



FTA VS. FMCSA: DRUG AND ALCOHOL TESTING - A REGULATORY COMPARISON

2009

Presented by: John Morrison, Senior Auditor

Prior Comparisons

FTA vs. FHWA

- FTA-FMCSA Comparisons
 - ❖ FTA Drug and Alcohol Regulation Updates Newsletter Issue 11 Spring 1999
 - ❖ 2003 Revisions to *Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit*
- Drug and Alcohol Testing – A Survey of Labor-Management Relations
 - ❖ TCRP 16/NCHRP 46 – June 2001-pp 25-33

Regulatory Citations

FMCSA established 1 / 1 / 2000

FTA

- 49 CFR Part 655
- Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations

FMCSA

- 49 CFR Part 382
- Controlled Substances and Alcohol Use and Testing

Procedural Regulation

FTA

- Testing procedures
- 49 CFR Part 40

FMCSA

- Testing procedures
- 49 CFR Part 40

Coverage

FTA

- Recipients of FTA funding (5307, 5309, 5311, 5316 (JARC), 5317 (New Freedom) and 23 U.S.C. 103(e)(4)
- Regulation is of *employers only*

FMCSA

- “Every person and all employers of such persons”
- *Drivers only*
 - Hold CDL under 383
 - Licencia Federal de Conductor (Mexico)
 - Canadian National Safety Code Commercial Drivers Licensing

Drugs Prohibited

FTA

- Prohibited drugs
 - Marijuana, Cocaine, Amphetamines, Opiates, PCP

FMCSA

- Prohibited drugs
 - Marijuana, Cocaine, Amphetamines, Opiates, PCP

Safety-Sensitive Functions

FTA

- Operators, Dispatchers, Mechanics, CDL/Non-Revenue, Armed Security, Supervisors if may perform S-S
- Includes trainees when driving, even if not in revenue service
- Volunteers if required to have a CDL or for remuneration in excess of actual expenses

FMCSA

- Drivers who operate a CMV in commerce when they are:
 - Driving or **required to be ready to drive**
 - Waiting to be dispatched
 - Inspecting, repairing, securing assistance, loading or unloading the CMV
- Covers mechanics, dispatchers, etc if they may be required to drive a CMV at any time

Most Provisions Similar— Policy Provisions (1)

FTA

- Develop policy statement
- Disseminate policy or notice of availability to employees
- No explicit requirement for notice to employee organizations
- Adopted by local governing board
- No requirement for certification of receipt

FMCSA

- Provide educational material explaining policy and procedures
- Distribute to each driver
- Written notice to employee organizations
- No adoption requirement
- Certification of receipt required

Policy Provisions (2)

FTA

- Person, office, branch position for questions
- Safety-sensitive categories
- Prohibited behavior
- Testing circumstances
- Testing procedures

FMCSA

- Person who answers questions
- Categories of drivers subject to regs
- Covered S-S duties
- Prohibited behavior
- Testing circumstances
- Testing procedures

Policy Provisions (3)

FTA

- Requirement to submit to testing
- Refusal behaviors
- Consequences of positive/refused test including immediate removal
- Consequences BAC 0.02 to 0.039

FMCSA

- Requirement to submit to testing
- Refusal behaviors
- Consequences of positive/refused test including immediate removal
- Consequences BAC 0.02 to 0.039

Policy Provisions (4)

FTA

- Additional employer provisions

FMCSA

- Effects of alcohol & drugs, signs and symptoms, methods of intervention, referral to EAP and/or management
- Additional employer provisions

Employees of Multi-Modal Employers

- ❑ Single Pre-employment Test
- ❑ Ran rate of mode regulating 50%+ of emp time
- ❑ Modal reg covering function at time when post-accident or RS testing becomes required
- Sec. 655.45(i) and §382.305(n) both state: “If a given driver is subject to random alcohol or controlled substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the driver's function.”

