

## **BMWED Summary of FRA Drug and Alcohol Final Rule, 49 CFR Part 219**

(Prepared 5/1/17)

The following is a summary/overview of the FRA Drug and Alcohol Final Rule published in the Federal Register (Docket No. FRA-2009-0039, Notice No. 3) on June 10, 2016. The Final Rule, which expands FRA's drug and alcohol testing regulation (49 CFR, Part 219) to cover persons who perform maintenance of way activities, has an effective date of June 12, 2017.

This summary is not intended to be all inclusive. Please refer to the Final Rule (<https://www.gpo.gov/fdsys/pkg/FR-2016-06-10/pdf/2016-13058.pdf>) for detailed information and regulatory guidance.

### **Scope**

FRA is expanding the scope of Title 49 CFR Part 219, Control of Alcohol and Drug Use, to cover railroad employees and contractors/sub-contractors who perform MOW activities for a railroad. Effective June 12, 2017, MOW employees will be subject to all Part 219 testing including random testing, post-accident toxicological (PAT) testing, reasonable cause testing, pre-employment testing, return-to-duty testing, and follow up testing.

Railroads must provide the employee with clear and unequivocal written notice of the type of federal test that will be conducted. (e.g., random, reasonable suspicion, reasonable cause, follow-up, return-to-work, etc.)

### **Key Definitions**

The final rule adopts the FRA Part 214 definition of Roadway Worker to define coverage for MOW employees.

- ***Roadway worker*** means any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communications systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts as defined. (see 49 CFR 214.7, definitions)
- ***Employee*** means any individual (including a volunteer, or probationary employee) performing activities for a railroad or a contractor to a railroad.
- ***Regulated Employee*** means any employee or maintenance-of-way employee who performs regulated service for a railroad subject to the requirements of Part 219.
- ***Regulated Service*** means covered service or maintenance-of-way activities, the performance of which makes an employee subject to the requirements to Part 219.

### **Random Testing**

The Final Rule mandates, with limited exceptions for small railroad, random testing of employees who meet the definition of roadway worker as defined in Part 214.

Railroads and railroad contractors must establish and maintain FRA-compliant random testing programs meeting the criteria of Part 219 for regulated employees. Railroads may also conduct “company policy” testing independent of, and in addition to, the FRA testing requirements. FRA has set the initial minimum annual random testing rates for MOW employees at 50 percent for drugs and 25 percent for alcohol. FRA has the authority to lower these random testing rates in the future if MOW positive test rates fall below FRA thresholds.

### **Random Testing Selection**

Railroads and contractors must ensure that each regulated employee has an equal chance of being selected for random testing whenever selections are made. Railroads and contractors must use a random selection method that is compliant with FRA/DOT regulatory guidelines.

In essence, every MOW employee will be in either the Federal Motor Carrier Safety Administration (FMSCA) or FRA random testing pool. If a MOW employee works 51% of the year as a driver of a Commercial Motor Vehicle (CMV) requiring a Commercial Driver’s License (CDL), then that person will likely be placed in the FMSCA random testing pool. And vice versa; if a MOW employee works 51% of the year as anything other than a CMV driver requiring a CDL, that person will be placed in the FRA random testing pool. If the FMSCA and FRA are testing at different random rates, the higher rate of testing will apply regardless of which testing pool an MOW employee is assigned.

### **Post-Accident Toxicological (PAT) Testing**

FRA PAT testing predates the Department of Transportation (DOT) required procedures [49 CFR Part 40] for conducting drug and alcohol testing for federally regulated transportation employees. Therefore, PAT testing is unique to FRA and FRA establishes its own PAT testing protocols independent of DOT.

FRA PAT testing authorizes the collection of both blood and urine specimens for certain triggering events. Collection of PAT specimens must be performed at an independent medical facility, such as a hospital or physician’s office. By definition, an independent medical facility cannot be railroad owned or controlled.

FRA established a new triggering mechanism in which it’s mandatory to collect **blood** and urine specimen from a regulated employee if an accident/incident occurred. This mechanism is “**human-factor highway-rail grade crossing accident/incidents**,” when it involves:

- A regulated employee who interfered with the normal functioning of a grade crossing signal system, in testing or otherwise, without first taking measures to provide for the safety of the highway traffic that depends on the normal function of the system;
- A regulated employee who was performing, or should have been performing the duties of a flagger due to an activation failure, partial activation, or false activation of the grade crossing signal system;
- A fatality to any regulated employee performing duties of the railroad, regardless of fault; or

- A regulated employee violated an FRA regulation or railroad operating rule at, on, or near a grade crossing and whose actions may have played a role in the cause or severity of the accident/incident.

### ***General Exceptions to PAT Tests***

- Except for a human-factor highway-rail grade crossing accident/incident, no test may be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a highway/rail grade crossing.
- No test may be required for an accident/incident the cause and severity of which are wholly attributable to a natural cause (i.e., flood, tornado, or other natural disaster) or to vandalism or trespasser(s), as determined on the basis of objective and documented facts by the railroad representative.
- For a qualifying impact accident, passenger train accident, fatal train incident, or human-factor highway-rail grade crossing accident/incident, a surviving crewmembers or other regulated employee must be excluded from testing if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause of severity of the accident/incident. In making this determination, the railroad representative must consider any information that is immediately available at the time the qualifying event is made in compliance with the regulation.

