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**united transportation union**



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(Nickel Plate, Wabash, Wheeling & Lake Erie Districts  
and portions of former Conrail)

817 Kilbourne Street  
Bellevue, Ohio 44811-9407



October 25, 2002

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and portions of Former Conrail  
C-T-E

Dear Sisters and Brothers:

Enclosed for your review and files is Final Rule concerning 49 CFR Part 40 - Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Procedures for Non-Evidential Alcohol Screening Devices (ADS) provided this office by the Ohio State Legislative Director and of interest to all our members. This ruling is to become effective October 31, 2002.

Fraternally yours,

Delbert G. Strunk, Jr.  
General Chairperson  
United Transportation Union

cc: All Vice-Local Chairpersons  
All Local Secretaries  
All Local Presidents  
All Local Leg Reps

DGS/ksm

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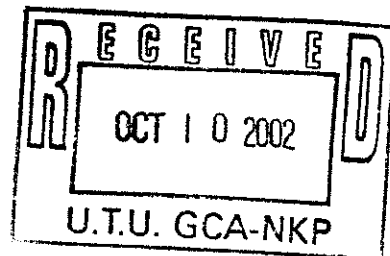
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October 9, 2002



ALL LEGISLATIVE REPRESENTATIVES  
AND SECRETARIES,  
UTU LOCALS,  
STATE OF OHIO

RE: 49 CFR Part 40  
Procedures for Transportation Workplace Drug and Alcohol  
Testing Programs; Procedures for Non-Evidential Alcohol  
Screening Devices (ADS).

Dear Sirs and Brothers:

Enclosed is the Department of Transportation (DOT) **Final Rule** on the Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Procedures for Non-Evidential Alcohol Screening Devices. This **Final Rule** establishes the procedures for an alcohol screening test using a saliva Alcohol Screening Device (ADS) or a breath tube ADS.

It is imperative that our members are informed of this **Final Rule**, which will take effect on October 31, 2002.

Therefore, I strongly urge you to inform your Local members of this new **Final Rule** that will affect our union Brothers and Sisters. Also, please keep this office informed of all irregularities encountered while being tested with ASDs.

Fraternally yours,

JOSEPH A. BODA, JR., Chairman  
& State Legislative Director

JAB/jvs

cc: Mr. Byron A. Boyd, Jr.,  
International President  
Mr. James M. Brunkenhoefer,  
National Legislative Director  
All General Chairmen representing  
Ohio Locals

File  
Enclosure

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[Rules and Regulations]  
[Page 61521-61523]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST-2002-13431]  
RIN 2105-AD13

Procedures for Transportation Workplace Drug and Alcohol Testing  
Programs; Procedures for Non-Evidential Alcohol Screening Devices

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

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SUMMARY: The Department of Transportation (DOT) originally established procedures for use of non-evidential alcohol screening devices (ASDs) in April, 1995. At that time, we indicated that as additional ASDs were determined by the National Highway Traffic Safety Administration (NHTSA) to be capable of detecting the presence of alcohol at the 0.<STRONG>02</STRONG> or greater level of alcohol concentration, they would be suitable for use within DOT regulated industry testing programs. Because NHTSA has approved a device, the operating mechanism of which differs from other ASDs, the Department had no Part 40 procedures for its use. This rule establishes procedures for the use of this device.

DATES: This rule is effective October 31, 2002.

FOR FURTHER INFORMATION CONTACT: Jim L. Swart, Drug and Alcohol Policy Advisor at 202-366-3784 (voice), 202-366-3897 (fax), or at:  
<A href="mailto:jim.swart@ost.dot.gov">jim.swart@ost.dot.gov</A> (e-mail).

SUPPLEMENTARY INFORMATION:

Background

When the Department originally published its alcohol testing rules on February 15, 1994 (54 FR 7302 et seq.), the Department established breath testing using evidential breath testing devices (EBTs) as the method to be used. However, in response to comments requesting additional flexibility in testing methods the Department said that NHTSA would develop model specifications, evaluate additional screening devices, and periodically publish a conforming products list of those additional screening devices that meet model specifications. The Department noted, too, that the Department would also have to undertake separate rulemaking proceedings to establish procedures for use by DOT-regulated industries of any devices after they are approved by NHTSA.

