

commencing the subject operation. FRA will attempt to decide on such petitions within 90 days. If no action is taken on the petition within 90 days, the petition remains pending for decision and the cross-border crew assignments on the operation covered by the petition will be subject to subparts E, F, and G until FRA grants the petition should the petitioner commence the proposed operation.

[66 FR 41973, Aug. 9, 2001, as amended at 69 FR 19287, Apr. 12, 2004]

§ 219.9 Responsibility for compliance.

(a) Any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$650 and not more than \$25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed \$105,000 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, e.g., § 219.105, which must be construed to qualify the responsibility of a railroad for the unauthorized conduct of an employee that violates § 219.101 or § 219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See appendix A to this part for a statement of agency civil penalty policy.

(b)(1) In the case of joint operations, primary responsibility for compliance with this part with respect to determination of events qualifying for breath or body fluid testing under subparts C and D of this part rests with the host railroad, and all affected em-

ployees must be responsive to direction from the host railroad consistent with this part. However, nothing in this paragraph (b)(1) restricts the ability of the railroads to provide for an appropriate assignment of responsibility for compliance with this part as among those railroads through a joint operating agreement or other binding contract. FRA reserves the right to bring an enforcement action for noncompliance with applicable portions of this part against the host railroad, the employing railroad, or both.

(2) Where an employee of one railroad is required to participate in breath or body fluid testing under subpart C or D of this part and is subsequently subject to adverse action alleged to have arisen out of the required test (or alleged refusal thereof), necessary witnesses and documents available to the other railroad must be made available to the employee on a reasonable basis.

(c) Any independent contractor or other entity that performs covered service for a railroad has the same responsibilities as a railroad under this part, with respect to its employees who perform covered service. The entity's responsibility for compliance with this part may be fulfilled either directly by that entity or by the railroad's treating the entity's employees who perform covered service as if they were its own employees for purposes of this part. The responsibility for compliance must be clearly spelled out in the contract between the railroad and the other entity or in another document. In the absence of such a clear delineation of responsibility, FRA will hold the railroad and the other entity jointly and severally liable for compliance.

[66 FR 41973, Aug. 9, 2001, as amended at 69 FR 30593, May 28, 2004; 72 FR 51196, Sept. 6, 2007; 73 FR 79701, Dec. 30, 2008; 77 FR 24420, Apr. 24, 2012]

§ 219.11 General conditions for chemical tests.

(a) Any employee who performs covered service for a railroad is deemed to have consented to testing as required in subparts B, C, D, and G of this part; and consent is implied by performance of such service.

(b)(1) Each such employee must participate in such testing, as required

§219.11

49 CFR Ch. II (10–1–12 Edition)

under the conditions set forth in this part by a representative of the railroad.

(2) In any case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimen(s).

(3) Failure to remain available following an accident or casualty as required by company rules (i.e., being absent without leave) is considered a refusal to participate in testing, without regard to any subsequent provision of specimens.

(c) A covered employee who is required to be tested under subpart C or D of this part and who is taken to a medical facility for observation or treatment after an accident or incident is deemed to have consented to the release to FRA of the following:

(1) The remaining portion of any body fluid specimen taken by the treating facility within 12 hours of the accident or incident that is not required for medical purposes, together with any normal medical facility record(s) pertaining to the taking of such specimen;

(2) The results of any laboratory tests for alcohol or any drug conducted by or for the treating facility on such specimen;

(3) The identity, dosage, and time of administration of any drugs administered by the treating facility prior to the time specimens were taken by the treating facility or prior to the time specimens were taken in compliance with this part; and

(4) The results of any breath tests for alcohol conducted by or for the treating facility.

(d) An employee required to participate in body fluid testing under subpart C of this part (post-accident toxicological testing) or testing subject to subpart H of this part shall, if requested by the representative of the railroad or the medical facility (including, under subpart H of this part, a non-medical contract collector), evidence consent to taking of specimens, their release for toxicological analysis under pertinent provisions of this part, and release of the test results to the

railroad's Medical Review Officer by promptly executing a consent form, if required by the medical facility. The employee is not required to execute any document or clause waiving rights that the employee would otherwise have against the employer, and any such waiver is void. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others. Any consent provided consistent with this section may be construed to extend only to those actions specified in this section.

