

of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing.

(d) The decision not to administer a drug and/or alcohol test under this section shall be based on the employer's determination, using the best available information at the time of the determination that the employee's performance could not have contributed to the accident. Such a decision must be documented in detail, including the decision-making process used to reach the decision not to test.

(e) Nothing in this section shall be construed to require the delay of necessary medical attention for the injured 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.

(f) The results of a blood, urine, or breath test for the use of prohibited drugs or alcohol misuse, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section provided such test conforms to the applicable Federal, State, or local testing requirements, and that the test results are obtained by the employer. Such test results may be used only when the employer is unable to perform a post-accident test within the required period noted in paragraphs (a) and (b) of this section.

§ 655.45 Random testing.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees; the random alcohol testing rate shall be 10 percent. As provided in paragraph (b) of this section, this rate is subject to annual review by the Administrator.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug and alcohol testing is based, respectively, on the reported positive drug and alcohol violation rates for the entire industry. All information used for

this determination is drawn from the drug and alcohol Management Information System (MIS) reports required by this part. In order to ensure reliability of the data, the Administrator shall consider the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry's verified positive results and violation rates. Each year, the Administrator will publish in the FEDERAL REGISTER the minimum annual percentage rates for random drug and alcohol testing of covered employees. The new minimum annual percentage rate for random drug and alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c) Rates for drug testing. (1) 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 § 655.72 for the two preceding consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(2) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 655.72 for the 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 or random alcohol testing to 50 percent of all covered employees.

(d) Rates for alcohol testing. (1)(i) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 655.72 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(ii) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all

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covered employees if the Administrator determines that the data received under the reporting requirements of § 655.72 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(2)(i) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 655.72 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(ii) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 655.72 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The selection of employees for random drug and alcohol 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.

(f) The employer 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 rates for random drug and alcohol testing determined by the Administrator. If the employer conducts random drug and alcohol testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random drug and alcohol testing at the same minimum annual percentage rate under this part.

(g) Each employer shall ensure that random drug and alcohol tests conducted under this part are unannounced and unpredictable, and that the dates for administering random tests are spread reasonably throughout the calendar year. Random testing must be conducted at all times of day when safety-sensitive functions are performed.

(h) Each employer shall require that each covered employee who is notified of selection for random drug or random alcohol testing proceed to the test site immediately. If the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site immediately.

(i) A covered employee shall only be randomly tested for alcohol misuse while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions. A covered employee may be randomly tested for prohibited drug use anytime while on duty.

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

(k) If an employer is required to conduct random drug and alcohol testing under the drug and alcohol testing rules of more than one DOT agency, the employer may—

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

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