Most Provisions Similar-

Random Testing

FTA

Random testing rate, minimum

- 25% drugs
- 10% alcohol

Scientifically valid selection

Unannounced and unpredictable

Reasonably spread through calendar year

At all times of day

FMCSA

Random testing rate, minimum

- 50% drugs
- 10% alcohol

Same

Unannounced (“After a list of drivers for random testing has been generated, you should test those drivers as soon as possible”-FMCSA Implementation Guidelines, p 5-17)

Same

No comparable requirement

Most Policy Provisions Similar- Removal

- SAP – RTD

- ❑ Violation
 - ❖ Same – Removal from safety-sensitive function
- ❑ SAP referral process
 - ❖ Same - Must comply with Part 40 Subpart O
- ❑ Return-to-Duty and Follow-Up
 - ❖ Same - Must comply with Part 40 Subpart O
- ❑ 655 reiterates Part 40 requirement for employer to advise employee of readily-available SAP-counseling-treatment program ... 382 does not

Most Policy Provisions Similar-

Availability for testing

FTA

- Drug random testing anytime an employee is on duty
- Alcohol random testing only just before, during, just after performance
- May negotiate arrangements employee who must leave at end of shift

FMCSA

- Same
- Same
- May notify driver who is on off-duty status-
 - Testing time counts for Hours of Service

Most Policy Provisions Similar- Refusal to Submit

FTA

- Description of kind of behavior constitutes refusal to test
- Statement such refusal constitutes a violation of employer's policy
- Part 655 does not list refusal behaviors

FMCSA

- Explanation of what constitutes a refusal to test and
- The attendant consequences
- Part 382 lists drug but not alcohol refusal behaviors

Most Policy Provisions Similar- Testing after Notification

FTA

- On notification,
 - If not performing safety-sensitive function, proceed immediately
 - If performing safety-sensitive function, cease performing and proceed immediately

FMCSA

- On notification,
 - If not performing safety-sensitive function, proceed immediately
 - If performing safety-sensitive function, cease performing and proceed as soon as possible

Major Differences-Coverages

FTA

- Regulation is applicable to employer
- Employer requires compliance from safety-sensitive employee

FMCSA

- Regulation of employer
- Independent regulation of Safety-sensitive employee thru CDL
- Owner-operators must comply with employer and employee provisions

Exempted from Compliance

FTA

- Contract maintenance providers of systems in areas of less than 200,000
- Taxi operators if transit patrons are free to choose from 2 or more taxi providers

FMCSA

- Persons required to comply with Part 655 (382.103(d)(1))
- Military personnel generally
- Operators of a farm vehicle generally
- Firefighters and ambulance drivers

Pre-Employment Testing

FTA

- Employees working part-time for two covered entities are in both random pools and take two pre-employment tests

FMCSA

- Employers may use an employee w/o a pre-employment test if the employee is and has been in a random testing program for a year and not had a drug/alcohol violation
- Independent owner/operators must be in a consortium

Pre-Employment D&A Test History

FTA

- **2 year review of drug and alcohol testing records**
- 49 CFR Section 40.25
 - Alcohol tests of ≥ 0.04
 - Verified positive drug tests
 - Refusals/adulterated/etc
 - Other violations of DOT agency drug/alcohol regs
- Documentation of successful completion of SAP-required RTD/follow-up process

FMCSA

- **3 year review of history**
- *For Inter-State Drivers*
- 49 CFR Section 391.23 Investigation & Inquiries
- 3 yr-State driving records
- 3 yr-Safety performance from all employers
- 3 yr-Alcohol and controlled substance violations from all employers
 - Same information as Part 40 requirements

After Out of Random Pool

FTA

- Pre-employment test if employee out of pool for 90 days

FMCSA

- Pre-employment test if employee out of pool for 30 days

NEXUS Requirement

Post-Accident Testing–

FTA

- Fatality-mandatory; or Person receives medical attention away from scene; Vehicle disabled.
- NEXUS:
 - *Unless* employee's performance can be fully discounted as contributing.

FMCSA

- Fatality-mandatory; or Person receives medical attention away from scene; Vehicle disabled.
- NEXUS:
 - *And* operator receives moving vehicle citation.