On April 20, 1995 (FR Vol. 60, No. 76), the Department published procedures for use of ASDs, both breath devices and saliva devices. At

that time, the Department did not anticipate that additional devices would be developed that, while using breath or saliva as the means of obtaining a result, would necessitate new procedures for their use. As a result, the revised Part 40 (65 FR 79462) published December 19, 2000 stated, in part, that ASDs on the NHTSA conforming products list (CPL) could be used for Part 40 alcohol screening tests. Because NHTSA added an ASD to their CPL and the Department had no procedures for its use, we were forced to amend that rule. On August 9, 2001 (65 FR 41944) Part 40 was amended to read, "You may use an ASD that is on the NHTSA CPL for DOT alcohol tests only if there are instructions for its use in this part."

This effectively prevented use of this ASD for DOT testing purposes even though it was on NHTSA's CPL. The Department has taken steps to rectify this situation by developing procedures for this ASD's use and by amending the regulation accordingly. We have also taken the step to fine-tune the regulation to include in regulation text the fact that breath alcohol technicians (BAT), knowledgeable of how to use an ASD (or ASDs), can conduct screening tests using them.

Instructions for use of the breath tube are somewhat parallel to those for the saliva device. Both devices prohibit use of the device after the expiration date has been reached. Both have procedures for conducting additional tests if proper procedures cannot be followed. Both have some similar fatal flaw criteria.

The breath tube requires the STT or BAT to remove a tube from the box and break the device's ampule in the presence of the employee. The STT or BAT must then attach an inflation bag to the appropriate end of the tube. The employee is given the opportunity to hold the tube and provided instructions regarding how to blow (i.e., forcefully and steadily for approximately 12 seconds) through the tube.

The rules also provide instructions for reading the results. In this case, the STT or BAT must compare the color of the crystals in the breath tube with the colored crystals on manufacturer-produced control tube. Comparisons must take place within specific time frames.

Fatal Flaws" require tests to be cancelled. Problems with the breath tube which cause fatal flaws are: The STT or BAT reads the device either sooner or after than the time allotted; and the device is used after its expiration date.

The breath tube works this way. When a person's breath is blown through the tube it goes around and across the tube's crystals. If the person's breath contains no alcohol, the crystals remain their original color. However, if the person's breath contains alcohol, the alcohol causes a chemical reaction leading to a change in crystal color. A color change matching the color of crystals in the control tube is indicative of a screening test result that must subsequently be confirmed using an EBT. Such a color change indicates that the screening test result is 0.<STRONG>02</STRONG> or above.

#### Regulatory Analyses and Notices

This rule is not a significant rule for purposes of Executive Order 12866 and DOT. It does not increase costs on regulated parties. In fact it may facilitate the use of a device that may increase flexibility, and decrease costs, for employers who choose to use them. There are not sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. To the extent that there is any such impact, it is expected to be a small favorable impact, since some small entities may be able to conduct screening tests at a lower cost.

The Department is issuing this as a final rule without opportunity for notice and public comment. The Department determined that doing so would be impracticable, unnecessary, and contrary to the public interest because this breath device already appears on NHTSA's CPL and has, therefore, proven to be an accurate screening device for Part 40 alcohol screening tests.

Alcohol testing, Drug testing, laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

[[Page 61522]]

Issued this 20th day of September at Washington, DC.  
Norman Y. Mineta,  
Secretary of Transportation.

For reasons set forth in the preamble, the Department of Transportation amends Part 40 of Title 49, Code of Federal Regulations, as follows:

PART 40--PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

1. The authority citation for 49 CFR part 40 continues to read as follows:

Authority: 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 et seq.

2. Revised Sec. 40.245 to read as follows:

Sec. 40.245 What is the procedure for an alcohol screening test using a saliva ASD or a breath tube ASD?

(a) As the STT or BAT, you must take the following steps when using the saliva ASD:

(1) Check the expiration date on the device or on the package containing the device and show it to the employee. You may not use the device after its expiration date.

(2) Open an individually wrapped or sealed package containing the device in the presence of the employee.

(3) Offer the employee the opportunity to use the device. If the employee uses it, you must instruct the employee to insert it into his or her mouth and use it in a manner described by the device's manufacturer.

(4) If the employee chooses not to use the device, or in all cases in which a new test is necessary because the device did not activate (see paragraph (a)(7) of this section), you must insert the device into the employee's mouth and gather saliva in the manner described by the device's manufacturer. You must wear single-use examination or similar gloves while doing so and change them following each test.

(5) When the device is removed from the employee's mouth, you must follow the manufacturer's instructions regarding necessary next steps in ensuring that the device has activated.

(6)(i) If you were unable to successfully follow the procedures of paragraphs (a)(3) through (a)(5) of this section (e.g., the device breaks, you drop the device on the floor), you must discard the device and conduct a new test using a new device.

(ii) The new device you use must be one that has been under your control or that of the employee before the test.

