

original collection and the observed collection be sent to the laboratory (e.g., specimen out of temperature range) [the result requiring the most stringent consequence will ultimately be the result of record].

The Department is also clarifying and making uniform among DOT agencies how employers determine the total number of employees against which the annual random rate applies. Some DOT agencies have told employers to count the number of covered employees working at the start of the calendar year; some DOT agencies have directed employers to count the total number of covered employees that worked for the company within the year; and still others have advised employers to count the average number of employees on a monthly or quarterly basis.

This rule directs employers to add the total number of covered employees eligible for random testing in each random testing selection period for the year and divide that total by the number of random testing periods. For instance, a company conducting random testing quarterly will add the total of safety-sensitive employees they had in the random pool when each selection was made; then divide this number by 4 to obtain the yearly average number of covered employees. [As an example, if Company A had 1500 employees in the first quarter random pool, 2250 in the second quarter, 2750 in the third quarter; and 1500 in the fourth quarter;  $1500 + 2250 + 2750 + 1500 = 8000$ ;  $8000 / 4 = 2000$ ; the total number of employees subject to testing for the year would be reported as "2000". (Note: This number, "2000", would also be the number on which an employer would base the random testing rate.)]

As stated earlier, no company will be required to factor the average number of employees more often than once per month: No more than 12 times per year.

Companies (and their contractors, as applicable) will continue to submit the MIS reports in accordance with requirements (e.g., dates for submission; selection of companies required to submit, etc.) that will continue to be in each DOT agency regulation. Likewise, DOT agency regulations will continue to address the manner (e.g., mail; CD; electronic transmission) and locations for submitting the forms. Responding to a commenter, we have added a reference to this in rule text.

It is important to note that MIS alcohol testing data reflects all these proposals made for MIS drug testing data. Refusals will count as testing events; cancelled tests will not; and random pool averages will determine

the number of employees against which the annual testing rate applies.

The Department is currently working toward an electronic MIS form capable of Internet submission. Each form would be DOT agency specific and would not have extraneous items showing (for example, the USCG-specific form would not include an alcohol testing section; the RSPA-specific form would not show an alcohol random testing category). Additionally, the system would bring to the attention of the person completing the form any items that did not accurately compute mathematically. Finally, employee categories listed would only be those for the specific DOT agency.

The Department recognizes that Consortia/Third Party Administrators (C/TPAs) are responsible for administering a large number of transportation industry drug and alcohol testing programs. For this reason, the MIS form will contain a space for the employer to note the name of the C/TPA the company uses, if any. Finally, we have made some of the minor, but useful changes recommended by several commenters and DOT agency representatives. These include typographical, counting, and example errors; and the option to use zeros instead of leaving testing data items blank.

Finally, the Department wants reasonable suspicion and reasonable cause testing to be counted together on the MIS form with no differentiation between the two. The issue of how to count these two types of tests has been complicated by the fact that neither the CCF nor the BATF distinguish between the two even though the DOT agencies do. For instance, FMCSA and FTA authorize reasonable suspicion drug testing; FAA, RSPA, and USCG authorize reasonable cause drug testing; and FRA authorizes both. FMCSA, FAA, FTA, and RSPA authorize reasonable suspicion alcohol testing; and FRA authorizes both reasonable suspicion and reasonable cause alcohol testing. Sufficient documentation should exist with employers for DOT agency representatives to tell the difference between the two during inspections and audits.

#### Regulatory Analyses and Notices

This rule is not a significant rule for purposes of Executive Order 12866 or the DOT's regulatory policies and procedures. Nor is the rule an economically significant regulation. It is a reworking of existing requirements; it imposes no new mandates; and it will not create any new costs. In fact, the

rule will serve to reduce requirements and costs. The Department realizes that some companies maintain their current MIS data items on basic computer spreadsheets. However, we are requiring only a minimal number of additions to the format while removing a larger number of items.

This final rule does not have sufficient Federalism impact to warrant a Federalism assessment under Executive Order 13132. With respect to the Regulatory Flexibility Act, the certifies that, if adopted, this rule would not have a significant economic impact on a substantial number of small entities, so a Regulatory Flexibility analysis has not been prepared. Even though this rule might affect a large number of small entities, we do not expect the new MIS requirements to have a significant economic impact on anyone.

The rule also contains information collection requirements. As required by the Paperwork Reduction Act of 1995, (the PRA, 44 U.S.C. 3507(d)), the Department is submitting these requirements to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB) for review, as required under the PRA. For informational purposes, the Department will place its entire PRA package for the MIS form on the Internet when that submission is approved.

As noted elsewhere in this preamble, the proposal would amend part 40 to include a new format and a new set of instructions for the MIS form. This single form would be used across DOT agencies rather than the multiple forms with multiple instructions currently in use. The form's data elements would be reduced significantly as well.

Completing an MIS report requires a company to collect and compile drug and alcohol testing data generated throughout the year by that company's drug and alcohol testing program and placing some of that data onto the form. Certainly, the more complex a company's testing program set-up, the more complex assembling needed data becomes. Companies having decentralized program locations may have to draw information from a variety of localized programs. Companies with a number of subsidiaries may have large amounts of data to compile and authenticate. In addition, companies failing to regularly update and bring together their testing data may find themselves in positions of having to do so in a hurried manner at the end of the year. Also, companies lacking computerization of data capabilities may have to rely on manual methods.