

DEPARTMENT OF TRANSPORTATION**Federal Transit Administration****49 CFR Part 653**

[Docket No 92-H]

RIN 2132-AA37

Prevention of Prohibited Drug Use in Transit Operations

AGENCY: Federal Transit Administration, DOT.

ACTION: Final rule; technical amendments.

SUMMARY: The Federal Transit Administration (FTA) is making technical amendments to its anti-drug rule to correct a citation, add words that inadvertently had been omitted, redesignate a provision, and clarify portions of the preamble discussion of the rule. This rule is intended to clarify the existing rule.

DATES: This rule is effective March 6, 1995.

FOR FURTHER INFORMATION CONTACT: Nancy M. Zaczek, Attorney-Advisor for Legislation and Rulemaking, Office of the Chief Counsel, FTA, 400 7th Street SW, Washington DC 20590. (202) 366-4011. Information may also be obtained from Judy Meade or Rhonda Crawley of the Office of Safety and Security, Federal Transit Administration, same address. (202) 366-2896.

SUPPLEMENTARY INFORMATION: FTA recipients and other interested parties may access this rule through the FTA's Transit Safety and Security Bulletin Board using a microcomputer and a modem. The telephone number for the Bulletin Board is 1-800-231-2061. The Bulletin Board is a user-friendly, menu-driven system with information accessible seven days a week, twenty-four hours a day. Once registration is completed, interested parties may access this and other regulations.

To obtain additional information regarding access to the Bulletin Board, please contact the Operator, at (617) 494-2108, or leave a message on the Message Board of the Bulletin Board.

The FTA is making the following technical amendments to its anti-drug rule.

Applicability—Commuter Railroads and CDL Holders

The applicability provision, section 653.5, clarifies which Department of Transportation (DOT) drug and alcohol testing program covers Commercial Drivers License (CDL) holders who work for commuter railroads. Three DOT agencies are involved in this issue: FTA,

which funds commuter railroads; the Federal Railroad Administration (FRA), which regulates railroads, including commuter railroads; and the Federal Highway Administration (FHWA), which requires CDL holders to be tested for prohibited drugs and the misuse of alcohol. Under the FTA's final rule, to avoid jurisdictional problems, commuter railroads that receive FTA funds are to comply with FRA's drug and alcohol regulation. Because the FRA regulation only covers hours-of-service employees, however, there remains a question as to which agency's drug and alcohol program covers CDL holders who work for a commuter railroad. This rule clarifies that it is FHWA's regulation that covers such CDL holders.

We also note that the FRA hours-of-service classification system does not include the same kinds of workers covered under FTA's rules; for example, armed security personnel are covered by FTA's rules but not FRA's. Because FTA in its rule has delegated its authority to require commuter railroads to implement a drug and alcohol testing program to FRA, commuter railroad workers who are not safety-sensitive under FRA's rule are not subject to testing, even though they would be if they were subject to FRA's rules.

Section 653.5 is changed to correct a citation error in a reference to the regulations of the United States Coast Guard. The citation now reads 33 CFR part 95 and 46 CFR parts 4, 5, and 16.

Definitions

The definition of the term "disabling damage" is changed to be consistent with the definition used by the Federal Highway Administration, and is now defined independently of the term "accident."

The definition of "large operator" is changed to add the word "urbanized," which inadvertently was omitted. Thus, a large operator operates primarily in an urbanized area of 200,000 or more in population.

A parallel change is made to the definition of "small operator," which operates primarily in a nonurbanized area or in an urbanized area of less than 200,000 in population. These changes are consistent with the way the Federal Transit Administration administers its grant programs.

The definition of "safety-sensitive function" is changed, at subsection (4), to clarify that the rule excludes from coverage maintenance contractors working for recipients or small operators primarily serving an area of less than 50,000 in population, regardless of whether they receive section 18 or section 3 funding.

The definition of "vehicle" is changed to add, in the category of "mass transit vehicle," certain vehicles used for services ancillary to mass transportation. The definition of a mass transit vehicle thus now includes not only buses and vans, but also nonrevenue service commercial motor vehicles and vehicles used by armed security personnel.

Starting Date for Drug Testing Programs

Section 653.13 makes a conforming change in the implementation section of the rule to reflect the addition of the word "urbanized" to the definition of large operator.

Referral, Evaluation, and Treatment

Section 653.37(a) is changed to add the word "or," which clarifies that an employee who either refuses to submit to a drug test or has a verified positive drug test result must be advised of the resources available to him or her in evaluating and resolving problems associated with prohibited drug use, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

Supervisors Acting as a Collection Person

The reasonable suspicion testing provision, section 653.43, specifically prohibited a supervisor from acting as a collection site person for covered employees under his or her direct supervision. This provision, however, was misplaced; it was our intention to prohibit a direct supervisor from acting as a collection site person for any of the tests required under the rule. Accordingly, we have redesignated section 653.43(c) as section 653.65.