### **Reasonable Cause Testing**

Each railroad's decision process regarding whether reasonable cause testing is authorized must be completed before the reasonable cause testing is performed and documented according to the requirements of Part 219. There are numerous circumstances in which a reasonable cause test would be authorized including, but not limited to, a regulated employee:

- Involved in a train accident or incident reportable to FRA and a responsible railroad supervisor has a reasonable belief, based on specific, articulable facts, that the individual employee's acts or omissions contributed to the occurrence or severity of the accident.
- Directly involved in a railroad rule violation or FRA regulation violation.
- In noncompliance with a train order, track warrant, track bulletin, track permit, etc. etc.
- Failing to protect on-track equipment (OTE).
- Fouling track without authorization.
- Aligning a switch in violation of a railroad rule, failure to align a switch as required for movement, operation of a switch under on-track equipment, or unauthorized running through a switch.
- Involved a collision between roadway maintenance machine (RMM) and OTE, or regulated employee(s).
- Failing to notify employees when releasing working limits.
- Failing as a flagman/watchman/lookout to notify employees of approaching train/OTE.
- Operating a machine that results in a collision between a roadway maintenance machine and on-track equipment or a regulated employee.

- Failing of the roadway worker-in-charge to notify all affected employees when releasing working limits.
- Failing of a watchman/lookout to notify employees of an approaching train or other on-track equipment.
- Failing to ascertain that provision was made for on-track safety before fouling a track.
- Improperly use of individual train detection in a manual interlocking or control point.
- Engaging in other circumstances which constitute reasonable cause for the administration of alcohol and/or drug testing under the authority of Part 219.

### **Pre-Employment Testing**

FRA has grandfathered in all current MOW employees from pre-employment drug and alcohol testing. Only regulated employees hired after the effective date must have a negative DOT pre-employment drug and alcohol test result before performing regulated service for the first time.

FRA mandates that railroads and contractors conduct a search (for non-negative test results, e.g., positives, substitutions, and adulterations) of a new hire's past two years drug test records before that individual can perform any DOT safety-sensitive functions. This requirement applies only to the railroad or contractor's direct employees (e.g., a railroad has no responsibility to conduct a background check on a contractor's direct employees, since that responsibility belongs to the contractor). Additionally, railroads must ensure and verify that each employee of a contractor/sub-contractor who performs regulated service on the railroad's behalf has had a negative DOT pre-employment drug test and that drug test is on file with their employer.

### **Return-To-Duty Testing**

A regulated employee may not return to the performance of safety-sensitive functions until after the Substance Abuse Professional (SAP) has determined that the employee has successfully complied with prescribed education and/or treatment and has taken a return-to-duty test in which the regulated employee has a negative drug test and an alcohol concentration of less than 0.02. Further, a regulated employee may not perform DOT safety-sensitive functions for any other employer regulated by a DOT agency until he/she has completed the Federal return-to-duty process under Part 219.

### **Follow Up Testing**

Regulated employees requiring random follow-up testing after a non-negative test must have a minimum six (6) non-positive follow-up test in the first twelve (12) months of returning to service. Railroads may place a regulated employee on duty for the sole purpose of a follow-up **drug** test anytime the regulated employee is subject to being called for duty. In addition, a direct observation urine collection must be performed whenever an employee's previous test results indicated the possibility of specimen tapering, or is a follow-up test or return-to-duty test as defined by federal regulation.

## **Reasonable Suspicion Testing**

- ***Breath alcohol test:*** May be performed when a railroad has reasonable suspicion to believe a regulated employee may be intoxicated or under the influence of alcohol. Railroads bases for determining if a regulated employee is in violation has to be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the regulated employee.
- ***Drug test:*** The observation must be made by a responsible railroad supervisor who is trained in accordance with Part 219. For drug testing on the grounds of reasonable suspicion, the required observation must be made by two (2) responsible railroad supervisors with at least one of whom must be both on site and trained in accordance with Part 219. If the second responsible railroad supervisor is off-site, the on-site supervisor must communicate with the off-site supervisor by telephone or electronic communication, *but not radio*, any information necessary to make the required observation.

## **Post-Fatality Testing**

Post-Fatality Testing will now include railroad employees, contractor and sub-contractor employees and volunteers who have been fatally injured. This applies regardless of whether the employee was performing regulated service, was at fault, or had a role in the cause of the incident.

## **Refusal of Breath or Body Fluid Specimen**

A regulated employee who refuses to provide a breath or a body fluid specimen or specimens when required under a provision of Part 219, *must* be withheld from service for a period of nine (9) months. The same applies to a specimen that was adulterated or substituted, which is automatically deemed to be a refusal to test. ***NOTE: Railroads may impose additional sanctions, up to and including dismissal, for a refusal to test.***

## **Supervisor Responsibility**

A supervisor who is responsible for regulated employees must be trained in the signs and symptoms of alcohol and drug influence, intoxication, and misuse consistent with that railroads program submitted to FRA. This program shall provide at minimum, information concerning the acute behavioral and apparent physiological effect of alcohol, the major drug groups on the controlled substances list and other impairing drugs. FRA is requiring a supervisor to be able to demonstrate an understanding of these signs through a written or oral exam.

## **Railroad's Responsibility for Educating Regulated Employees**

Each railroad must develop and publish educational materials, specifically designed for regulated employees that clearly explain the requirements of the Final Rule, as well as the railroad's policies and procedures in respect to meeting those requirements. Additionally, for a minimum of three (3) years after May 27, 2017, the railroads must distribute a copy of these materials to each MOW employee hired or transferred to a position that requires drug and alcohol testing under Part 219.

## **Disclaimer**

This summary/overview by BMWED is for informational and educational purposes only; it is not all inclusive and may possibly include inadvertent errors or omissions. For complete information and regulatory text, please refer to the Final Rule, 49 CFR Part 219, in its entirety.

BMWED members with specific questions should contact their General Chairperson or contact the BMWED Department of Safety at 202-508-6439.

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