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§ 262.1 Scope

(a) This part requires operators of pipeline facilities subject to part 192, 193 or 195 of Title 49 of the Code of Federal Regulations (49 CFR) to test employees for the presence of prohibited drugs and provide an employee assistance program.

(b) A description of Parts 40, 190, 192, 193, 195 or 199 of Title 49 of the Code of Federal Regulations (49 CFR), as referenced in this Part, may be found in Section 10.2 of this Title.

§ 262.2 Applicability

(a) This Part applies to pipeline operators, only with respect to pipeline employees located within the territory of the United States.

(b) This Part does not apply to any person for whom compliance with this Part would violate the domestic laws or policies of another country.

(c) This Part does not apply to covered functions performed on:

(1) "Master meter systems" defined in section 262.3 of this Part, or

(2) Pipelines that transport only petroleum gas or petroleum gas/air mixtures.

§ 262.3 Definitions

As used in this Part:

(a) Accident means an incident reportable under 49 CFR Part 191 (as described in section 10.2 of this Title) involving gas pipeline facilities or LNG facilities, or an accident reportable under 49 CFR Part 195 (as described in section 10.2 of this Title) involving hazardous liquid or carbon dioxide pipeline facilities.

(b) Administrator means the Administrator of the Research and Special Programs Administration (RSPA) of the Federal Department of Transportation (DOT), or his or her delegate.

(c) Covered employee, employee, or individual to be tested means a person who performs a covered function, including persons employed by the operator, contractors engaged by the operator, and persons employed by such contractors.

(d) Covered function means an operation, maintenance, or emergency-response function that is performed on a pipeline or LNG facility and the function is regulated by 49 CFR part 192, 193, or 195.

(e) Department means New York State Department of Public Service as certified under the pipeline safety laws (49 U.S.C. 60101 et seq.).

(f) DOT procedures means the Procedures for Transportation Work Place Drug Testing Programs published by the Office of the Secretary of Transportation of the United States in 49 CFR Part 40 (as described in section 10.2 of this Title).

(g) Fail a drug test means that the confirmation test result shows positive evidence of the presence under DOT procedures of a prohibited drug in an employee's system.

(h) Master meter system means an underground/buried pipeline system for distributing gas within, but not limited to, a definable area, such as a mobile home park, housing project, or apartment complex, where the operator purchases metered gas from an outside source for resale through an underground/buried gas distribution pipeline system. The gas distribution pipeline system supplies the ultimate consumer who either purchases the gas directly through a meter or by other means such as by rents.

(i) Operator means a person who owns or operates pipeline facilities subject to 49 CFR Part 192, 193 or 195 (as described in section 10.2 of this Title).

(j) Pass a drug test means that initial testing or confirmation testing under DOT Procedures does not show evidence of the presence of a prohibited drug in a person's system.

(k) Performs a covered function includes actually performing, ready to perform or immediately available to perform a covered function.

(l) Positive rate means the number of positive results for random drug tests conducted under this Part plus the number of refusals of random tests required by this Part, divided by the total number of random drug tests conducted under this Part plus the number of refusals of random tests required by this Part.

(m) Prohibited drug means any of the following substances specified in Schedule I or Schedule II of the Controlled Substances Act *21 U.S.C. 801.812* (1981 & 1987) (Cum. P.P.): marijuana, cocaine, opiates, amphetamines, and phenylcyclidine (PCP).

(n) Refused to submit, refuse, or refuse to take means behavior consistent with DOT Procedures concerning refusal to take a drug test or refusal to take an alcohol test.

(o) RSPA means the Research and Special Programs Administration of the federal Department of Transportation.

§ 262.5 DOT procedures

The anti-drug and alcohol programs required by this Part must be conducted according to the requirements of this Part and the DOT procedures. Terms and concepts used in this Part have the same meaning as in the DOT procedures. Violations of DOT procedures with respect to anti-drug and alcohol programs required by this Part are violations of this Part.

§ 262.7 Stand-down waivers

(a) Each operator who seeks a waiver under *49 CFR 40.21* from the stand-down restriction must submit an application for waiver in duplicate to the Office of Gas and Water of the Department of Public Service.

(b) Each application must:

(1) identify section 40.21 of 49 CFR as the rule from which the waiver is sought;

(2) explain why the waiver is requested and describe the employees to be covered by the waiver; and

(3) contain the information required by 49 CFR 40.21 and any other information or arguments available to support the waiver requested.

