THE PROBLEM AND ITS SOLUTION

The nation’s transportation agencies need access to authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The legal projects of both the National Cooperative Highway Research Program (NCHRP) and the Transit Cooperative Research Program (TCRP) are designed to provide insight into the operating practices and legal elements of specific problems in transportation law.

For the most part, the NCHRP and TCRP conduct independent legal studies under their respective programs. Because the subject matter and players are usually different, the studies are suited to this independent approach. However, for specific subjects, the NCHRP and the TCRP are committed to joint research efforts when appropriate. The subject of this Digest is one such case.

The NCHRP and TCRP also publish separate Legal Research Digest series. Therefore, this joint issue carries the next legal research digest number for each series as a convenience to individual and library subscribers.

APPLICATIONS

Congress enacted the Omnibus Transportation Employee Testing Act of 1991 directing drug and alcohol testing for employees of transportation companies and agencies engaged in “safety sensitive functions.” Some of the carriers are unionized and must comply with the requirements of either the National Labor Relations Act or the Railroad Labor Act. These laws prescribe bargaining requirements for employers.

What happens when there is an intersection of the Omnibus Transportation Employee Testing Act of 1991, the National Labor Relations Act, or the Railroad Labor Act? This report examines the relationship between these laws, as well as the impact that intersections have had on existing collective bargaining agreements.

The report should be helpful to attorneys, human resources officials, administrators, and labor relations specialists.
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Throughout this report, there are references to 49 Code of Federal Regulations (C.F.R), Part 40 (2000). The United States Department of Transportation issued a Notice of Final Rulemaking on December 19, 2000, Fed. Reg., Vol. 65, No. 244 (79462), in which it amended portions of Part 40 pertaining to medical review, officers’ review, and split specimen testing requirements effective January 19, 2001. C.F.R. Part 40 has been completely revised and according to the Notice of Final Rulemaking will be reissued and become effective August 1, 2001.

However, the effective date of a portion of the rule is conditioned upon the promulgation of rules by the United States Department of Health and Human Services. Accordingly, the revised 49 C.F.R, Part 40 could be effective August 1, 2001, or portions may be postponed even further.

We have decided to proceed with this report using citations from the 2000 version of the C.F.R. Our reasons for proceeding in this manner are as follows: first, the requirements being inserted add to but do not change the basic structure of the program; second, at this point the effective date for all portions of the revised 49 C.F.R, Part 40 is not certain; and third, the changes in the regulatory provisions do not basically change the matters being discussed—When regulatory requirements under a Federal Assistance Program can be negotiated as part of the collective bargaining process.

DRUG AND ALCOHOL TESTING—A SURVEY OF LABOR-MANAGEMENT RELATIONS

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I. INTRODUCTION

The Omnibus Transportation Employee Testing Act of 1991 (Omnibus Testing Act) was enacted as Title V of the Department of Transportation and Related Agencies Appropriations Act of 1992, Pub. L. 102–143, 105 Stat. 917 (1991). Under that law, the Department of Transportation (DOT) was directed to issue regulations requiring workers who engage in “safety-sensitive” functions within the truck, bus, mass transit, and rail sectors of the transportation industry to be tested for drugs and alcohol by their employing carrier.¹

Many of the carriers in the transportation industry are unionized. Therefore, in addition to having to comply with the specific requirements imposed under the Omnibus Testing Act, carriers, in their capacity as employers, are also responsible for complying with the requirements of either the National Labor Relations Act (NLRA) or the Railway Labor Act (RLA). These latter laws require, among other things, that “rates of pay, wages, hours of employment, or other conditions of employment” of employees be established through a collective bargaining process with the employees’ representative.²

The following report looks at the relationship between the labor laws and the Omnibus Testing Act and the effect that bargaining duties imposed under the labor laws may have on carriers’ implementation of DOT’s substance abuse testing requirements. In particular, the report considers the impact that the requirements mandated by the Omnibus Testing Act may have already had on existing collective bargaining agreements, as well as the potential future impact that federal and applicable state testing requirements may have on carriers’ testing programs in the motor carrier, transit, and rail sectors of the transportation industry.

Prior to addressing such matters, however, the report will first consider the fundamental legality of DOT’s mandated testing and a number of the legal challenges that have been brought against the regulations.

A. Legality Issues Concerning the Department of Transportation’s Mandatory Drug and Alcohol Testing Requirements

1. Overview Regarding Unreasonable Searches and Right of Privacy

The Fourth Amendment of the United States Constitution provides, in relevant part, for “[t]he right of the people to be secure in their persons…against unreasonable searches and seizures shall not be violated….”³ The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government and those acting at their direction.⁴

In Schmerber v. California,⁵ the United States Supreme Court held that blood and breath tests conducted by law enforcement agents are searches within the meaning of the Fourth Amendment. The Supreme Court further instructed that the Fourth Amendment’s privacy protections are not limited solely to searches involving suspected criminal activity, but may include suspected breaches of noncriminal statutory or regulatory standards, including instances of suspected workplace misconduct.⁶

¹ The Omnibus Testing Act also required testing by air carriers. Although Congress was aware that DOT had previously issued regulations requiring most transportation workers to be drug tested, and that DOT was at the time also considering imposing similar testing requirements for alcohol, the Omnibus Testing Act’s passage was nonetheless thought to be necessary. As the Act’s legislative history explained, there were three principal reasons for the Omnibus Testing Act: (1) DOT did not then have the statutory authority to require mass transit employee to be tested; (2) Absent a statutory mandate for such testing, the existing drug rules would be “subject to the whimsical interpretations and revisions of future DOT Administrations”; and (3) Congress was very concerned about the occurrence of alcohol-related transportation accidents. S. REP. No. 54, 102d Cong., 1st Sess. 5–6 (1991).