Post-Accident Testing

Sections 653.45(a)(1), (a)(2)(i), and (a)(2)(ii) are amended to change the phrase "on duty in," to "operating." The provision as drafted required the testing of any safety-sensitive employee on duty in a revenue service vehicle when an accident occurred. The rule, however, was not meant to use the same standard for both vehicle operators and other covered employees who happen to be in the vehicle at the time of the accident. Thus, the mass transit vehicle operator must be tested if an accident has occurred and he or she has received a citation from a State or local law enforcement official. (In a Notice of Proposed Rulemaking published in the **Federal Register** on February 6, 1995, at 60 FR 7169, the FTA seeks comment on whether this citation requirement should be deleted.) We note that to test

other covered employees, the employer must determine whether that employee contributed to the accident, using the best information available at the time of the decision.

Random Testing Rate

On December 2, 1994, FTA changed section 653.47 by, among other things, adopting a performance-based random drug testing rate. For more information on these changes, see 59 FR 62217-62231.

Certification of Compliance

On October 12, 1994, the FTA published a **Federal Register** Notice, at 59 FR 51793, entitled "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements." In the Notice, FTA compiled a complete listing and the full text of the certifications and assurances necessary to receive financial assistance from the Federal Transit Administration. Instead of submitting a variety of certifications and assurances with each grant application, the grant applicant and its attorney certify compliance with all of the certifications and assurances relevant to any and all grants for which the grant applicant wishes to apply in fiscal year 1995 by signing the single Signature Page, attached to the Notice at 59 FR 51813. The Notice, which will be updated and republished annually for use in future fiscal years, includes a certification of compliance with the FTA drug and alcohol testing program. Accordingly, we are deleting as unnecessary the sample certification in the rule.

Retention of Records

The preamble discussion of this topic contained an error; specifically, it stated in Subpart E, paragraph A, at 59 FR 7587, that "[t]he rule provides three separate record retention periods for different types of records—five years, three years, and one year." Actually, records must be retained for either five years, two years, or one year. The regulatory text, however, is accurate, and remains unchanged.

Executive Order 12612

We inadvertently stated in this paragraph, at 59 FR 7589, that FTA was not preempting Indian tribal law. Elsewhere in the preamble, however, we discussed this issue at length and concluded that FTA is preempting Indian tribal law under the standard developed by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). There is a comprehensive discussion of

this issue in the **Federal Register**, published on February 15, 1994, at 59 FR 7541, 7549, and 7581.

List of Subjects in Part 653

Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety and Transportation.

For the reasons set forth in the preamble, the FTA amends Title 49, Code of Federal Regulations, part 653 as follows:

1. The authority for part 653 continues to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

§ 653.5 [Amended]

a. Paragraph (b) of § 653.5 is amended by removing "part 219" and adding "parts 219 and 382, as appropriate".

2. The note to § 653.5 is amended by changing the phrase "and 6" to the phrase "and 16".

§ 653.7 [Amended]

3. In § 653.7, the definition of *accident* is amended in paragraph (3) by removing the period at the end of the first sentence and adding a semicolon; and by removing the second and third sentences.

4. The definition of *large operator* is amended by adding the word "urbanized" after the word "an" and before the word "area".

5. The definition of *safety-sensitive function* is amended in paragraph (4) by adding the words "section 3 funding and is in an area of less than 50,000 in population or" after the word "receives" and before the word "section".

6. The definition of *small operator* is amended by removing the words "in an area" and adding in their place the words "in a nonurbanized area or in an urbanized area."

7. The definition of *vehicle* is amended by adding the words "or for ancillary services" after the word "transportation" and before the period.

8. In § 653.7 a new definition following the definition of "covered employee" is added as follows:

§ 653.7 [Definitions]

* * * * *

Disabling damage means damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusion*. Damage to motor vehicles that could have been driven,

but would have been further damaged if so driven.

(2) Exclusions.

(i) Damage which can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlamp or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers which makes them inoperative.

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§ 653.13 [Amended]

9. Section 653.13(a) is amended by adding the word "primarily" after the word "operating" and before the word "in" and by adding the word "urbanized" after the word "an" and before the word "area".

10. Section 653.13(b) is amended by removing the words "operating in an area" and adding in their place the words "operating primarily in a nonurbanized area or in an urbanized area".

§ 653.37 [Amended]

11. Section 653.37(a) is amended by adding the word "or" after the word "result" and before the word "refuses".

§ 653.43 [Amended]

12. Section 653.43(c) is redesignated as § 653.65, *Supervisor acting as collection site person*, in subpart D.

§ 653.45 [Amended]

13. Section 653.45(a)(1) is amended by removing the phrase "on duty in" and adding in its place the word "operating".

14. Section 653.45(a)(2)(i) is amended by removing the phrase "on duty in" and adding the word "operating" in its place.

15. Section 653.45(a)(2)(ii) is amended by removing the phrase "on duty in" and adding the word "operating" in its place.

Appendix A to Part 653 [Removed and Reserved]

16. Appendix A to Part 653, Sample Certification of Compliance, is removed and reserved.

Date Issued: February 27, 1995.

Gordon J. Linton,
Administrator.

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