

## § 120.205

testing are made applicable to employers by this subpart.

(c) *Employer responsibility.* As an employer, you are responsible for all actions of your officials, representatives, and service agents in carrying out the requirements of the DOT agency regulations.

### § 120.205 Preemption of State and local laws.

(a) Except as provided in paragraph (a)(2) of this section, these regulations preempt any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement and this subpart is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this subpart.

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

### § 120.207 Other requirements imposed by employers.

Except as expressly provided in these alcohol testing requirements, nothing in this subpart shall be construed to affect the authority of employers, or the rights of employees, with respect to the use or possession of alcohol, including any authority and rights with respect to alcohol testing and rehabilitation.

### § 120.209 Requirement for notice.

Before performing an alcohol test under this subpart, each employer shall notify a covered employee that the alcohol test is required by this subpart. No employer shall falsely represent that a test is administered under this subpart.

### § 120.211 Applicable Federal regulations.

The following applicable regulations appear in 49 CFR and 14 CFR:

## 14 CFR Ch. I (1–1–12 Edition)

(a) 49 CFR Part 40—Procedures for Transportation Workplace Drug Testing Programs

(b) 14 CFR:

(1) § 67.107—First-Class Airman Medical Certificate, Mental.

(2) § 67.207—Second-Class Airman Medical Certificate, Mental.

(3) § 67.307—Third-Class Airman Medical Certificate, Mental.

(4) § 91.147—Passenger carrying flights for compensation or hire.

(5) § 135.1—Applicability

[Doc. No. FAA–2008–0937, 74 FR 22653, May 14, 2009; Amdt. 120–0A, 75 FR 3154, Jan. 20, 2010]

### § 120.213 Falsification.

No individual may make, or cause to be made, any of the following:

(a) Any fraudulent or intentionally false statement in any application of an alcohol testing program.

(b) Any fraudulent or intentionally false entry in any record or report that is made, kept, or used to show compliance with this subpart.

(c) Any reproduction or alteration, for fraudulent purposes, of any report or record required to be kept by this subpart.

### § 120.215 Covered employees.

(a) Each employee, including any assistant, helper, or individual in a training status, who performs a safety-sensitive function listed in this section directly or by contract (including by subcontract at any tier) for an employer as defined in this subpart must be subject to alcohol testing under an alcohol testing program implemented in accordance with this subpart. This includes full-time, part-time, temporary, and intermittent employees regardless of the degree of supervision. The safety-sensitive functions are:

(1) Flight crewmember duties.

(2) Flight attendant duties.

(3) Flight instruction duties.

(4) Aircraft dispatcher duties.

(5) Aircraft maintenance or preventive maintenance duties.

(6) Ground security coordinator duties.

(7) Aviation screening duties.

(8) Air traffic control duties.

(b) Each employer must identify any employee who is subject to the alcohol testing regulations of more than one

DOT agency. Prior to conducting any alcohol test on a covered employee subject to the alcohol testing regulations of more than one DOT agency, the employer must determine which DOT agency authorizes or requires the test.

**§ 120.217 Tests required.**

(a) *Pre-employment alcohol testing.* As an employer, you may, but are not required to, conduct pre-employment alcohol testing under this subpart. If you choose to conduct pre-employment alcohol testing, you must comply with the following requirements:

(1) You must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(2) You must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (*i.e.*, you must not test some covered employees and not others).

(3) You must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(4) You must conduct all pre-employment alcohol tests using the alcohol testing procedures of 49 CFR part 40.

(5) You must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04. If a pre-employment test result under this paragraph indicates an alcohol concentration of 0.02 or greater but less than 0.04, the provisions of §120.221(f) apply.

(b) *Post-accident alcohol testing.* (1) As soon as practicable following an accident, each employer shall test each surviving covered employee for alcohol if that employee's performance of a safety-sensitive function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the employ-

er's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.

(2) If a test required by this section is not administered within 2 hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FAA upon request of the Administrator or his or her designee.

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

(c) *Random alcohol testing.* (1) Except as provided in paragraphs (c)(2) through (c)(4) of this section, the minimum annual percentage rate for random alcohol testing will be 25 percent of the covered employees.

(2) The Administrator's decision to increase or decrease the minimum annual percentage rate for random alcohol testing is based on the violation rate for the entire industry. All information used for this determination is drawn from MIS reports required by this subpart. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the Administrator will publish in the FEDERAL REGISTER the minimum annual percentage rate for random alcohol testing of covered employees. The new minimum annual percentage rate for