³ U.S. CONST. amend. IV.


⁶ See, eg., O’Connor v. Ortega, 480 U.S. 709 (1987) (Ortega): “[b]ecause the individual’s interest in privacy and personal security ‘suffers whether the government’s motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,…it would be anomalous to say that the individual and his private property are fully protected only when the individual is suspected of criminal behavior.”
The Fourth Amendment's protection of privacy will be implicated only if the conduct at issue infringes "an expectation of privacy that society is prepared to consider reasonable." While this would ordinarily require searches to be based on probable cause and an accompanying search warrant, the Supreme Court has also instructed that probable cause need not exist at the time of a search "where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." In the case of workplace searches in particular, the Supreme Court has held that employer intrusions into the constitutionally-protected privacy of employees "for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct," are to be judged by the standard of reasonableness rather than probable cause.

Determining the reasonableness of searches under the Fourth Amendment requires a two-fold inquiry: (1) whether the action was justified at its inception; and, (2) whether the scope of the search is reasonably-related to the circumstances justifying the interference in the first place. In the second instance, the determination of "[w]hat is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." The permissibility of any particular search requires "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." 10

2. Judicial Challenges to DOT's Testing Requirements

The legality of DOT's drug and/or alcohol testing requirements has been challenged in court on a number of occasions. Most of the challenges occurred prior to the enactment of the Omnibus Testing Act in 1991, and in all but two instances were unsuccessful. Of the challenges to DOT's testing mandates, the Supreme Court's 1989 decision in Skinner v. Railway Labor Executives' Assn. (Skinner) is considered the seminal case. Skinner involved a challenge by the Railway Labor Executives' Association (RLEA) to the 1985 drug and alcohol testing regulations issued by DOT's Federal Railroad Administration (FRA). FRA's regulations mandated that following certain accidents and rule violations, the urine, breath, and blood of train crew members be tested. With the exception of the RLEA's Fourth Amendment challenge, the remaining arguments were summarily dismissed by the Ninth Circuit.

13 489 U.S. 602 (1989). In a case decided by the Supreme Court with Skinner, National Treasury Employees Union v. Von Raab (Von Raab), 489 U.S. 656 (1989), the Court also upheld drug testing regulations of the United States Customs Service, which required drug testing of employees applying for promotion to positions directly involving the interdiction of drugs, or to positions that required an employee to carry a firearm. Applying the same analysis as Skinner, the Court held that:

[The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions. 489 U.S. at 679.]

At the same time, while agreeing that employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Service's screening program, especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish their expectations of privacy in respect of a urinalysis test 489 U.S. at 677 (citation omitted), the Court specifically declined to rule on the constitutionality of Custom's regulation, citing the inadequacy of the record.

(It is not clear, however, whether the category defined by the Service's testing directive encompasses only those Customs employees likely to gain access to sensitive information...rais[ing] in our minds the question whether the service has defined this category of employees more broadly than is necessary to meet the purposes of the Commission's directive. Id at 678.) As further discussed, infra, the Von Rabb decision rather than Skinner has served as the principle basis to uphold DOT's modal testing requirements in several instances.

14 Railway Labor Executives' Assn. v. Burnley, 839 F.2d 575 (9th Cir. 1988).

However, the Ninth Circuit found FRA's testing requirements were an impermissible search under the Fourth Amendment. As the Ninth Circuit explained, "intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment" (emphasis supplied). The Supreme Court, however, found the Ninth Circuit's reading of the Fourth Amendment's prohibition on searches to be too narrow in the case of FRA regulations, and reversed, applying the following analysis.

The Supreme Court initially looked at whether the Fourth Amendment applied at all, and, if so, whether the nature of the required tests amounted to a "search" within the scope of the Fourth Amendment. The Court found that testing required by FRA would be conducted by private railroad employers rather than directly by the federal government and, therefore, that the Fourth Amendment would ordinarily not apply in such circumstances. Nonetheless, the Court found there were "clear indices of the Government's encouragement, endorsement, and participation and suffice to implicate the Fourth Amendment." Then, turning the focus of its analysis to whether the testing of urine, breath, and blood of train crew employees was sufficiently intrusive of expectations of privacy to be deemed a Fourth Amendment "search," the Court concluded that the collection and subsequent analysis of the biological specimens required by the regulations would intrude upon the expectations of privacy "that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions...must be deemed searches under the Fourth Amendment."

The Court next turned its attention to the heart of the issue—whether the search required by the FRA was unreasonable, explaining that "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable" (emphasis added). After explaining that the determination of what is reasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself," the Court went on to advise that "the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Applying this balancing test to the FRA's regulations, the Court instructed that the government's interest of ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty...[and] also requires and justifies the exercise of supervision to assure that the restrictions are in fact observed.

Then, after rejecting the unions' argument that the Fourth Amendment required railroads' supervisors to obtain a search warrant as a precondition of testing ("imposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating, the objectives of the Government's testing program"), the Court went on to conclude that FRA's testing procedures "pose only limited threats to the justifiable expectations of privacy of covered employees," while, on the

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16 In addition to challenging the regulations under the Fourth Amendment, the RLEA challenged FRA's testing requirements on a number of additional grounds: the regulations violated the Railroad Labor Act by denying employees the right to have union representation when a test was conducted; the testing impinged on the right of privacy; the regulations violated equal protection; FRA lacked the statutory authority to delegate testing to individual railroads; and the regulations discriminated against the handicapped, in violation of the Federal Rehabilitation Act of 1973, by causing the dismissal of employees who could perform their jobs in spite of their drug or alcohol use. See 839 F.2d at 590–92.

17 839 F.2d at 592.

18 489 U.S. 602 at 615–16.

