

## **FRA Guidance on Drug and Alcohol Testing Requirements During the COVID-19 Public Health Emergency<sup>1</sup>**

On March 23, 2020, the Department of Transportation (DOT) Office of Drug and Alcohol Policy and Compliance (ODAPC) issued *DOT Guidance on Compliance with Drug and Alcohol Testing Regulations* (“*ODAPC Guidance*”) to provide clarity on DOT drug and alcohol testing requirements given concerns about Coronavirus Disease 2019 (COVID-19). (See <https://www.transportation.gov/odapc/compliance-with-dot-drug-and-alcohol-testing-regulations>.) The *ODAPC Guidance* indicates that DOT-regulated employers must comply with applicable DOT testing requirements, which include the Federal Railroad Administration’s (FRA) alcohol and drug testing regulations at Part 219.

Nevertheless, the *ODAPC Guidance* acknowledges that compliance with regulations such as Part 219 may not be possible due to various COVID-19-related concerns, and directs employers to “applicable modal regulations” that might apply in situations where testing cannot be completed. On March 30, 2020, FRA issued the guidance below<sup>2</sup> in response to an emergency waiver request to illustrate the flexibility the following Part 219 provisions provide to a railroad<sup>3</sup> that is unable to complete a testing collection for COVID-19-related reasons.

### **RANDOM ALCOHOL AND DRUG TESTING**

- **49 C.F.R. § 219.615(f), *Incomplete collections.*** “A railroad must use due diligence to ensure that a random testing collection is completed for each selected pool entry, unless it has an acceptable explanation for not conducting the collection. All reasons for incomplete collections must be fully documented and are subject to inspection by FRA upon request.”

*If a railroad believes it has an acceptable COVID-19-related reason for not conducting a random testing collection, it must document that reason, which is subject to FRA inspection. Except for situations where a railroad has acted in bad faith, FRA will exercise its discretion not to take enforcement action if a railroad used due diligence to complete a random testing collection, but was unable to do so for documented COVID-19-related reasons.*

- **49 C.F.R. § 219.613(f), *Increasing random selections.*** “A railroad that is unable to complete a collection for each selection made during a designated testing period may increase the number of selections in a subsequent selection period to ensure that it meets the annual minimum random testing rate for the calendar year.”

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<sup>1</sup> This guidance document does not have the force and effect of law and is not meant to bind the public in anyway. It is intended only to provide clarity regarding existing requirements under the law.

<sup>2</sup> <https://www.regulations.gov/document?D=FRA-2020-0002-0032>

<sup>3</sup> These provisions also apply to railroad contractors and subcontractors conducting FRA random alcohol and drug testing.

*If a railroad is unable, due to COVID-19-related reasons, to complete testing for each selection in a testing window, the railroad may increase the number of selections in a subsequent selection period to help ensure that it meets the 2020 minimum annual random testing rate.*

- **49 C.F.R. § 219.613(c)(1), Minimum random testing rate.** “Each railroad must distribute random tests reasonably throughout the calendar year and make sufficient selections to ensure that each random testing pool meets the Administrator's minimum annual random testing rates as established according to §219.625.”

*If a railroad schedules additional random test collections later in 2020 for COVID-19-related reasons and the railroad documents its schedule and the COVID-19-related reasons, FRA would consider this a reasonable distribution of random tests to ensure that the railroad meets the minimum annual random testing rate for 2020.*

- **49 C.F.R. § 219.617(a)(3), Railroad responsibility.** “A railroad may excuse an employee who has been notified of [his] or her selection for random testing only if the employee can substantiate that a medical emergency involving the employee or an immediate family member (*e.g.*, birth, death, or medical emergency) supersedes the requirement to complete the test. A medical emergency is defined in this part as an acute medical condition requiring immediate emergency care. To be eligible for exclusion from random testing, the employee must provide verifiable documentation of the emergency situation from a credible outside professional within a reasonable period of time (*e.g.*, a doctor, dentist, hospital, law enforcement officer, or school authority). A railroad may not test an employee who has been excused from testing under the same random selection.”