§ 262.100 Purpose

The purpose of these Drug Testing rules is to establish programs designed to help prevent accidents and injuries resulting from the use of prohibited drugs by employees who perform covered functions for operators of certain pipeline facilities subject to 49 CFR Part 192, 193, or 195.

§ 262.101 Anti-drug plan

(a) Each operator shall maintain and follow a written anti-drug plan that conforms to the requirements of this Part and the DOT procedures. The plan must contain:

- (1) methods and procedures for compliance with all the requirements of this Part, including the employee assistance program;
- (2) the name and address of each laboratory that analyzes the specimens collected for drug testing;
- (3) the name and address of the operator's medical review officer and Substance Abuse Professional; and
- (4) procedures for notifying employees of the coverage and provisions of the plan.

(b) The administrator or Department may, after notice and opportunity for hearing as provided in *49 CFR 190.237*, require the operator to amend its plans and procedures as necessary to provide a reasonable level of safety.

§ 262.103 Use of persons who fail or refuse a drug test

(a) An operator may not knowingly use as an employee any person who:

(1) fails a drug test required by this Part and the medical review officer makes a determination under 262.15(d)(2);
or

(2) refuses to take a drug test required by this Part.

(b) Paragraph (a)(1) of this section does not apply to a person who has:

(1) passed a drug test under DOT procedures;

(2) been recommended by the medical review officer for return to duty in accordance with DOT procedures and have been determined by a substance abuse professional to have successfully completed required education or treatment; and

(3) not failed a drug test required by this Part after returning to duty.

§ 262.105 Drug tests required

Each operator shall conduct the following drug tests for the presence of a prohibited drug:

(a) Pre-employment testing. No operator may hire or contract for the use of any person as an employee unless that person passes a drug test or is covered by an anti-drug program that conforms to the requirements of this Part.

(b) Post-accident test. As soon as possible but no later than 32 hours after an accident, an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, it is not likely that a drug test would reveal whether the performance was affected by drug use.

(c) Random testing.

(1) Except as provided in paragraphs (c) (2) through (4) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees.

(2) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug Management Information System (MIS) reports required by Part 199 of Title 49 of the Code of Federal Regulations (49 CFR). 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 operators, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the Federal Register the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(3) When the minimum annual percentage rate for random drug 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 *199.119 of Title 49 of the Code of Federal Regulations* (49 CFR) for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(4) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of *Section 199.119 of Title 49 of the Code of Federal Regulations* (49 CFR) for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

(5) The selection of employees for random drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

(6) The operator shall randomly select 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 drug testing determined by the Administrator. If the operator conducts random drug testing through a consortium, the number of employees to be tested may be calculated for each individual operator or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

(7) Each operator shall ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(8) If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency for the same operator, the employee shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(9) If an operator is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the operator may:

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

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

(d) Testing based on reasonable cause. Each operator shall drug test each employee when there is reasonable cause to believe the employee is using a prohibited drug. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use. At least two of the employee's supervisors, one of whom is trained in detection of the possible symptoms of drug use, shall substantiate and concur in the decision to test an employee. The concurrence between the two supervisors may be by telephone. However, in the case of operators with 50 or fewer employees subject to testing under this Part, only one supervisor of the employee trained in detecting possible drug use symptoms shall substantiate the decision to test.

(e) Return to Duty Testing. A covered employee who refuses to take or has a positive drug test may not return to duty in the covered function until the covered employee has complied with applicable provisions of DOT Procedures concerning substance abuse professionals and return-to-duty process.

(f) Follow-up Testing. A covered employee who refuses to take or has a positive drug test shall be subject to unannounced follow-up drug tests administered by the operator following the covered employee's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the covered employee's return to duty. In addition, follow-up testing may include testing for alcohol as directed by the substance abuse professional, to be performed in accordance with 49 CFR Part 40. Follow-up testing shall not exceed 60 months from the date of the covered employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

§ 262.107 Drug testing laboratory

(a) Each operator shall use for the drug testing required by this Part only drug testing laboratories certified by the U.S. Department of Health and Human Services under the DOT procedures.

(b) The drug testing laboratory must permit:

(1) inspections by the operator before the laboratory is awarded a testing contract; and

(2) unannounced inspections, including examination of records, at any time, by the operator, the Administrator, and a representative of the Department.