19 Id. at 617.
other hand, "the Government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" (emphasis supplied). The next challenge to DOT's testing regulations involved the drug testing regulations issued by the former Urban Mass Transportation Administration (UMTA), now the Federal Transit Administration (FTA), in Amalgamated Transit Union v. Skinner. While the challenge to the regulations was successful, UMTA's regulations were found infirm for jurisdictional, not constitutional, reasons.

A more substantive challenge to DOT's testing requirements occurred in the case of Bluestein v. Skinner, which involved the random drug testing requirements of the Federal Aviation Administration (FAA). In this case, the Ninth Circuit upheld the FAA's random testing requirement, summarily rejecting the union's contention that the airlines' conduct of random testing without a warrant constituted an unreasonable search in violation of the Fourth Amendment. Relying primarily upon the Supreme Court's decision in the Von Raab case, the companion case to Skinner, the Ninth Circuit rejected the argument that the Fourth Amendment required the FAA to demonstrate the existence of a drug abuse problem in the airline industry and held that the FAA was only required to show there was a potential for serious harm to occur.

Less than a year after its Bluestein decision, the Ninth Circuit was again asked to consider the legality of DOT-required random drug testing. This time, in International Brotherhood of Teamsters v. Dept. of Transp. (IBT), the challenge was to the random test-

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26 894 F.2d 1362 (D.C. Cir. 1990).
27 Id. at 1362 (citation omitted).
28 In the case of breath tests, the Court found even less intrusion ("Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment." Id. at 625). And, while urine testing presented "[a] more difficult question", Id. at 626, the Court found such testing to be valid as well. (While urine tests "require employees to perform an excretory function traditionally shielded by great privacy,... the FRA's regulations "endeavor to reduce the intrusiveness of the collection process", Id.; the samples were not required to be given under the direct observation of a monitor ("despite the desirability of such a procedure to ensure the integrity of the sample," Id.), and would be "collected in a medical environment, by personnel unrelated to the railroad employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination." Id. at 626–27.
29 Id. at 628. Concerning the need for an individualized suspicion, the Court observed that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable," Id. at 624. Rather, the Court said, "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest...would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Id. at 624.
31 Id. at 457.
32 According to the Ninth Circuit, the Von Raab decision (discussed in greater detail in note 14, supra) was more appropriate to its analysis because the random testing at issue in Bluestein was "more closely analogous to the facts of Von Raab than to those of Skinner." 908 F.2d at 455. As the court explained: "In Von Raab, as in [Bluestein], the testing program did not require any level of individualized suspicion or the occurrence of any suspicion-triggering event; in Skinner, on the other hand, testing was limited to those employees involved in a train accident or safety rule violation." Id. at 456 n.6.
33 932 F.2d 1292 (9th Cir. 1991). FHWA's regulations were also challenged in separate cases brought by the Amalgamated Transit Union; Railway Labor Executives' Association; and the Oil, Chemical and Atomic Workers International Union. These cases were consolidated with IBT. In addition, a fifth challenge to the FHWA's regulations, by the Owner-Operators Independent Drivers Association (OOIDA), was consolidated as well. The OOIDA case had been brought in the district court, which had enjoined FHWA's random and post-accident testing requirements. Owner-Operators Indep. Drivers Ass'n v. Burnley, 705 F. Supp. 481 (N.D. Cal. 1989). In preliminary matters, the Ninth Circuit rejected OOIDA's argument to remand the cases to district court, 932 F.2d at 1297–98, and instead opted to review FHWA's regulations on their substantive merits de novo. ("Because the Unions have challenged the regulations on their face, rather than as applied, we decide only the narrow question whether these drug tests 'can ever be conducted' without offending the fourth amendment." Id. at 1298 (emphasis in original).
ing requirements of the Federal Highway Administration (FHWA). Following the Supreme Court's analysis in Skinner and Von Rabb, as well as the reasoning previously applied in its Bluestein decision, the Ninth Circuit again upheld the constitutionality of random testing. In so doing, the court also observed that "random drug testing has particular appeal because, due to its inherent element of surprise, complete abstinence from drug use is the drivers' only safeguard against failure."\(^{35}\)

Slightly more than a month after its IBT decision, the Ninth Circuit, in Railway Labor Executives' Assoc. v. Skinner (RLEA),\(^{36}\) upheld the constitutionality of the FRA's random testing requirements. In so doing, the court applied the same analysis and reasoning previously followed in Bluestein and IBT ("We can find no principled distinction between the regulations in Bluestein and the ones challenged here.").\(^{37}\)

The most recent, successful, challenge to DOT's testing regulations occurred in the case of American Trucking Association v. Fed. Hwy. Admin. (ATA).\(^{38}\) In ATA, like Amalgamated Transit Union v. Skinner, the challenge to DOT's testing requirement was not on constitutional grounds. Rather, the challenge was to the reasonableness of FHWA's interpretation of its statutory authority to require motor carriers to conduct preemployment alcohol testing.

Section 5 of the Omnibus Testing Act directed DOT to promulgate regulations requiring motor carriers to conduct "preemployment...testing of operators of commercial motor vehicles for the use of a controlled substance..." (emphasis added).\(^{39}\) On the basis of the statute's wording, the trucking association argued that, as a matter of law, FHWA had misconstrued the statute to require the agency to adopt regulations requiring motor carriers to test driver-applicants at "any time prior to the first time the employee performs safety-sensitive functions," including even pre-hiring.\(^{40}\) Furthermore, the trucking association argued that because the use of alcohol by an applicant prior to being hired as a commercial motor vehicle operator would not be a violation of law or federal regulation, FHWA did not have the authority to require motor carriers to test drivers for their pre-hire use of alcohol. The Fourth Circuit agreed and struck down FHWA's regulation to the extent that it "require[d] alcohol testing of all would-be motor carrier operators prior to their first performance of a safety-sensitive function."\(^{41}\) As the Fourth Circuit explained: "By permitting the pre-employment testing to be conducted pre-hiring (at which point any discovered alcohol use would ordinarily be lawful), the rule does not require[ ] motor carriers to conduct preemployment...testing of operators of commercial motor vehicles for use, in violation of law or Federal regulation, of alcohol"\(^{42}\) (emphasis in original).

