

per month (*e.g.*, you select daily, weekly, bi-weekly), you do not need to compute this total number of covered employees rate more than on a once per month basis.

(i) As a railroad, you may use a service agent (*e.g.*, C/TPA) to perform random selections for you, and your covered employees may be part of a larger random testing pool of covered employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only covered employees are in the random testing pool.

(ii) [Reserved]

(2) The program must include testing procedures and safeguards, and, consistent with this part, procedures for action based on tests where the employee is found to have violated § 219.101.

(3) The program must ensure that random alcohol tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(4) The program must ensure to the maximum extent practicable that each covered employee perceives the possibility that a random alcohol test may be required at any time the employee reports for work and at any time during the duty tour (except any period when the employee is expressly relieved of any responsibility for performance of covered service).

(5) An employee may be subject to testing only while on duty. Only employees who perform covered service for the railroad may be subject to testing under this part. In the case of employees who during some duty tours perform covered service and during others do not, the railroad program may specify the extent to which, and the circumstances under which they are subject to testing. To the extent practical within the limitations of this part and in the context of the railroad's operations, the railroad program must provide that employees are subject to the possibility of random testing on any day they actually perform covered service.

(6) Testing must be conducted promptly, as provided in § 219.701(b)(1).

(7) Each time an employee is notified for random alcohol testing the employee must be informed that selection was made on a random basis.

(8) Each railroad must ensure that each covered employee who is notified of selection for random alcohol testing proceeds to the test site immediately; provided, however, that if the employee is performing a safety-sensitive function at the time of the notification, the railroad must instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(c) *Implementation.* (1) No later than 45 days prior to commencement of random alcohol testing, the railroad must publish to each of its covered employees, individually, a written notice that the employee will be subject to random alcohol testing under this part. Such notice must state the date for commencement of the program, must state that the selection of employees for testing will be on a strictly random basis, must describe the consequences of a determination that the employee has violated § 219.101 or any applicable railroad rule, and must inform the employee of the employee's rights under subpart E of this part. A copy of the notice must be provided to each new covered employee on or before the employee's initial date of service. Since knowledge of Federal law is presumed, nothing in this paragraph (c)(1) creates a defense to a violation of § 219.101. This notice may be combined with the notice or policy statement required by § 219.23.

(2) A railroad commencing operations must submit a random testing program 60 days after doing so. The railroad must implement its approved random testing program not later than the expiration of 60 days from approval by the Administrator.

[66 FR 41973, Aug. 9, 2001, as amended at 68 FR 75464, Dec. 31, 2003]

**§ 219.608 FRA Administrator's determination of random alcohol testing rate.**

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random alcohol testing must be 25 percent of covered employees.

(b) 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 the determination is drawn from the alcohol MIS reports required by this part. 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 random alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of §219.800 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of §219.800 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of §219.800 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting require-

ments of §219.800 for any calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The railroad must randomly select and test a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the Administrator. If the railroad conducts random alcohol testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random testing at the same minimum annual percentage rate under this part or any DOT agency alcohol testing rule.

(f) If a railroad is required to conduct random alcohol testing under the alcohol testing rules of more than one DOT agency, the railroad may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the railroad is subject.

[66 FR 41973, Aug. 9, 2001, as amended at 68 FR 75464, Dec. 31, 2003]

**§219.609 Participation in alcohol testing.**

A railroad must, under the conditions specified in this subpart and subpart H of this part, require a covered employee selected through the random testing program to cooperate in breath testing to determine compliance with §219.101, and the employee must provide the required breath and complete the required paperwork and certifications. Compliance by the employee may be excused only in the case of a documented medical or family emergency.