(e) Nothing in this part may be construed to authorize the use of physical coercion or any other deprivation of liberty in order to compel breath or body fluid testing.

(f) Any railroad employee who performs service for a railroad is deemed to have consented to removal of body fluid and/or tissue specimens necessary for toxicological analysis from the remains of such employee, if such employee dies within 12 hours of an accident or incident described in subpart C of this part as a result of such event. This consent is specifically required of employees not in covered service, as well as employees in covered service.

(g) Each supervisor responsible for covered employees (except a working supervisor within the definition of co-worker under this part) must be trained in the signs and symptoms of alcohol and drug influence, intoxication and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of alcohol and the major drug groups on the controlled substances list. The program must also provide training on the qualifying criteria for post-accident testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C and appendix C of this part. The duration of such training may not be less than 3 hours.

(h) Nothing in this subpart restricts any discretion available to the railroad

Federal Railroad Administration, DOT

§ 219.23

to request or require that an employee cooperate in additional body fluid testing. However, no such testing may be performed on urine or blood specimens provided under this part. For purposes of this paragraph (h), all urine from a void constitutes a single specimen.

(i) A railroad required or authorized to conduct testing under this part may conduct all such testing in the United States. A foreign railroad required to conduct testing under this part may conduct such tests in its home country, provided that it otherwise complies with the requirements of this part.

[66 FR 41973, Aug. 9, 2001, as amended at 69 FR 19288, Apr. 12, 2004]

§ 219.13 Preemptive effect.

(a) Under section 20106 of title 49, United States Code, issuance of the regulations in this part preempts any State law, rule, regulation, order or standard covering the same subject matter, except a provision directed at a local hazard that is consistent with this part and that does not impose an undue burden on interstate commerce.

(b) FRA does not intend by issuance of the regulations in this part to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

§ 219.15 [Reserved]

§ 219.17 Construction.

Nothing in this part—

(a) Restricts the power of FRA to conduct investigations under sections 20107, 20108, 20111, and 20112 of title 49, United States Code; or

(b) Creates a private right of action on the part of any person for enforcement of the provisions of this part or for damages resulting from noncompliance with this part.

§ 219.19 [Reserved]

§ 219.21 Information collection.

(a) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork

Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2130-0526.

(b) The information collection requirements are found in the following sections: 219.7, 219.23, 219.104, 219.201, 219.203, 219.205, 219.207, 219.209, 219.211, 219.213, 219.303, 219.401, 219.403, 219.405, 219.407, 219.501, 219.502, 219.503, 219.601, 219.605, 219.701, 219.801, 219.803, 219.901, and 219.903.

§ 219.23 Railroad policies.

(a) Whenever a breath or body fluid test is required of an employee under this part, the railroad must provide clear and unequivocal written notice to the employee that the test is being required under FRA regulations. Use of the mandated DOT form for drug or alcohol testing satisfies the requirements of this paragraph (a).

(b) Whenever a breath or body fluid test is required of an employee under this part, the railroad must provide clear, unequivocal written notice of the basis or bases upon which the test is required (e.g., reasonable suspicion, violation of a specified operating/safety rule enumerated in subpart D of this part, random selection, follow-up, etc.). Completion of the DOT alcohol or drug testing form indicating the basis of the test (prior to providing a copy to the employee) satisfies the requirement of this paragraph (b). Use of the DOT form for non-Federal tests is prohibited.

(c) Use of approved forms for mandatory post-accident toxicological testing under subpart C of this part provides the notifications required under this section with respect to such tests. Use of those forms for any other test is prohibited.

(d) Each railroad must provide educational materials that explain the requirements of this part, and the railroad's policies and procedures with respect to meeting those requirements.

(1) The railroad must ensure that a copy of these materials is distributed to each covered employee prior to the start of alcohol testing under the railroad's alcohol misuse prevention program and to each person subsequently hired for or transferred to a covered position.