While the legality of DOT's regulations within the various transportation modes have been soundly tested on a number of occasions, the regulations have thus far withstood each challenge, including the challenges to DOT's random testing requirements. To date, therefore, the only two successful challenges to the regulations have been on other than constitutional grounds. Amalgamated Transit Union v. Skinner was brought on jurisdictional grounds and attacked the authority of the former UMTA to mandate any testing; that jurisdictional infirmity has since been corrected by enactment of Section 6 of the Omnibus Testing Act.\(^{43}\) The other successful challenge, American Trucking Association v. Fed. Hwy. Admin., was similarly jurisdictional and turned on DOT's interpretation of its regulatory agency's authority rather than on the constitutional merits of such testing.

The government's successful defense of its regulations has been of benefit to employers, who have been able to cite to Skinner, Von Rabb, and their progeny when their individual testing programs have been challenged on constitutional grounds. See, e.g., Dwan v. Massachusetts Bay Transportation Authority\(^{44}\) (asserting federal and state constitutional challenges of FTA's testing requirement of a sheet metal worker who per-

\(^{34}\) On December 9, 1999, the Motor Carrier Safety Improvement Act was signed into law and, among other things, established the new Federal Motor Carrier Safety Administration (FMCSA). As a result, the motor carrier safety regulatory and enforcement duties previously administered by the FHWA's Office of Motor Carrier Safety have been transferred to and become the responsibility of Federal Motor Carrier Safety.

\(^{35}\) Id. at 1305. The appeals court also summarily dismissed the unions' constitutional challenges to FHWA's periodic, preemployment, and post-accident testing requirements, as well as the union's claim that FHWA had acted arbitrarily and capriciously in adopting the regulations. Id. at 1306-09.

\(^{36}\) 934 F.2d 1096 (9th Cir. 1991).

\(^{37}\) Id. at 1099.

\(^{38}\) 51 F.3d 405 (4th Cir. 1995).

\(^{39}\) 49 U.S.C. § 31306(b).

\(^{40}\) 51 F.3d at 410, quoting 59 Fed. Reg. 7321 (emphasis added by the court).

\(^{41}\) Id. at 414.

\(^{42}\) Id. at 410.

\(^{43}\) Codified at 49 U.S.C. § 5331.

forms corrective maintenance on transit buses, including repair and rehabilitation), also N.J. Transit PBA v. N.J. Transit. 46 (upholding the constitutionality of the transit agency's random testing of transit police officers). However, this is subject to change as a result of the recent decision by the United States Court of Appeals for the Sixth Circuit, in Hammons v. Norfolk Southern Corp., 47 which preliminarily has found merit in a so-called "Bivens" challenge to the railroad's testing program.

The Hammons case involves a railroad employee who, as a result of having previously tested positive for cocaine, was allegedly subject to approximately 24 random drug tests during the year and a half following his return to service. When he subsequently tested positive, he was discharged for violating the company's policy and the terms of the carrier's letter authorizing his prior return to duty, which had warned that he was subject to dismissal if he again tested positive. After unsuccessfully appealing his discharge to the Public Law Board, Hammons sued Norfolk, asserting both his Bivens claim and also a claim under 42 U.S.C. § 1983. 48

In Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics (Bivens), 49 the Supreme Court held that federal agents can be liable for damages they cause by violating an individual's Fourth Amendment rights. The Sixth Circuit's decision holding that Bivens actions can be brought against private corporations is not dispositive of the ultimate issue and, therefore, does not necessarily augur against carriers administering tests pursuant to DOT's regulations. 50 The appeal court's decision has been tempered by its cautionary warning that "the issue of whether Norfolk engaged in state action significant enough for Hammons to maintain a Bivens claim is not for us to decide at this juncture, but for purposes of this appeal we will assume that sufficient state action has been alleged." 51 On remand, therefore, the district court was directed to determine whether "the corporate policy at issue has violated Hammons' constitutional rights under the Fourth Amendment, and that the policy is attributable to the federal government..." 52 If so, according to the court, "Hammons is entitled to relief." 53

Hammons appears to be the first case to have used Bivens to attack the administration of substance abuse testing conducted pursuant to DOT regulations. For the moment at least, we must await its outcome to determine what, if any, future adverse affect it might have on carriers' testing programs. In light of the Supreme Court's underlying reasoning and holdings in Skinner and Von Rabb, particularly the latter case where federal action was clearly present, the constitutionality of testing by private employers of their safety-sensitive employees at the government's direction would not, in the author's opinion, seem to be much in jeopardy, even when challenged under the collateral theory of Bivens.

3. Admissibility and Reliability of the Results of Drug and Alcohol Tests

As a general rule, the federal exclusionary rule concerning the admissibility of evidence obtained in violation of the Fourth Amendment applies solely to criminal proceedings. However, the application of DOT's testing requirements would not arise in the context of a civil proceeding but would instead occur in some form of administrative disciplinary proceeding or subsequent civil litigation attacking the disciplinary action imposed by the employer. Although the Supreme Court on one occasion found the exclusionary rule to apply in a civil proceeding involving the forfeiture of an automobile, see One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 54 the Court has thus far declined to extend the exclusionary rule to other civil matters; see United States v. J anis 55 (federal tax proceeding), also