§ 262.109 Review of drug testing results

(a) MRO appointment. Each operator shall designate or appoint a medical review officer (MRO). If an operator does not have a qualified individual on staff to serve as MRO, the operator may contract for the provision of MRO services as part of its anti-drug program.

(b) MRO qualifications. The MRO must be a licensed physician who has the qualifications required by DOT Procedures.

(c) MRO duties. The MRO must perform functions for the operator as required by DOT Procedures.

(d) MRO reports. The MRO must report all drug test results to the operator in accordance with DOT Procedures.

(e) Evaluation and rehabilitation may be provided by the operator, by a substance abuse professional under contract with the operator, or by a substance abuse professional not affiliated with the operator. The choice of substance abuse professional and assignment of costs shall be made in accordance with the operator/employee agreements and operator/employee policies.

(f) The operator shall ensure that a substance abuse professional, who determines that a covered employee requires assistance in resolving problems with drug abuse, does not refer the covered employee to the substance abuse professional's private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring a covered employee for assistance provided through:

(1) a public agency, such as a State, county, or municipality;

(2) the operator or a person under contract to provide treatment for drug problems on behalf of the operator;

(3) the sole source of therapeutically appropriate treatment under the employee's health insurance program; or

(4) the sole source of therapeutically appropriate treatment reasonably accessible to the employee.

§ 262.111 Retention of samples and additional testing

(a) Samples that yield positive results on confirmation must be retained by the laboratory in properly secured, long term, frozen storage for at least 365 days as required by the DOT Procedures. Within this 365 day period, the employee or his representative, the operator, the Administrator, or the department may request that the laboratory retain the sample for an additional period. If, within the 365-day period, the laboratory has not received a proper written request to retain the sample for a further reasonable period specified in the request, the sample may be discarded following the end of the 365-day period.

(b) If the medical review officer (MRO) determines there is no legitimate medical explanation for a confirmed positive test result other than the unauthorized use of a prohibited drug, and if timely additional testing is requested by the employee according to DOT Procedures, the split specimen must be tested. The employee may specify retesting by the original laboratory or by a second laboratory that is certified by the Department of Health and Human Services. The

operator may require the employee to pay in advance the cost of shipment (if any) and reanalysis of the sample, but the employee must be reimbursed for such expense if the additional test is negative.

(c) If the employee specifies testing by a second laboratory, the original laboratory must follow approved chain of custody procedures in transferring a portion of the sample.

(d) Since some analytes may deteriorate during storage, detected levels of the drug below the detection limits established in the DOT procedures, but equal to or greater than the established sensitivity of the assay, must, as technically appropriate, be reported and considered corroborative of the original positive results.

§ 262.113 Employee assistance program

(a) Each operator shall provide an employee assistance program (EAP) for its employees and supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The operator may establish the EAP as a part of its internal personnel services or the operator may contract with an entity that provides EAP services. Each EAP must include education and training on drug use. At the discretion of the operator, the EAP may include opportunity for employee rehabilitation.

(b) Education under each EAP must include at least the following elements: display and distribution of informational material; display and distribution of a community service hot line telephone number for employee assistance; and display and distribution of the employer's policy regarding the use of prohibited drugs.

(c) Training under each EAP for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause must include one 60-minute period of training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use.

§ 262.115 Contractor employees

With respect to those employees who are contractors or employed by a contractor, an operator may provide by contract that the drug testing, education, and training required by this Part be carried out by the contractor provided:

(a) The operator remains responsible for ensuring that the requirements of this Part are complied with.

(b) The contractor allows access to property and records by the operator, the administrator, and a representative of the Department for the purpose of monitoring the operator's compliance with the requirements of this Part.

§ 262.117 Recordkeeping

(a) Each operator shall keep the following records for the periods specified and permit access to the records as provided by subdivision (b) of this section:

(1) Records that demonstrate the collection process conforms to this Part must be kept for at least three years.

(2) Records of employee drug test results that indicate a verified positive result, records that demonstrate compliance with the recommendations of a substance abuse professional, and MIS annual report data shall be maintained for a minimum of five years.

(3) Records of employee drug test results that show employee passed a drug test must be kept for at least one year.

(4) Records confirming that supervisors and employees have been trained as required by this Part must be kept for at least three years.

(b) Information regarding an individual's drug testing results or rehabilitation must be released upon the written consent of the individual and as provided by DOT Procedures. Statistical data related to drug testing and rehabilitation that is not name-specific and training records must be made available to the administrator or the representative of the Department upon request.

