

companies that had already collected 2002 data would have had to download that information. In addition, many companies had not been collecting vital data regarding refusals to test. Therefore, use of the new form will be required in CY 2004 for collecting data representing CY 2003 testing.

During 2003, the Federal Transit Administration (FTA) has agreed to field-test an electronic data collection system using data elements of the new form. The FTA will select transit systems for reporting MIS data as part of this field-test. FTA's Volpe Center resources will coordinate the data collection. Through field-testing we can expose the Volpe-developed system software to a wide range of equipment and real-world usage. This field test will be accomplished with an eye toward full implementation across all DOT agencies as soon as possible. We believe the revised MIS form and its data format represent the best way to accomplish the Department's ultimate goal of having full automation for MIS submissions. Early demonstrations of FTA's system have shown the design to be very user-friendly and uncomplicated for the input required data.

*Comment:* Several commenters expressed the concern that employers could believe the data requirements no longer reflected on MIS forms are being de-emphasized by the DOT agencies. Most of these commenters wished us to reiterate the importance of training information that will no longer be asked for on the MIS form.

*DOT Response:* As we stated in the NPRM, the items for which we are no longer asking are items that DOT agencies can obtain in a variety of other ways and in other venues and formats. It is worth reiterating that the vast majority of items removed from the MIS form remain important. Employers would be remiss, to say nothing about being in violation of part 40 and DOT agency regulations, if they chose not to obtain, maintain, and furnish information required by regulations. Employers and service agents will be in clear violation of regulations and subject to sanctions if the DOT agency requirements (e.g., for supervisory training, for recordkeeping) are now ignored simply because the data generated by those requirements are no longer being recorded on the MIS form.

*Comment:* The bulk of commenters supported how the Department proposed to count the number of covered employees (i.e., employees subject to testing because they perform DOT safety-sensitive duties) using the averaging formula. Some commenters, while supporting the averaging formula

method, expressed concern for companies that make random selections on a daily or weekly basis (as opposed to those selecting monthly or quarterly). Only one commenter expressed the desire to use a number determined at the start of the year believing it simpler than factoring-in employee census fluctuations. This commenter believed that doing so would be better than having an employer determine the average number of employees at year's end—which was not an idea proposed by the Department in the NPRM. In addition, this commenter indicated that employers represented by the commenter did not know how many safety-sensitive employees they actually employ throughout the year.

*DOT Response:* The Department believes the calculation of the employee average will be the best way for employers to determine the number of covered employees eligible for DOT testing throughout the year. This process will more readily enable employers to take into account employment of seasonal workers; periods of downsizing; and business start-ups and other increases in employee numbers. To fix the number of covered employees at the start of a year does not take those important factors into consideration. For some employers, establishing the number at the start of the year may lead to their conducting much more random testing than required, and for others, far too little random testing.

Companies that do not know how many employees they employ and release from employment; do not know how many eligible employees are in each random selection pool; and do not know if eligible employees are placed into and taken out of random selection pools have problems irrespective of how the MIS form is completed.

In any case, the Department believes the best way for the random testing pools to be kept current and for the random testing rate to reflect the number of employees actually performing safety sensitive duties is the proposed averaging formula, and we have adopted it in this regulation. It is imperative that companies not wait until the end of the year to make this calculation. Companies must place all covered employees into the pool, know how many are in the pool, and select and test the appropriate percentages.

While we believe that companies conducting their random testing draws on a daily or weekly basis have computer systems sophisticated enough to factor the average on a daily or weekly basis, the Department will not require those companies to do so.

However, those companies conducting random draws more frequently than monthly (e.g., daily, weekly, bi-weekly) will not be required to do the averaging more than once each month. And, for example, companies selecting monthly, must calculate monthly; and companies selecting quarterly, must calculate quarterly.

*Comment:* One commenter believed the requirement to capture "refusal to test" data would be too complex for employers. This commenter also stated that counting the number of cancelled tests would also add a burden to employers, although the commenter wished to have cancelled tests counted toward satisfaction of the random testing rate. In short, this commenter did not favor changes to the old single-industry-specific forms.

*DOT Response:* The Department believes that the testing panorama has changed considerably since the inception of the DOT testing program. Other program forms, such as the Breath Alcohol Testing Form and the Federal Drug Testing Custody and Control Form, have changed to reflect program changes. We believe it is important that the MIS form transform accordingly. At one time the Department did not envision that specific reasons for refusals would become important enough to track. However, a troubling industry has risen whose primary goal is to "beat the drug test." Adulterated and substituted test results have increased considerably: when we speak of refusals, no longer are we simply talking about employees failing to appear for tests. Times change and this refusal delineation is now important for the Department, the DOT agencies, and employers to have.

As proposed in the NPRM, we have determined that refusals to test should count as a test result—one that goes toward satisfaction of a company's random testing rate. However, we do not believe that cancelled tests should count toward satisfaction of the rate. We continue to support part 40's contention that a cancelled test does not count toward compliance with DOT's testing requirements.

Again, we believe a single MIS format is the most appropriate approach. We believe that the many items we no longer desire to capture on the form more than offset the few new collection requirements for refusals and cancellations.

*Comment:* Two commenters believed the collection of data on separate sheets for each employee category would present too much work for those charged with completing the form. One commenter supported the one-page