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47 156 F.3d 701 (6th Cir. 1998).
48 Bivens and § 1983 actions are counterparts of each other and differ only in the fact that § 1983 actions relate to constitutional infringements by state officials rather than federal officials. 156 F.3d at 707. In Hammons, the district court granted the Norfolk Southern's motion to dismiss Hammons' § 1983 claim. The Sixth Circuit declined to consider the merits of Hammons' § 1983 claim on appeal, observing in a footnote that "[b]ecause we hold that a Bivens action is applicable to a private corporation that engages in federal action, it is not necessary for us to consider this alternative claim." 156 F.3d at 708, n.11.
49 403 U.S. 388 (1971).
50 The district court's finding, in Hammons, that private corporations are not subject to a Bivens claim, was based on its reading of the Supreme Court's decision in Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471 (1994). The Sixth Circuit rejected the district court's interpretation of Meyer, holding: "Nothing in Meyer prohibits a Bivens claim against a private corporation that engages in federal action. Moreover, the reasons given by the Supreme Court for barring a Bivens claim against a federal agency do not apply to private corpo-

rations." 156 F.3d at 705.
51 156 F.3d at 705. The court further stressed in a footnote that "[f]or purposes of remand, we emphasize that we pass no judgment as to whether federal action is involved in the instant case." Id. note 8. At the same time, however, by holding that Bivens actions may be brought against private corporations, the Sixth Circuit also noted that it was joining similar holdings by the First, Fifth, and Ninth circuits. Id. at 708.
52 Id. at 708.
Immigration and Naturalization Serv. v. Lopez-Mendoza (civil deportation proceeding). As Ahart v. Dept. Of Corrections explained, the exclusionary rule is a judicially created remedy to safeguard Fourth Amendment rights by deterring future illegal police conduct. Its deterrent effects “are minimal in the context of discharge proceedings.”

While constitutional challenges to DOT’s testing requirements continue to arise from time-to-time, as evidenced by the Bivens claim in Hammon, supra, the legality of the DOT-required tests under both the Fourth Amendment and state law has thus far been resolved in favor of the testing. This result seems likely to continue. Accordingly, the remainder of the discussion in this section shifts from the question of the “admissibility” of DOT tests to their evidentiary reliability in a disciplinary context.

In the latter regard, the following remarks of Arbitrator Dennis Nolan provide both a historical background and helpful insight into the extent to which a test conducted pursuant to DOT’s procedural protocols will be perceived as being reliable:

In the early days of drug testing programs, before the federal government mandated strict procedures to insure accurate results, arbitrators sometimes regarded even minor irregularities as enough to invalidate a positive test. Drug testing programs have since grown far more sophisticated. All require careful record-keeping, strict controls on collection, identification, and preservation of samples, and constant checking to guarantee that equipment is operating correctly. As a result, if a reputable laboratory follows the critical steps in collecting, handling, and analyzing a urine sample, a positive test result will be extremely reliable. It takes more to throw out a test result, in other words, than bald assertions of “it can’t be so!” or suggestions that some evil-doer could have found some way to switch samples. Even a minor departure from procedures will detract from a test’s reliability only if it could reasonably have affected the result.

The reliability of any specific DOT test result must, therefore, be addressed on a case-by-case basis and will depend upon the extent to which the specific test in question has been conducted in accordance with DOT’s protocols. In cases where strict compliance has occurred, or where a departure is merely technical and could not reasonably be considered to affect the test result, the test should be considered reliable. For example, in Atlantic Southeast Airlines, supra, the fact that the employee was given an open specimen container rather than a closed one in which to provide her specimen was considered an insufficient reason to throw out the employee’s positive test result. In that case, the employee testified that the container had been empty at the time it had been given to her and that it had been properly labeled and sealed in her presence, thereby leading the arbitrator to conclude: “There is thus no allegation that the collected sample was tainted or belonged to someone else.”

However, where more than a minor departure has occurred, the test result is more likely to be considered unreliable and any adverse disciplinary action that may have been taken in reliance on the result by the employer is more likely to be overturned if challenged.

For example, in re San Mateo County Transit Dist. involved a breach in the chain-of-custody of the employee’s specimen, evidenced by the seal/label of the specimen bottle not having been initialed by the employee. This raised serious doubt as to whether the particular specimen that had been tested came from the employee, thereby seriously undermining the test result’s reliability. Consequently the arbitrator ordered the employee to be reinstated, explaining:

The purpose of requiring that the employee initial the sealed bottle is obvious. If the bottle is made “tamper-proof” in the employee’s presence and the employee himself/herself places his [sic] identifying mark on the label, then no issue can arise as to whether the specimen in question came from the employee. If the seal/label is not initialed by the employee, then it remains possible for a credibility question to arise, as here, regarding the point at which the bottle was sealed. The party most able to eliminate such questions is the employer who contracts with the collection site contractor and/or sets up the testing procedure. Again, such protocols are designed to yield custodial certitude. Particularly where an employee’s reputation and job are on the line, the trier of fact should not have to speculate regarding the innocent...

57 Id. at 11 IER 1860.
60 101 La. at 515.
61 101 La. at 519.
or venial means by which an unsealed specimen bottle might have become misidentified.\textsuperscript{66}

Similarly, in So. Calif. Rapid Transit Dist.,\textsuperscript{64} the arbitrator reinstated an employee whose primary specimen tested positive for cocaine but whose split specimen test result was negative.\textsuperscript{65}

The reliability of individual drug tests has also been addressed by DOT, in informal guidance regarding the integrity of specimen collections.\textsuperscript{66} In its guidance, DOT has directed laboratories to reject specimens for testing whenever one or more of the following “fatal flaws” has occurred in the collection process:

- the pre-printed specimen I.D. number on the employee’s specimen bottles and chain-of-custody form do not match;
- the specimen I.D. number does not appear on the employee’s specimen bottles;
- there is an insufficient quantity of urine for the laboratory to complete testing;
- the seal on the specimen bottle(s) is broken or shows evidence of tampering;
- the specimen is obviously adulterated (i.e., color, foreign objects, unusual odor) and the collector did not collect a second specimen under direct supervision.