(iii) You must note on the "Remarks" line of the ATF the reason for the new test. (Note: You may continue using the same ATF with which you began the test.)

(iv) You must offer the employee the choice of using the device or having you use it unless the employee, in the opinion of the STT or BAT, was responsible (e.g., the employee dropped the device) for the new test needing to be conducted.

(v) If you are unable to successfully follow the procedures of paragraphs (a)(3) through (a)(5) of this section on the new test, you must end the collection and put an explanation on the "Remarks" line of the ATF.

(vi) You must then direct the employee to take a new test immediately, using an EBT for the screening test.

(7) If you are able to successfully follow the procedures of paragraphs (a)(3)--(a)(5) of this section, but the device does not activate, you must discard the device and conduct a new test, in the same manner as provided in paragraph (a)(6) of this section. In this case, you must place the device into the employee's mouth to collect saliva for the new test.

(8) You must read the result displayed on the device no sooner than the device's manufacturer instructs. In all cases the result displayed must be read within 15 minutes of the test. You must then show the device and its reading to the employee and enter the result on the ATF.

(9) You must never re-use devices, swabs, gloves or other materials used in saliva testing.

(10) You must note the fact that you used a saliva ASD in Step 3 of the ATF.

(b) As the STT or BAT, you must take the following steps when using the breath tube ASD:

(1) Check the expiration date on the device or on the package containing the device and show it to the employee. You must not use the device after its expiration date.

(2) Remove a device from the package and break the tube's ampule in the presence of the employee.

(3) Secure an inflation bag onto the appropriate end of the device, as directed by the manufacturer on the device's instructions.

(4) Offer the employee the opportunity to use the device. If the employee chooses to use (e.g. hold) the device, instruct the employee to blow forcefully and steadily into the blowing end of device until the inflation bag fills with air (approximately 12 seconds).

(5) If the employee chooses not to hold the device, you must hold it and provide the use instructions in paragraph (b)(4) of this section.

(6) When the employee completes the breath process, take the device from the employee (or if you were holding it, remove it from the employee's mouth); remove the inflation bag; and either hold the device or place it on a clean flat surface while waiting for the reading to appear.

(7)(i) If you were unable to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section (e.g., the device breaks apart, the employee did not fill the inflation bag), you must discard the device and conduct a new test using a new one.

(ii) The new device you use must be one that has been under your control or that of the employer before the test.

(iii) You must note on the "Remarks" line of the ATF the reason for the new test. (Note: You may continue using the same ATF with which you began the test.)

(iv) You must offer the employee the choice of holding the device or having you hold it unless the employee, in your opinion, was responsible (e.g., the employee failed to fill the inflation bag) for the new test needing to be conducted.

(v) If you are unable to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section on the new test, you must end the collection and put an explanation on the "Remarks" line of the ATF.

(vi) You must then direct the employee to take a new test immediately, using another type of ASD (e.g., saliva device) or an EBT.

(8) If you were able to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section, you must compare the color of the crystals in the device with the colored crystals on the manufacturer-produced control tube no sooner than the manufacturer instructs. In all cases color comparisons must take place within 15

minutes of the test.

(9) You must follow the manufacturer's instructions for determining the result of the test. You must then show both the device and the control tube side-by-side to the employee and record the result on the ATF.

(10) You must never re-use devices or gloves used in breath tube testing. The inflation bag must be voided of air following removal from a device. One inflation bag can be used for up to 10 breath tube tests.

(11) You must note the fact that you used a breath tube device in Step 3 of the ATF.

3. Amend Sec. 40.267 by revising the introductory text and paragraph (a) to read as follows:

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Sec. 40.267 What problems always cause an alcohol test to be cancelled?

As an employer, a BAT, or an STT, you must cancel an alcohol test if any of the following problems occur. These are "fatal flaws." You must inform the DER that the test was cancelled and must be treated as if the test never occurred. These problems are:

(a) In the case of a screening test conducted on a saliva ASD or a breath tube ASD:

(1) The STT or BAT reads the result either sooner than or later than the time allotted by the manufacturer and this Part (see Sec. 40.245(a)(8) for the saliva ASD and Sec. 40.245(b)(8) for the breath tube ASD).

(2) The saliva ASD does not activate (see Sec. 40.245(a)(7); or

(3) The device is used for a test after the expiration date printed on the device or on its package (see Sec. 40.245(a)(1) for the saliva ASD and Sec. 40.245(b)(1) for the breath tube ASD).

\* \* \* \* \*

[FR Doc. <STRONG>02</STRONG>-<STRONG>24731</STRONG> <STRONG>Filed</STRONG> 9-30-<STRONG>02</STRONG>; 8:45 am]

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