(c) The laboratory shall release information related to a positive drug test of an individual to the individual, the employer, or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual and arising from a certified positive drug test.

§ 262.119 Reporting of anti-drug testing results

(a) Each large operator (having more than 50 covered employees) shall submit an annual MIS report to RSPA of its anti-drug testing using the Management Information System (MIS) form and instructions as required by 49 CFR Part 40 (at section 40.25 and appendix H to Part 40), not later than March 15 of each year for the prior calendar year (January 1 through December 31). The Administrator shall require by written notice that small operators (50 or fewer covered employees) not otherwise required to submit annual MIS reports to prepare and submit such reports to RSPA.

(b) Each report required under this section shall be submitted to the Office of Pipeline Safety, Research and Special Programs Administration, U.S. Department of Transportation, Room 7128, 400 Seventh Street, SW, Washington, DC 20590.

(c) To calculate the total number of covered employees eligible for random testing throughout the year, as an operator, you must add the total number of covered employees eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Covered employees, and only covered employees, are to be in an employer's random testing pool, and all covered employees must be in the random pool. If you are an employer conducting random testing more often than once 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.

(d) As an employer, you may use a service agent (e.g., Consortia/Third Party Administrator (C/TPA) as defined in 49 CFR Part 40) 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.

(e) Each operator that has a covered employee who performs multi-DOT agency functions (e.g., an employee performs pipeline maintenance duties and drives a commercial motor vehicle), count the employee only on the MIS report for the DOT agency under which he or she is randomly tested. Normally, this will be the DOT agency under which the employee performs more than 50% of his or her duties. Operators may have to explain the testing data for these employees in the event of a DOT agency inspection or audit.

(f) A service agent (e.g., C/TPA) may prepare the MIS report on behalf of an operator. However, each report shall be certified by the operator's anti-drug manager or designated representative for accuracy and completeness.

§ 262.200 Purpose

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform covered functions for operators of certain pipeline facilities subject to parts 192, 193, or 195 of Title 49 of the Code of Federal Regulations (49 CFR).

§ 262.202 Alcohol misuse plan

Each operator shall maintain and follow a written alcohol misuse plan that conforms to the requirements of this part and the DOT procedures concerning alcohol testing programs. The plan shall contain methods and procedures for compliance with all the requirements of this part, including required testing, recordkeeping, reporting, education and training elements.

§ 262.209 Other requirements imposed by operators

(a) Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of operators, or the rights of employees, with respect to the use or possession of alcohol, including authority and rights with respect to alcohol testing and rehabilitation.

(b) Operators may, but are not required to, conduct pre-employment alcohol testing under this Part. Each operator that conducts pre-employment alcohol testing must:

(1) Conduct a pre-employment alcohol test before the first performance of covered functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of covered functions);

(2) Treat all covered employees the same for the purpose of pre-employment alcohol testing (i.e., you must not test some covered employees and not others);

(3) Conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test;

(4) Conduct all pre-employment alcohol tests using the alcohol testing procedures in DOT Procedures; and

(5) Not allow any covered employee to begin performing covered functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

§ 262.211 Requirement for notice

Before performing an alcohol test under this part, each operator shall notify a covered employee that the alcohol test is required by this part. No operator shall falsely represent that a test is administered under this part.

§ 262.215 Alcohol concentration

Each operator shall prohibit a covered employee from reporting for duty or remaining on duty requiring the performance of covered functions while having an alcohol concentration of 0.04 or greater. No operator having actual knowledge that a covered employee has an alcohol concentration of 0.04 or greater shall permit the employee to perform or continue to perform covered functions.

§ 262.217 On-duty use

Each operator shall prohibit a covered employee from using alcohol while performing covered functions. No operator having actual knowledge that a covered employee is using alcohol while performing covered functions shall permit the employee to perform or continue to perform covered functions.

§ 262.219 Pre-duty use

Each operator shall prohibit a covered employee from using alcohol within 4 hours prior to performing covered functions, or, if an employee is called to duty to respond to an emergency, within the time period after the employee has been notified to report for duty. No operator having actual knowledge that a covered employee has used alcohol within 4 hours prior to performing covered functions or within the time period after the employee has been notified to report for duty shall permit that covered employee to perform or continue to perform covered functions.