The same DOT guidance further provides that the following collection flaws are also to be considered fatal (and the laboratory required to reject the specimen) unless the flaw is corrected by signed documentation:

- the collector has failed to sign the collector’s certification statement on the drug testing custody and control form;
- the collector’s block on the drug testing custody and control form is incomplete (at a minimum, the form must be dated and signed in two places by the collector and the shipping/storage entry completed);\textsuperscript{67} and
- the employee’s social security number or I.D. number is omitted on the drug testing custody and control form, unless “refusal of donor to provide” is stated in the remarks section.

Further, DOT’s guidance also instructs the Medical Review Officer (MRO)\textsuperscript{68} to cancel a positive test result where one of the following procedural errors occurs and is not corrected:

- the employee’s certification statement is not signed and there is no indication in the remarks section of the drug testing custody and control form concerning the employee’s refusal to sign; or
- the signature of the certifying scientist at the laboratory is omitted on the laboratory copy of the drug testing custody and control form.

Additionally, many employers use arbitration to resolve contract disputes and related grievances involving substance abuse related employee terminations and discipline.\textsuperscript{69} Therefore, two other matters that can po-

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\textsuperscript{63}Id. at 373.
\textsuperscript{64}101 La. 10 (1993).
\textsuperscript{65}Employers are frequently heard to express concern about their potential liability exposure for noncompliance by the laboratory, collector, or another independent contractor providing testing-related services. See, however, Carroll v. Federal Express, 12 IER Cases 1409 (1997), which held that Federal Express was not vicariously liable for the failure of its independent contractor to comply with the DOT’s chain of custody procedures.

\textsuperscript{66}The “reliability” of DOT alcohol tests is specifically addressed in the alcohol testing provisions of 49 C.F.R. pt. 40. Section 40.79 provides that a breath alcohol test taken on an EBT “shall be invalid” if: (i) the breath alcohol technician (BAT) fails to follow the requirements of §§ 40.63 and 40.65 (relating to the signing of the form by the BAT) (the breath alcohol technician is an individual who instructs and assists employees in the alcohol testing process and operates the evidential breath testing device on which the employee is tested); (ii) the BAT fails to wait at least 15 minutes or to perform an air blank of the EBT following an initial positive; (iii) the next external calibration check of the EBT exceeds the accepted tolerance; (iv) the BAT fails to note in the remarks section of the “Breath Alcohol Testing Form” that the employee failed or refused to sign the form following the recording or printing of the test result (pursuant to § 40.107(b) an invalid test result would likewise arise under the same circumstances for breath alcohol tests conducted on a nonevidential screening device); (v) the EBT fails to print a confirmation test result; or (vi) the test number or alcohol concentration displayed on the EBT during a confirmation or screening test (where applicable) does not match the printed sequential test number or alcohol concentration. In the case of saliva screens, § 40.107 provides that the test will be invalid if: (i) the result is read before 2 minutes or after 15 minutes from the time the swab is inserted into the testing device; (ii) the device does not activate; (iii) the device is used for a test after the expiration date printed on its package; or (iv) the screening test technician fails to note in the remarks section of the testing form that the test was conducted on a saliva device.

\textsuperscript{67}According to DOT, it is not necessary for the courier to sign the drug testing custody and control form.

\textsuperscript{68}The MRO is a licensed medical doctor or doctor of osteopathy with knowledge of substance abuse disorders who has responsibility for receiving an employee’s test results from the laboratory. The MRO has the training to interpret and evaluate an employee’s confirmed positive test result together with the employee’s medical history and other relevant biomedical information in order to verify whether the result should be reported to the employer as a confirmed positive result.

\textsuperscript{69}Nineteen of the transit agencies, five of the motor carriers of property, and one of the railroads that re
tentially affect the determination of a particular test result’s reliability are the arbitrator’s familiarity with and/or understanding of DOT’s applicable modal regulations and procedural requirements, and the extent to which a court must defer to the arbitrator’s interpretation and resulting decision. Customarily, a court’s review of an arbitration decision is extremely limited and an arbitrator’s decision is given considerable deference. As the Supreme Court observed in United States Paperworkers International Union v. Misco, Inc.: 73

To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator’s interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.

However, courts are not required to give arbitrators the same degree of deference where the arbitrator’s award goes beyond the collective bargaining agreement and undertakes to interpret DOT’s regulations:

It is DOT which has established the protocol for this program. What these procedures require is an issue outside the scope of the collective bargaining agreement. The employee’s claim that his test is not admissible is not, on its face, governed by the contract. The award, therefore, does not draw its essence from the contract, and we owe it no special deference. 74

Thus, in Logistics Personnel Corp. v. Truck Drivers Local Union No. 299, 75 the court threw out a driver’s reinstatement where the collective bargaining agreement had incorporated DOT’s procedures and the arbitrator imposed evidentiary requirements in addition to those imposed by the collective bargaining agreement and DOT’s regulations. 75 Likewise, in United Public Employee, Local 790 v. City and County of San Francisco, 62 Cal. Rptr. 2d 440 (Cal. Ct. App. CA 1997), the union’s dispute of the city’s classification of a transit car cleaner as a “safety-sensitive employee,” in accordance with FTA’s requirements, was held to be a preempted issue that was beyond the scope of arbitration. 76 By comparison, in Frank v. Dept. of Transportation 75 and Lyons v. Norfolk & Western Railway Co., 77 arbitral decisions upholding employee terminations were themselves upheld by the courts on appeal, notwithstanding that the employers had not strictly followed DOT’s procedural rules.