Post-Accident – Time to Complete

FTA

- Immediately after operator dismissed from accident scene and medical attention provided
- Alcohol 2/8 hour rule
- Drugs 32 hour rule

FMCSA

- If no citation in 8 hours, no alcohol testing
- If no citation in 32 hours, no drug testing

Post-Accident – Slip and Fall + Revenue Service Exceptions

FTA

- Boarding-alighting-slip and fall accidents covered unless employee's performance discounted as a possible contributing factor
- Testing if vehicle out of revenue service

FMCSA

- Exceptions 382.305
- Occurrence involving only boarding-alighting from stationary vehicle
- Operation of a car or multi-passenger vehicle by an employer if not transporting passengers for hire

Reasonable Suspicion

FTA

- Only specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors
- No required written report (everybody does)

FMCSA

- Observations may include indications of chronic effects and withdrawal effects.
- Written report w/in 24 hours of observed behavior or before results of controlled substances/alcohol test are released

Retention of Training Records

FTA

- Training
 - Two years:
 - records relating to the collection process and employee training
- Other records same for FTA and FMCSA, but FMCSA descriptions more detailed

FMCSA

- Training
 - Indefinite Period:
 - Records relating to education and training of BATs, SSTs, supervisors and drivers
 - Maintained while the employee performs that function and for 2 years thereafter

Alcohol Prohibitions

FTA

- No performing covered activity if BAC 0.04 or greater
- No drinking 4 hrs before S-S duties
- No drinking while on-call specified hours
- 8 hour off-duty after BAC between 0.02 and 0.039, or until <0.02

FMCSA

- No performing covered activity if BAC 0.04 or greater
- No drinking 4 hrs before S-S duties
- No corresponding on-call requirement
- 24-hour mandatory off-duty after BAC between 0.02 and 0.039

Prescription Medications

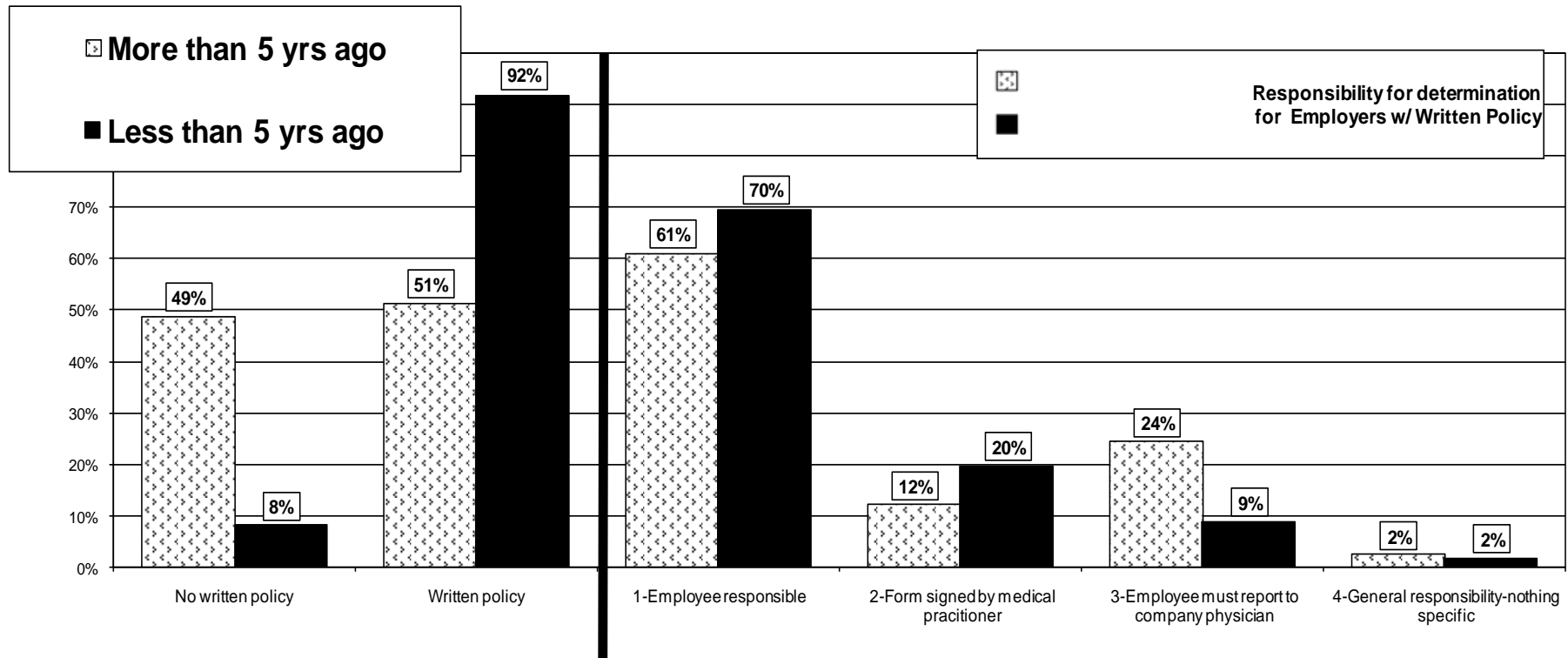
FTA

- FTA advisory info and substantial technical assistance is provided
- No regulatory requirements
- FTA *Prescription and Over-the-Counter Medications Toolkit* well-regarded by MROs