§ 262.221 Use following an accident

Each operator shall prohibit a covered employee who has actual knowledge of an accident in which his or her performance of covered functions has not been discounted by the operator as a contributing factor to the accident from using

alcohol for 8 hours following the accident unless he or she has been given a post-accident test under section 262.225(a), or the operator has determined that the employee's performance could not have contributed to the accident.

§ 262.223 Refusal to submit to a required alcohol test

Each operator shall require a covered employee to submit to a post-accident alcohol test required under section 262.225(a), a reasonable suspicion alcohol test required under section 262.225(b), or a follow-up alcohol test required under section 262.225(d). No operator shall permit an employee who refuses to submit to such a test to perform or continue to perform covered functions.

§ 262.225 Alcohol tests required

Each operator shall conduct the following types of alcohol tests for the presence of alcohol:

(a) Post-accident

(1) As soon as practicable following an accident, each operator shall test each surviving covered employee for alcohol if that employee's performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the operator's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.

(i) If a test required by this section is not administered within two hours following the accident, the operator shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by paragraph (a) is not administered within eight hours following the accident the operator shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(ii) (Reserved)

(3) A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the operator or operator representative of his/her location if he/she leaves the scene of the accident prior to submission to such test, may be deemed by the operator to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(b) Reasonable suspicion testing.

(1) Each operator shall require a covered employee to submit to an alcohol test when the operator has reasonable suspicion to believe that the employee has violated the prohibitions in this part.

(2) The operator's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee.

(3) Alcohol testing is authorized by this section only if the observations required by paragraph (b) (2) of this section are made during, just preceding, or just after the period of the work day that the employee is required to be in compliance with this part. A covered employee may be directed by the operator to undergo reasonable suspicion testing for alcohol only while the employee is performing covered functions; just before the employee is to perform covered functions; or just after the employee has ceased performing covered functions.

(4)(i) If a test required by this section is not administered within 2 hours following the determination under paragraph (b) (2) of this section, the operator shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the determination under paragraph (b) (2) of this section, the operator shall cease attempts to administer an alcohol test and shall state in

the record the reasons for not administering the test. Records shall be submitted to RSPA upon request of the Administrator.

(ii) (Reserved)

(iii) Notwithstanding the absence of a reasonable suspicion alcohol test under this section an operator shall not permit a covered employee to report for duty or remain on duty requiring the performance of covered functions while the employee is under the influence of or impaired by alcohol, as shown by the behavioral, speech or performance indicators of alcohol misuse, nor shall an operator permit the covered employee to perform or continue to perform covered functions, until:

(A) An alcohol test is administered and the employee's alcohol concentration measures less than 0.02; or

(B) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following the determination under paragraph (b) (2) of this section that there is reasonable suspicion to believe that the employee has violated the prohibitions in this part.

(iv) Except as provided in paragraph (b) (4) (ii), no operator shall take any action under this part against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an operator with the authority independent of this part from taking any action otherwise consistent with law.

(c) Return-to-duty testing. Each operator shall ensure that before a covered employee returns to duty requiring the performance of a covered function after engaging in conduct prohibited by sections 262.215 through 262.223, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(d) Follow-up testing.

(1) Following a determination under section 262.243(b) that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each operator shall ensure that the employee is subject to unannounced follow-up alcohol testing as directed by a substance abuse professional in accordance with the provisions of 262.243(c) (2) (ii).

(2) Follow-up testing shall be conducted when the covered employee is performing covered functions; just before the employee is to perform covered functions; or just after the employee has ceased performing such functions.

(e) Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04. Each operator shall retest a covered employee to ensure compliance with the provisions of section 262.237, if an operator chooses to permit the employee to perform a covered function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04.

§ 262.227 Retention of records

(a) General requirement. Each operator shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access and shall be in a form that is immediately accessible to the Administrator or representatives of the Department.

(b) Period of retention. Each operator shall maintain the records in accordance with the following schedule:

(1) Five years. Records of employee alcohol test results with results indicating an alcohol concentration of 0.02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, employee evaluation and referrals, and MIS annual report data shall be maintained for a minimum of 5 years.

(2) Two years. Records related to the collection process (except calibration of evidential breath testing devices), and training shall be maintained for a minimum of 2 years.

(3) One year. Records of all test results below 0.02 (as defined in 49 CFR 40) shall be maintained for a minimum of 1 year.