Public policy challenges by employers to arbitral decisions reinstating employees who have tested positive have received mixed reaction by the courts. In a num-

73 Under the arbitrator’s independent reading of the collective bargaining agreement and DOT’s regulations, the employer would have been required to produce evidence that the laboratory results were properly obtained in addition to submitting proof that the sample had been properly sealed, labeled, and initialed. The employer would also have been required to furnish a report from the MRO quantifying the specific level of the employee’s positive test result instead of the employer’s submission of a report from the MRO indicating merely that the employee’s test result had been positive.

74 See also the discussion of the arbitrator’s decision in Seminole Intermodal Transport and Richard Ferrell, infra.

75 9 IER Cases 1591 (4th Cir. 1994). In Frank, the employee was removed from his safety-sensitive position when his urine specimen was determined to be water, even though the employee had failed to sign the chain of custody form in violation of federal procedure. In upholding the arbitrator’s decision in favor of the removal, the court observed:

We are not prepared to say, however, that a violation of procedure automatically and fatally undermines the chain of custody. Each case must be considered on its own merits. The court concurred, with the arbitrators finding “that the violation of DOT chain-of-custody procedures did not harm or prejudice petitioner because there was no evidence that any other person had access to the specimen during the short time it was left unattended.” Id. at 1593.

76 163 F.3d 466 (7th Cir. 1999). (Arbitration panel’s failure to determine whether FRA’s regulations were complied with was not reversible error where collective bargaining agreement solely required the arbitration panel to determine whether an employee’s termination was “unjust” and the agreement did not incorporate the FRA’s regulations clearly or require the arbitration panel to interpret the employer’s compliance with the regulations.)
ber of cases courts have upheld reinstatements solely because the particular federal testing regulation that applied was specifically designed to test an employee’s fitness-for-duty and not to impose discipline. See, e.g., Transportation Union v. Union Pacific R.R.77 (holding that FRA’s regulations “do not forbid the reinstatement of an employee who has tested positive for drugs without completion of a rehabilitation program.”), 78 also International Brotherhood of Electrical Workers, Local 97 v. Niagara Mohawk Power Corp. 79 (reinstating employee who adulterated NRC drug test, where an arbitration panel found that an agreement between the company and the union provided for a retest rather than termination).

B. The Labor Laws and a Carrier’s Duty to Bargain

In general, the testing programs of most unionized carriers will be affected by either the NLRA or the RLA. However, many transit agencies are public sector employers. As such, they are expressly excluded from the NLRA’s definition of employer, 80 and therefore from direct application of the NLRA. However, many public sector employers are subject to so-called “mini Norris-Laguardia” acts imposed under state law, whose requirements essentially mirror the federal NLRA.

The NLRA applies to trucking companies. Transit agencies will also be subject to the NLRA, either directly or indirectly, under the following scenarios: (1) directly because the agency is not a public sector employer; (2) indirectly because transit services performed for or on behalf of an agency that is a public sector employer are provided by a contractor that is a private sector employer; or (3) indirectly under a state labor relations act: The RLA applies to the railroads. 81 Prior

to discussing and analyzing the specific testing and related obligations of trucking, transit, and rail carriers in relation to their duty to bargain, a brief review of the bargaining parameters established by the NLRA and RLA is provided. 82

1. The National Labor Relations Act

Under the provisions of the NLRA, employers, on the one hand, and the designated collective bargaining representatives of their employees, on the other, have a mutual obligation to bargain with each other in good faith about “wages, hours, and other terms and conditions of employment” — Subjects that are commonly referred to as the mandatory subjects of bargaining. While the parties remain “free to bargain or not to bargain” on other matters, 83 it is an unfair labor practice for a unionized employer 84 “to make changes in mandatory subjects of bargaining without first providing the collective-bargaining representative with an

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77 155 L.R.R.M. 2700 (9th Cir. 1997).
78 Id. at 2700. See also Brotherhood of Maintenance of Way Employees v. Denver and Rio Grande Western Railway Co., 1997 W.L. 227966 (D. Colo. 1997), upholding Railway Labor Board’s reinstatement of a noncovered maintenance of way employee, whom the railroad asserted was in a safety-sensitive position for purposes of compliance with the industry’s “Rule G.”
79 143 F.3d 704 (2d Cir. 1998).
81 45 U.S.C. § 151 et seq.
82 Section 2(2) of the NLRA, 29 U.S.C. § 152(2), states in relevant part that the term “employer”...shall not include...any State or political subdivision thereof...”
83 For purposes of defining the jurisdiction of the RLA, Section 1 of the RLA, 45 U.S.C. §151, defines, in relevant part, “carrier” as any:
express company, sleeping-car company, carrier by railroad, subject to subtitle IV of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad...but shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation."
84 The majority of states have “mini” labor relations acts that apply to public sector employees and provide the same or similar requirements to those of the federal NLRA, in particular the employer’s duty to bargain. See e.g., CAL. GOVT CODE § 35002.5; F.L.A. STAT. ch. 447.301; 5 ILL. COMP. STAT. 315/4.; N.Y. CIV. SERV. LAW §§ 201–14. Because of the similarities between the federal NLRA and many of the state laws, the report’s discussion of the duty to bargain will focus on the federal NLRA’s requirements and case law arising under the NLRA.
85 As the Supreme Court explained in NLRB v. Borg-Warner Corp., 356 U.S. 342, 348–49 (1958), the duty of employers and labor to engage in collective bargaining is derived from reading §§ 8(a)(5) and 8(b)(3) of the NLRA (29 U.S.C. §§ 158(a)(5) and 158(b)(3) respectively) in conjunction with § 8(d) (29 U.S.C. § 158(d)). Sections 8(a)(5) and 8(b)(3) respectively make it an unfair labor practice for employers and unions “to refuse to bargain collectively.” Section 8(d) defines the obligation of collective bargaining in relevant part as:

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.
86 Id. at 349.
87 The terms “organized employer” and “unionized employer” are used interchangeably in this report.
opportunity to bargain with the employer about the proposed changes.