FMCSA

- Drivers can not operate unless advised by licensed medical practitioner that OTC/prescription will not impact ability to safely operate. 382.213(a)
- Employers may require drivers to inform the employer of any therapeutic drug use. 382.213(c)

FTA Written Policies Prescription/OTC Meds



Source: DAPM Audit Interview Questions

Employee Self-Identification

FMCSA Section 382.121

- ❑ Employees who admit drug use/alcohol misuse not subject to provisions of Part 40
 - If employer has written self-identification policy
 - If admission not an attempt to avoid testing
 - If admission made before going on duty

- ❑ Must not perform SS duties until employee has been evaluated and successfully completed education & treatment & participates in follow-up testing as appropriate

Enforcement & Compliance

FTA

- Suspension or ineligibility for federal funding
- Annual certification of compliance (in Master Agreement)
- State DOTs certify compliance of sub-recipients

FMCSA

- Fines and penalties on employer and/or employee
- Possibility of Issuance of an Out of Service order
- No requirement to self-certify compliance

Another Issue-- Exemptions From FMCSA §391 Medical Qualifications

- ❑ FMCSA §391 *per se* applies to interstate ops
- ❑ States establish medical qualifications for intrastate drivers (i.e., most transit drivers)
- ❑ Will affect pre-employment records reviews (and possibly require periodic testing)
- ❑ You should be aware of your state's adoption of FMCSA §391 Medical Qualifications

Exemptions in *State Adoptions* of §391

- ❑ Age (18 vs. 21)
- ❑ Medical Qualifications (usually Vision, Limb, and/or Diabetes)
- ❑ Vehicle weight/seating arrangements
- ❑ Municipal and/or school operations
- ❑ Driving radius for intrastate drivers
- ❑ Drug and alcohol histories (2 vs. 3 years)

Kentucky Adoption of 391

- ❑ Statutory Authority:
 - ❖ KRS 281.600, 281A.040, 49 CFR 383 Subpart E, 391 Subpart E
- ❑ Necessity, Function, & Conformity:
 - ❖ The Federal Highway Administration does not require a person who operates entirely in intrastate commerce to be subject to 49 CFR 391.
- ❑ Medical Waivers:
 - ❖ Allowed by FHWA for drivers operating exclusively in intrastate commerce (in addition to those allowed by §391.49)

Oregon Adoption of 391

- **SUBSTANCE ABUSE INQUIRY (40.25, 391.23)**

The motor carrier must inquire from previous employers within the last **three years**, whether the driver had violated any controlled substances or alcohol prohibitions and if so, whether the driver completed a rehabilitation program. This inquiry must be made in writing as soon as possible but no later than 30 days after hire, and must only be made with the driver's written authorization. Previous employers are required to release the information.

The motor carrier must also ask the applicant about all positive pre-employment tests or refusals for motor carriers within the last **two years** who did not hire the driver.

Private intrastate carriers (OAR 740-100-0010(2)(d))

A driver who is employed by a private intrastate carrier is exempt from Part 391 if the driver operates a CMV that is 26,000 lbs. or less GVWR, and is not transporting placarded hazardous materials. The driver must still have a valid driver's license.

Wyoming Adoption

- Effective July 1, 2004, commercial drivers must present a valid federal DOT medical certificate to renew or to be issued a CDL license.
- If your federal DOT medical certificate restricts you to "Intrastate Driving Only" your license will reflect the "K" restriction code.
- Firefighters and government employees **MUST** send proof of employment to be exempt from the requirement for a federal DOT medical certificate.



Thank you

Questions & Answers

John Morrison

will be available for
questions
immediately following this presentation

Room 209-210

