

(b) The concurrence of recognized employee representatives in an alternate policy may be evidenced by a collective bargaining agreement or any other document describing the class or craft of employees to which the alternate policy applies. The agreement or other document must make express reference to this part and to the intention of the railroad and employee representatives that the alternate policy applies in lieu of the policy required by § 219.403, § 219.405, or both.

(c) The railroad must file the agreement or other document described in paragraph (b) of this section with the Associate Administrator for Safety, FRA. If the alternate policy is amended or revoked, the railroad must file a notice of such amendment or revocation at least 30 days prior to the effective date of such action.

(d) This section does not excuse a railroad from adopting, publishing and implementing the policies required by §§ 219.403 and 219.405 with respect to any group of covered employees not within the coverage of an appropriate alternate policy.

### Subpart F—Pre-Employment Tests

#### § 219.501 Pre-employment drug testing.

(a) Prior to the first time a covered employee performs covered service for a railroad, the employee must undergo testing for drugs. No railroad may allow a covered employee to perform covered service, unless the employee has been administered a test for drugs with a result that did not indicate the misuse of controlled substances. This requirement applies to final applicants for employment and to employees seeking to transfer for the first time from non-covered service to duties involving covered service.

(b) As used in subpart H of this part with respect to a test required under this subpart, the term covered employee includes an applicant for pre-employment testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record may be maintained of the declination.

#### § 219.502 Pre-employment alcohol testing.

(a) A railroad may, but is not required to, conduct pre-employment alcohol testing under this part. If a railroad chooses to conduct pre-employment alcohol testing, the railroad must comply with the following requirements:

(1) It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(2) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).

(3) It must 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) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of part 40 of this title.

(5) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

(b) As used in subpart H of this part, with respect to a test authorized under this subpart, the term covered employee includes an applicant for pre-employment testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record may be maintained of the declination.

#### § 219.503 Notification; records.

The railroad must provide for medical review of drug test results as provided in subpart H of this part. The railroad must notify the applicant of the results of the drug and alcohol tests in the same manner as provided for employees in subpart H of this part. Records must be maintained confidentially and be retained in the same manner as required under subpart J of this part for employee test records, except

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that such records need not reflect the identity of an applicant whose application for employment in covered service was denied.

### § 219.505 Refusals.

An applicant who has refused to submit to pre-employment testing under this section may not be employed in covered service based upon the application and examination with respect to which such refusal was made. This section does not create any right on the part of the applicant to have a subsequent application considered; nor does it restrict the discretion of the railroad to entertain a subsequent application for employment from the same person.

## Subpart G—Random Alcohol and Drug Testing Programs

### § 219.601 Railroad random drug testing programs.

(a) *Submission.* Each railroad must submit for FRA approval a random testing program meeting the requirements of this subpart. A railroad commencing operations must submit such a program not later than 30 days prior to such commencement. The program must be submitted to the Associate Administrator for Safety, FRA, for review and approval by the FRA Administrator. If, after approval, a railroad desires to amend the random testing program implemented under this subpart, the railroad must file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A railroad already subject to this subpart that becomes subject to this subpart with respect to one or more additional employees must amend its program not later than 60 days after these employees become subject to this subpart and file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program may not be implemented prior to approval.

(b) *Form of programs.* Random testing programs submitted by or on behalf of each railroad under this subpart must meet the following criteria, and the railroad and its managers, supervisors,

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officials and other employees and agents must conform to such criteria in implementing the program:

(1) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensure that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as the result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection must be retained for not less than 24 months from the date upon which the particular specimens were collected.

(2)(i) The program must select for testing a sufficient number of employees so that, during the first 12 months—

(A) The random testing program is spread reasonably through the 12-month period.

(B) [Reserved]

(ii) During the subsequent 12-month period, the program must select for testing a sufficient number of employees so that the number of tests conducted will equal at least 50 percent of the number of covered employees. Annualized percentage rates must be determined by reference to the total number of covered employees employed by the railroad at the beginning of the particular twelve-month period or by an alternate method specified in the plan approved by the Associate Administrator for Safety, FRA. If the railroad conducts random testing through a consortium, the annual rate may be calculated for each individual employer or for the total number of covered employees subject to random testing by the consortium.

(3) Railroad random testing programs must ensure to the maximum extent practicable that each employee perceives the possibility that a random test may be required on any day the employee reports for work.

(4) Notice of an employee's selection may not be provided until the duty