

3. Number of other alcohol rule violations and actions taken for them.
4. Actions taken for alcohol test refusals.
5. Supervisor initial alcohol training data.
6. Number of persons denied a position following a positive drug test.
7. Number of employees returned to duty following a positive or refusal drug test.
8. Actions taken for positive drug tests.
9. Actions taken for drug test refusals.
10. Supervisor initial drug training data.

Finally, the Department stated that the DOT agencies would continue, in their regulations, to provide direction to their regulated employers regarding when, where, and how to report MIS data. The DOT agency final rules published today are designed to amend their rules so that regulated industries will report MIS data in accordance with 49 CFR part 40. In addition, the DOT agency final rules are designed so that no conflicts exist between them and part 40 regarding how the MIS form is to be completed and how the instructions are to be followed.

General Discussion of Rule Changes

The DOT agencies are amending several sections of their drug and alcohol testing regulations to incorporate references to the new one-page MIS form and its instructions found in 49 CFR part 40. In addition, other revisions are being made in an effort to conform MIS-related regulatory text used by the DOT agencies. Specifically, the items reflecting use of conforming language are as follows:

1. Definitions of "positive rate for random drug testing" and "violation rate for random alcohol testing" will conform throughout the regulations and will replace "annualized rate," "positive rate," and "violation rate," as appropriate. Both definitions will reflect how the DOT agencies will determine whether the random rates of testing within their regulated industries will rise, lower, or stay the same from year to year. It is important to note that RSPA has no random alcohol testing requirement and will, therefore, not include a definition for the "violation rate for random alcohol testing."

2. 49 CFR part 40 also clarified and made uniform among DOT agencies how employers determine the total number of employees to which the annual random rate applies. The averaging method highlighted in part 40 has been adopted in DOT agency rule text. The rules direct employers to add the 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. The rules also reference employers' use of service agents (e.g., Consortium/Third-Party Administrators) in their random testing programs.

3. Each DOT agency rule incorporates common language requiring use of the MIS form and the instructions found in 49 CFR part 40. The rules also permit employers to use the electronic version of the MIS form as designated by DOT agency administrators and furnished by DOT. Specific internet addresses are provided in DOT agency rules. As referenced in the preamble to 49 CFR part 40, the Department's ultimate goal of having full automation for MIS submissions has been accomplished. Through Volpe Center development and field-testing, the automated system will be fully operational across all DOT agencies at the end of 2003.

4. DOT agency rules also include conforming language regarding how employers, with covered employees performing duties under more than one DOT agency rule, are to enter testing data for those employees. In short, the employee needs to be counted only on the MIS report for the DOT agency under which he or she is random tested. It is important to note, that the FAA requires all employees performing FAA safety-sensitive duties to be tested (including random) under FAA regulations. Otherwise, this will be the DOT agency under which the employee performs more than 50% of his or her duties.

5. Finally, the conforming language addresses the preparation of the MIS form and who must attest to its accuracy. The regulations give employers the ability to have service agents (e.g., Consortium/Third-Party Administrators) prepare the report on their behalf. However, no matter who prepares the report, a company official (e.g., Designated Employer Representative as defined in 49 CFR part 40) must certify the accuracy and completeness of the form.

Other Significant Issues

Regarding 49 CFR part 40 and the MIS form, the OMB number assigned to the form is 2105-0529. This number was issued by OMB on October 28, 2003.

The Docket number assigned to the part 40 MIS final rule was OST-2003-15676. It should have been, OST-2002-13433. This will serve to correct that error.

DOT has been asked how specimen results are to be counted if the verified result is a refusal because the specimen

was found to be both adulterated and substituted. While these types of results rarely occur, they do nonetheless exist. Such a specimen result is to be counted as one test result. If this type of result is present in an employer's testing program, the data should be entered as "1" for the test result and as ".5" for the adulterated result and as ".5" for the substituted result.

In addition, it is possible for a positive test to also be identified as being a refusal because the specimen was either adulterated or substituted. If such a result is present in an employer's testing program, the data should be entered as "1" for the test result and as ".5" for the positive result and as ".5" for the adulterated result or the substituted result, as appropriate. The electronic MIS data entry system has been designed to accommodate these ".5" results, no matter how infrequently they occur.

Section 1, of the MIS form in 49 CFR part 40, references the "FMCSA." That should read, "FMCSA." MIS forms that appear on the DOT website reflect the appropriate change. Electronic formats designed for use by the FMCSA and their regulated industry also reflect the change.

Finally, the United States Coast Guard (USCG) will incorporate use of the new MIS form into their rules. Therefore, USCG-regulated employers will continue to report drug testing data on the new MIS form. The DOT supports the USCG in their desire to use and to incorporate use of DOT's MIS form into their regulation. Because the USCG is part of the Department of Homeland Security (DHS), their regulations must be published under the authority of DHS. Therefore, the USCG will publish a conforming amendment to 46 CFR part 16 incorporating use of the form.

Regulatory Analyses and Notices

These rules are not significant rules for purposes of Executive Order 12866 or the DOT's regulatory policies and procedures. Nor are the rules economically significant regulations. They represent a reworking of existing requirements, the economic burden of which are now incorporated into 49 CFR part 40; they impose no new mandates; and they will not create any new costs. In fact, use of the new MIS form has been shown to reduce requirements and costs. The DOT agencies will no longer account for the PRA cost associated with use of the form. These costs are now accounted for by the Office of the Secretary.

In addition, there is no need for the DOT agencies to publish an NPRM each regarding use of the new MIS form and