*For purposes of § 219.617(a)(3), any one of the following are examples of situations FRA would consider a medical emergency superseding the requirement to complete a random testing collection:*

- *An employee who has a positive COVID-19 test result;*
- *An employee who has been tested for COVID-19 and is awaiting the test result; or*
- *An employee who is exhibiting symptoms of COVID-19.*

As a reminder, a railroad may only subject an employee to random testing when the employee is on-duty and subject to performing regulated service. *See* 49 C.F.R. §§ 219.12(c) and 219.615(c)(1). An employee who is off-duty for COVID-19-related reasons may not, therefore, be called on-duty for the purpose of random testing.

Finally, consistent with the *ODAPC Guidance*, employees should be encouraged to discuss any COVID-19-related random testing concerns with their employing railroads. FRA joins ODAPC in suggesting that railroads respond to employee concerns in a sensitive and respectful way.

This discussion is not intended to be a complete description of either the *ODAPC Guidance* or Part 219 requirements. For further discussion on COVID-19 and DOT drug and alcohol testing requirements, please consult the *ODAPC Guidance*.

## TIME LIMIT REQUIREMENTS FOR ALCOHOL AND DRUG TESTING

These requirements are found in 49 C.F.R. § 219.203(d)(1) for post-accident testing, § 219.305(b) for reasonable suspicion testing, and § 219.407(b) for reasonable cause testing.

### Post-Accident Testing

In § 219.203(d)(1), it says that “specimens are provided as soon as possible after the accident or incident, preferably within four hours.” If specimens are not collected within four hours, they “must be collected as soon thereafter as practicable.” The only temporal cutoff is found in § 219.203(e)(3), which states that an employee “may not be recalled for testing if more than 24 hours have passed since the qualifying event.”

Post-accident testing must always be completed, regardless of delay (except that an employee may not be recalled for testing if more than 24 hours have passed since the qualifying event). In the context of post-accident testing, the public interest supports obtaining available toxicological testing information, regardless of delay in obtaining specimens. *See* 54 FR 39646-39645 (Sep. 27, 1989).

### Reasonable Suspicion Testing

- **49 C.F.R. § 219.301(a) Mandatory reasonable suspicion testing.** “Each railroad must require a regulated employee to submit to a breath alcohol test when the railroad has reasonable suspicion to believe that the regulated employee has violated any prohibition of subpart B of this part concerning use of alcohol. The railroad’s determination that reasonable suspicion exists to require the regulated employee to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. A Federal reasonable suspicion alcohol test is not required to confirm the on-duty possession of alcohol.”
- **49 C.F.R. § 219.301(b) Mandatory reasonable suspicion testing.** “Each railroad must require a regulated employee to submit to a drug test when the railroad has reasonable suspicion to believe that the regulated employee has violated the prohibitions of subpart B of this part concerning use of controlled substances. The railroad’s determination that reasonable suspicion exists to require the regulated employee to undergo a drug test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. Such observations may include indications of the chronic and withdrawal effects of drugs.”
- **49 C.F.R. § 219.305(a) Prompt specimen collection; time limitations.** “Consistent with the need to protect life and property, testing under this subpart must be conducted promptly following the observations upon which the testing decision is based.”

As shown by the § 219.301(a) requirement for “contemporaneous” observations and the § 219.305(a) requirement to complete reasonable suspicion testing “promptly,” testing for potential on-duty impairment is time-sensitive. If a railroad cannot complete a reasonable suspicion test

within the current 8-hour deadline, as required under § 219.407(b), for COVID-19-related reasons, the railroad must document why in accordance with § 219.305(b). As with random testing, FRA will exercise discretion to not take enforcement action if a railroad exercised good faith and due diligence to complete the collection.

### **Reasonable Cause Testing**

FRA reasonable cause testing is authorized, but not required. A railroad that chooses to conduct a reasonable cause test should determine at the time of its decision whether a collector or other necessary resources will be available. If a railroad is unable to complete a reasonable cause collection within the current 8-hour deadline for COVID-19-related reasons, the railroad must document why in accordance with 49 C.F.R. § 219.407(b). Because reasonable cause testing is not required, a railroad failing to complete a reasonable cause collection within the § 219.407(b) timelines will not be subject to FRA enforcement action.