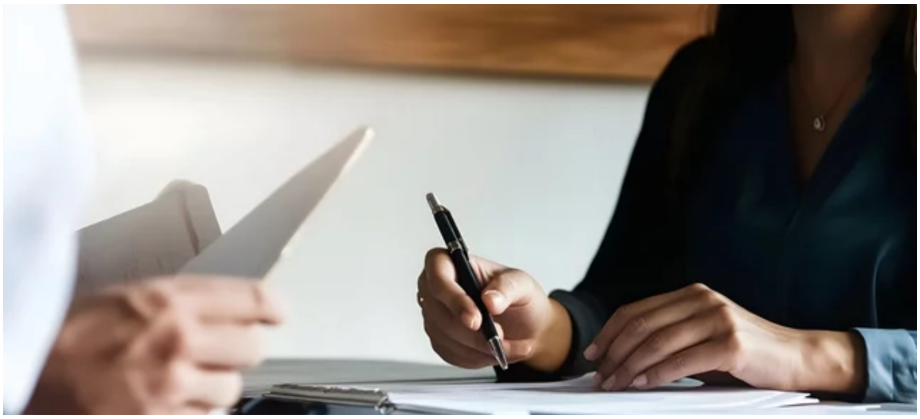
records that must be available for review. The records list will help employers prepare its records in a manner that facilitates the inspection and provides the documents necessary to demonstrate compliance.

The procedures for our inspections, including interview guides, are outlined in FAA Order 9120.1, titled Drug and Alcohol Compliance and Enforcement Surveillance Handbook. While onsite, we conduct an in-briefing, followed by an interview with the DER to review administrative and quality assurance of the program, and review of program documentation and records. It is important that the DER is available to describe and discuss an employer's testing program.



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The onsite inspection will conclude with an out-briefing that covers the result of our inspection. An employer will receive a letter after the inspection that will indicate no further action, or a Report of the Inspection (ROI) that lists any findings of noncompliance that require further action. The ROI will provide an employer the opportunity to provide a detailed description and evidence of its corrective actions to comply with the regulation. FAA strongly encourages an employer's DER to cooperate with the process and provide corrective action(s) that comply with the regulations and avoid recurrence of the noncompliance. The inspector must determine whether the corrective action is acceptable. If they cannot do so, it may require further enforcement action.

Verifying an FAA-Mandated Drug and Alcohol Program

Whether you are an employer hiring a contract employee and need to verify the contractor's FAA-mandated drug and alcohol testing program, or you are a consortium/third party administrator (C/TPA) and need to verify your client's employees are performing DOT-regulated duties before adding them to a random pool, getting a copy of the employer's program documentation (such as the Operations Specifications paragraph (A449), Letter of Authorization paragraph (A049), or registration) is the best proof!

All FAA-regulated employers must ensure that any individual hired to perform safety-sensitive functions, directly or by contract (including subcontract at any tier), is subject to a DOT/FAA drug and alcohol testing program under 14 CFR part 120. FAA defines an employer under § 120.7(g) as a part 119 certificate holder with authority to operate under parts 121 and/or 135 of this chapter, an operator as defined in 14 CFR § 91.147 of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. Military. An employer may use a contract employee who is not included under its FAA-mandated drug and alcohol testing program to perform safety-sensitive functions only if that contract employee is included under the contractor's FAA-mandated drug and alcohol testing program and is performing a safety-sensitive function on behalf of that contractor (i.e., within the scope of employment with the contractor). A contractor would document the program under an A449 as a part 145 repair station that elects to conduct its own testing, or a registration for a non-certificated contractor or group of part 145 repair station operators. Employers hiring a contractor and contractors subcontracting work should obtain a copy of the program documentation to demonstrate coverage for a contractor.

Employers or contractors should verify that contract employees are subject to the contractor's FAA-mandated testing program on an on-going basis. Although part 120 does not require specific documentation to be kept on file, each employer or contractor must demonstrate to an FAA inspector that they have verified the employee is covered under an FAA-mandated program.