(c) Types of records. The following specific records shall be maintained:

(1) Records related to the collection:

- (i) Collection log books, if used.
 - (ii) Calibration documentation for evidential breath testing devices.
 - (iii) Documentation of breath alcohol technician training.
 - (iv) Documents generated in connection with decisions to administer suspicion alcohol tests.
 - (v) Documents generated in connection with decisions on post-accident tests.
 - (vi) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.
- (2) Records related to test results:
 - (i) The operator's copy of the alcohol test form, including the results of the test.
 - (ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this part.
 - (iii) Documents presented by a employee to dispute the result of alcohol test administered under this part.
 - (3) Records related to other violations of this part.
 - (4) Records related to evaluations:
 - (i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.
 - (ii) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.
 - (5) Record(s) related to the operators MIS annual testing data.
 - (6) Records related to education and training:
 - (i) Materials on alcohol misuse awareness, including a copy of the operator's policy on alcohol misuse.
 - (ii) Documentation of compliance with the requirements of 262.231.
 - (iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.
 - (iv) Certification that any training conducted under this part complies with the requirements for such training.

§ 262.229 Reporting of alcohol testing results

(a) Each large operator (having more than 50 covered employees) shall submit an annual MIS report to RSPA of its alcohol testing results using the Management Information System (MIS) form and instructions as required by 49 CFR Part 40 (at section 40.25 and appendix H to Part 40), by March 15 of each year for the previous calendar year (January 1 through December 31). The Administrator may require by written notice that a small operator (50 or fewer covered employees), not otherwise required to submit annual MIS reports, submit such a report to RSPA.

(b) Each operator that has a covered employee who performs multi-DOT agency functions (e.g., an employee performs pipeline maintenance duties and drives a commercial motor vehicle), count the employee only on the MIS report for the DOT agency under which he or she is tested. Normally, this will be the DOT agency under which the employee performs more than 50% of his or her duties. Operators may have to explain the testing data for these employees in the event of a DOT agency inspection or audit.

(c) Each report required under this section shall be submitted to the Office of Pipeline Safety (OPS), Research and Special Programs Administration, Department of Transportation, Room 7128, 400 Seventh Street SW., Washington, DC 20590. RSPA will allow the operator the option of sending the report on the computer disk provided by RSPA. If this option is used, a signature page attesting to the validity of the information on the computer disk must be sent to the address in this section.

(d) A service agent (e.g., Consortia/Third Party Administrator as defined in 49 CFR Part 40) may prepare the MIS report on behalf of an operator. However, each report shall be certified by the operator's anti-drug manager or designated representative for accuracy and completeness.

§ 262.231 Access to facilities and records

(a) Except as required by law or expressly authorized or required in this part, no employer shall release covered employee information that is contained in records required to be maintained in section 262.227.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The operator shall promptly provide the records requested by the employee. Access to a employee's records shall not be contingent upon payment for records other than those specifically requested.

(c) Each operator shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, any DOT agency, or a representative of a state agency with regulatory authority over the operator.

(d) Each operator shall make available copies of all results for employer alcohol testing conducted under this part and any other information pertaining to the operators alcohol misuse prevention program when requested by the Department. The information shall include name-specific alcohol test results, records, and reports.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, an operator shall disclose information related to the operator's administration of any post-accident alcohol tests administered following the accident under investigation.

(f) An operator shall make records available to a subsequent employer upon receipt of the written request from the covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's written request.

(g) An operator may disclose information without employee consent as provided by DOT Procedures concerning certain legal proceedings.

(h) An operator shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

§ 262.233 Removal from covered function

Except as provided in sections 262.239 through 262.243, no operator shall permit any covered employee to perform covered functions if the employee has engaged in conduct prohibited by sections 262.215 through 262.223 or an alcohol misuse rule of another DOT agency.

§ 262.235 Required evaluation and testing

No operator shall permit a covered employee who has engaged in conduct prohibited by sections 262.215 through 262.223 to perform covered functions unless the employee has met the requirements of 262.243.

§ 262.237 Other alcohol-related conduct

(a) No operator shall permit a covered employee tested under the provisions of section 262.225, who is found to have an alcohol concentration of 0.02 or greater but less than 0.04, to perform or continue to perform covered functions until:

(1) The employee's alcohol concentration measures less than 0.02 in accordance with a test administered under section 262.225(e); or

(2) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following administration of the test.

(b) Except as provided in Subdivision (a) of this section, no operator shall take any action under this part against an employee based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an operator with authority independent of this part from taking any action otherwise consistent with law.