Hiring a Service Agent and Employer's Obligations

All DOT/FAA employers are responsible for their service agents hired to help carry out the requirements of the FAA and DOT regulations, in accordance with 49 CFR § 40.11(b). Whether you hire a consortium/third party administrator (C/TPA) to assist with your random testing selections or collection site to conduct your drug and alcohol testing, you are responsible for compliance with the federal rules. For that reason alone, it is critical that you take a hands-on approach with your service agents to ensure compliance and identify errors that can be fixed!

As it relates to your C/TPA, stay engaged and communicate often if they are managing your random testing to ensure you are meeting the requirements under 14 CFR § 120.109(b) and 14 CFR § 120.217(c). You must ensure your safety-sensitive employees have an equal chance of being tested each time a selection is made and that all your employees are in the random pool. If an employee should be removed or added, you must notify your C/TPA and you should always follow-up before a selection to ensure the random pool is updated.

If your employees are selected, you must get a random selection list in a timely manner and notify your employees throughout the testing cycle or calendar year. If you are in a combined random testing pool with other employers, check to ensure the C/TPA is on target to meet the minimum annual testing rate for the year. Remember that if your employees are in a combined pool with other employees regulated under a different DOT-transportation agency, the random testing pool must meet the highest rate dictated under the federal rule. For FAA, it is 25% for drug and 10% for alcohol. It is higher for employees covered under Federal Motor Carrier Safety Administration (FMCSA), which may impact your random testing rate. Talk to your C/TPA.

For collection personnel, it is even more critical to stay engaged. Collection personnel (including urine or oral fluid collectors, breath alcohol technicians (BATs), and screening test technicians (STTs)) are often the most vulnerable link in the entire program. Visit your collection site and go through a drug and alcohol collection or walk through the process step-by-step. Ask questions and refer to the DOT's website for a Collection Site Audit Brochure to use.

We published our inspection guide that includes a part for collection site reviews. These tools can help you verify the collector, BAT, and/or STT are consistent and compliant with the requirements for collecting a drug or alcohol test. Compare their words with your records, and report collectors to FAA who refuse to comply.

Remember that you must take an active role, and you can always take your money elsewhere! There are many service agents willing to compete for your business, and finding one that offers the quality and level of service that you require may reduce the amount of time you spend correcting vendor errors.

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What Happens When a Follow-Up Test is Positive

As an employer, if you return an employee to a safety-sensitive function following a DOT violation, successful evaluation by a DOT-qualified Substance Abuse Professional (SAP), and negative return-to-duty drug or alcohol test, you must implement the follow-up drug and/or alcohol testing in accordance with the SAP's plan. What happens if the employee fails a follow-up drug or alcohol test? The employer must immediately remove the employee from safety-sensitive duties and provide a listing of SAPs in accordance with 49 CFR § 40.285. The follow-up testing plan initially prescribed by the SAP would end, and the employee must start the return-to-duty process over if they plan to return to performing any safety-sensitive duties.

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An employer must consider whether a follow-up test violation indicates that an employee is permanently disqualified from performing the duties he or she performed prior to the result when it is a second positive drug test under 14 CFR § 120.111(e)(1) or second alcohol misuse violation under 14 CFR § 120.221(b)(2). An employer would determine an individual's status based on their drug and alcohol testing history and the employee's safety-sensitive position prior to the second test violation. If the employee is disqualified based on his or her testing history, we encourage employers to notify them and remind them they are obligated to repeat the return-to-duty process if they want to return to work in a different DOT or FAA-regulated safety-sensitive position.

How to Demonstrate a "Good Faith Effort"

All DOT-covered employers are required under 49 CFR § 40.25 to obtain a safety-sensitive applicant's written consent and request the drug and alcohol test information from DOT-regulated employer(s) who previously employed the applicant during any period in the previous two years. The request must be sent to each identified DOT-regulated employer(s) and the new employer must document a good faith effort to obtain the information within 30 days from when the employee first performs covered duties.