§ 262.239 Operator obligation to promulgate a policy on the misuse of alcohol

(a) General requirements. Each operator shall provide educational materials that explain these alcohol misuse requirements and the operator's policies and procedures with respect to meeting those requirements.

(1) The operator shall ensure that a copy of these materials is distributed to each covered employee prior to start of alcohol testing under this part, and to each person subsequently hired for or transferred to a covered position.

(2) Each operator shall provide written notice to representatives of employee organizations of the availability of this information.

(b) Required content. The materials to be made available to covered employees shall include detailed discussion of at least the following:

(1) The identity of the person designated by the operator to answer covered employee questions about the materials.

(2) The categories of employees who are subject to the provisions of this part.

(3) Sufficient information about the covered functions performed by those employees to make clear what period of the work day the covered employee is required to be in compliance with this part.

(4) Specific information concerning covered employee conduct that is prohibited by this part.

(5) The circumstances under which a covered employee will be tested for alcohol under this part.

(6) The procedures that will be used to test for the presence of alcohol, protect the covered employee and the integrity of the breath testing process, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.

(7) The requirement that a covered employee submit to alcohol tests administered in accordance with this part.

(8) An explanation of what constitutes a refusal to submit to an alcohol test and the attendant consequences.

(9) The consequences for covered employees found to have violated the prohibitions under this part, including the requirement that the employee be removed immediately from covered functions, and the procedures under section 262.243.

(10) The consequences for covered employees found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(11) Information concerning the effects of alcohol misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol problem (the employee's or a coworker's); and including intervening, evaluating and resolving problems associated with the misuse of alcohol, including intervening when an alcohol problem is suspected, confrontation, referral to any available EAP, and/or referral to management.

(c) Optional provisions. The materials supplied to covered employees may also include information on additional operator policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol level, that are based on the operator's authority independent of this part. Any such additional policies or consequences shall be clearly described as being based on independent authority.

§ 262.241 Training for supervisors

Each operator shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under section 262.225(b) receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

§ 262.243 Referral, evaluation, and treatment

(a) Each covered employee who has engaged in conduct prohibited by sections 262.215 through 262.223 of this part shall be advised of the resources available to the covered employee in evaluating and resolving problems associated with the misuse of alcohol. This includes the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(b) Each covered employee who engages in conduct prohibited under sections 262.215 through 262.223 shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

(c) (1) Before a covered employee returns to duty requiring the performance of a covered function after engaging in conduct prohibited by sections 262.215 through 262.223 of this part, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(2) In addition, each covered employee identified as needing assistance in resolving problems associated with alcohol misuse:

(i) Shall be evaluated by a substance abuse professional to determine that the employee has properly followed any rehabilitation program prescribed under Subdivision (b) of this section, and

(ii) Shall be subject to unannounced follow-up alcohol tests administered by the operator following the employee's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the employee's return to duty. In addition, follow-up testing may include testing for drugs, as directed by the substance abuse professional, to be performed in accordance with 49 CFR Part 40. Follow-up testing shall not exceed 60 months from the date of the employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

(d) Evaluation and rehabilitation may be provided by the operator, by a substance abuse professional under contract with the operator, or by a substance abuse professional not affiliated with the operator. The choice of substance abuse professional and assignment of costs shall be made in accordance with the operator/employee agreements and operator/employee policies.

(e) The operator shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with alcohol misuse does not refer the employee to the substance abuse professional's private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through:

- (1) A public agency, such as a State, county, or municipality,
- (2) The operator or a person under contract to provide treatment for alcohol problems on behalf of the operator,
- (3) The sole source of therapeutically appropriate treatment under the employee's health insurance program; or
- (4) The sole source of therapeutically appropriate treatment reasonably accessible to the employee.

§ 262.245 Contractor employees

(a) With respect to those covered employees who are contractors or employed by a contractor, an operator may provide by contract that the alcohol testing, training and education required by this part be carried out by the contractor provided:

(1) The operator remains responsible for ensuring that the requirements of this part and 49 CFR part 40 are complied with; and

(2) The contractor allows access to property and records by the operator, the Administrator, any DOT agency with regulatory authority over the operator or covered employee, and, if the operator is subject to the jurisdiction of the department, a representative of the department for the purposes of monitoring the operator's compliance with the requirements of this part and 49 CFR part 40.