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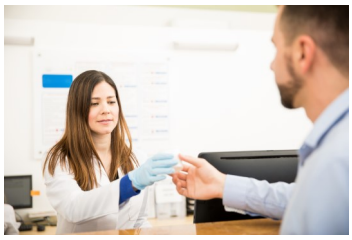
What is a "documented good faith effort" and what would an employer provide to an FAA inspector to demonstrate compliance? An employer must demonstrate the actions it took to obtain the applicant's previous testing information. Documentation would include sending the request and verification of receipt, which may include a certified mail receipt, fax confirmation, and/or time-stamped email. If the previous employer is out of business, and the email/mail is returned undeliverable or a fax did not transmit, the employer should first confirm the postal address, email, or fax number. This can be accomplished by talking to the employee or applicant to find out more information or search the internet to learn more about the former employer's business or contact information. These actions to confirm the previous employer's point of contact information should be made and documented prior to resending the request for drug and alcohol testing records.

How Soon Should Employees Report for Testing?

Immediately! When a safety-sensitive employee is on duty and notified to report for a drug or alcohol test by their employer, the employee must proceed immediately to the collection site without delay. An employee stopping along the way for personal or professional reasons could be deemed a refusal to test under 49 CFR § 40.191 or 49 CFR § 40.261 by an employer. A refusal to report for a DOT/FAA drug or alcohol test has the same consequences as a failed test.

- Employee must be removed from duty and cannot return to a safety-sensitive position until successfully completing the education and/or treatment with a DOT-qualified Substance Abuse Professional (SAP).
- Employees that hold an FAA issued certificate under 14 CFR part 61, 63, or 65 and refuse are reported to the FAA. The employee may lose some or all FAA certificates and job or face a monetary fine (civil penalty)!
- When applying for safety-sensitive work, an individual must report the previous refusal to any future DOT or FAA-regulated employer and provide records to demonstrate whether they met the requirements outlined in 49 CFR part 40, subpart O. Keep in mind that all hiring decisions are up to each employer.

For a pre-employment drug test, failing to appear in a timely manner, or not at all, is not a refusal to test. Once the applicant reports for the test and is provided the collection cup, they must complete the test. If there is a need for a second pre-employment drug test, then an applicant must report upon notification, or it is a refusal to test under 49 CFR § 40.191(a)(6).



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What You Should Know About an Insufficient Specimen

If a safety-sensitive employee is unable to provide a sufficient urine specimen for a DOT drug test, there are steps the collector, employer, and Medical Review Officer (MRO) must follow under 49 CFR § 40.193. Employees must comply with the testing process from the beginning to end, or it may be deemed a refusal to test by the Designated Employer Representative (DER) (see 49 CFR § 40.191). Once an employee provides an insufficient specimen, the collector must start the "shy bladder" protocols under § 40.193, which allow the donor to drink up to 40 ounces of fluid over a three-hour period to provide a sufficient 45 mL urine specimen. If the employee cannot provide within three hours, the collector must complete the federal custody and control form (CCF) and notify the DER. The DER, after consulting with the MRO, must direct the employee to obtain an evaluation from a licensed physician to determine if there is a medical explanation. The MRO will provide the licensed physician with instructions and determine the result of the test based on the information provided by the physician. If the MRO determines there is a medical condition that precluded the employee from providing a specimen, the MRO must cancel the test.

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The testing event is over unless the test requires a negative result (e.g., a pre-employment, return-to-duty, or follow-up test). In this case, the MRO must follow the steps under 49 CFR § 40.195. If there is no medical explanation for the insufficient specimen, the MRO determines the test is a refusal and the employee is prohibited from performing a safety-sensitive function for any DOT-regulated employer until they successfully complete the return-to-duty process under 49 CFR part 40, subpart O.

Stakeholder Outreach

Each year we participate in stakeholder conferences to share FAA-regulated drug and alcohol program news, national testing data/statistics, best practices for maintaining an effective program, resources, and other relevant topics in support of the testing regulations and critical safety awareness. On October 9, 2024, we participated as a guest speaker at the conference hosted by the Substance Abuse Program Administrators Association (SAPAA).

If you would like FAA's Drug Abatement Division to participate in a conference to discuss our drug and alcohol testing program, please send your request to drugabatement@faa.gov.

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Contact Us If You Need Help!

If you have questions about the FAA's drug and alcohol testing requirements that apply to aviation employers, employees, or service agents, please visit our website for an answer or contact us at drugabatement@faa.gov or 202-267-8442.

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