In Johnson-Bateman Co. and International Association of Machinists and Aerospace Workers, the National Labor Relations Board (NLRB or Board) held that the imposition of drug and alcohol testing requirements for existing employees is a mandatory subject for bargaining. However, in Star Tribune and The Newspaper Guild of the Twin Cities, the Board also held that drug and alcohol testing of applicants for employment is not a mandatory subject of bargaining. Thus, in the case of employees, an employer must first bargain with its union prior to implementing a policy for the first time and, later, before changing any of its terms. In the latter case, for example, see NLRB v. McClain of Georgia, Inc., where the employer was found to have violated sections (a)(1) and 8(a)(3) of the NLRA when it unilaterally changed its previous practice of allowing employees who tested positive to be retested and giving employees with known drug and alcohol problems a chance to remedy those problems without facing discharge.

At the same time, however, while employers have a general duty to bargain over the mandatory subjects of bargaining, the employer’s duty does not exist where the union has waived its right to bargain. Most commonly, a waiver to bargain will be expressed through the employer’s management rights clause and/or through the inclusion of a “zipper” clause in the collective bargaining agreement. However, the NLRB has “repeatedly held that generally worded management rights clauses or ‘zipper’ clauses will not be construed as waivers of statutory bargaining rights.” Rather, the union’s waiver must be clear and unmistakable, and will not be inferred from general contractual provisions.

The union’s waiver can also be adduced from the bargaining history of the contract. In making this determination, the NLRB and the courts will look at the bargaining of the contract to determine whether the subject matter that is being asserted to have been waived by the union was “fully discussed and consciously explored during negotiations, or that the Union [sic] consciously yielded or clearly and unmistakably waived its interest in regard to bargaining about the specific matter at issue.” As a general rule, however, the fact that the union may have previously acquiesced to an employer’s unilateral actions regarding the subject matter at issue “does not, without more, constitute a waiver by that union of any right [the union] may have to bargain about future action by the employer in that matter.” For example, in Lithibar Matik Inc., the union’s response to the employer’s proposed drug and alcohol policy, which stated that it was not necessary for the policy to be in the contract per se and could be later negotiated outside of the contract, was not considered a clear and unequivocal waiver by the union. The employer was therefore found to have committed an unfair labor practice by implementing its policy unilaterally. See also Laidlaw Transit, holding that CBA’s provision authorizing an employer to adopt reasonable work rules while remaining silent on the adoption of a drug testing policy was insufficient to constitute a waiver on the union’s part.

2. Railway Labor Act

Along the same line as the NLRA, Section 2, First of the RLA imposes a duty upon “all carriers, their offi-

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87 Id.
89 Id. at 548.
90 138 F.3d 1498 (11th Cir. 1998).
91 Management rights clauses are utilized by employers to identify those particular rights and subject matters over which the employer preserves the authority to make decisions unilaterally, i.e., without further need to bargain an issue with the union prior to taking action. Subject matters typically reserved to management in such clauses will include the right to: select and hire, including determining job qualifications and job descriptions; issue, enforce, and change reasonable work rules; impose discipline for just cause; assign work and schedule employees for work; and lay off, recall, and transfer employees.
92 “Zipper” clause(s) are contractual provisions used by both employers and unions to avoid mid-contract bargaining. Typically they take the form of either a statement that the written contract constitutes the entire agreement between the parties and is a waiver of management rights to bargain about other matters, or is expressed by a statement that management’s rights are not limited by prior practices. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 645 (5th ed. 1997).
93 Johnson-Bateman, supra, 295 NLRB at 184.
95 Id. at 186 (internal quotation marks omitted).
96 Id. at 188.
cers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions..." (emphasis supplied). Further, Section 2, Seventh,\(^{102}\) provides that "[n]o carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title" (emphasis supplied).\(^{103}\) According to the Supreme Court, the phrase “rates of pay, rules, or working conditions” is to be construed broadly,\(^{104}\) and in International Association of Machinists v. Trans World Airlines was interpreted to include drug testing programs.\(^{105}\)

Whereas an employer’s bargaining obligation under the NLRA depends, in part, on whether the matter at issue is a “mandatory” or “permissive” subject of bargaining, the employer’s obligation under the RLA depends on whether the matter is classified as a “major” or “minor” dispute.

“Major” disputes relate “to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one.”\(^{106}\) Thus, an employer’s adoption of a new drug or alcohol testing policy, or modification to an existing one, would most likely be classified as a “major” dispute. “Minor” disputes, on the other hand, “contemplate [ ] the existence of a collective agreement already concluded”\(^{107}\) and “relate [ ] either to the meaning or proper application or interpretation of a particular provision with reference to a specific situation or to an omitted case.”\(^{108}\)

“Major” disputes are subject to the notice, negotiation, and mediation process imposed by Section 6 of the RLA,\(^{109}\) while “minor” disputes “are committed to the exclusive jurisdiction of the appropriate National Railroad Adjustment Board established under the RLA for final and binding arbitration.”\(^{110}\)

Section 6 establishes the procedures whereby employers may change the rates of pay, rules, and working conditions of their employees.\(^{111}\) In the case of a “major” dispute, the Act requires the parties “to undergo a lengthy process of bargaining and mediation,”\(^{112}\) during which an employer is obligated to maintain the status quo and may not implement new terms or change existing ones until the procedures established in Section 6 have been exhausted.\(^{113}\)

Sections 2 and 3 provide the statutory bases for addressing “minor” disputes and, in cases of a dispute, require the parties to confer and, if necessary, to submit to compulsory and binding arbitration before the National Railroad Adjustment Board. Review of an arbitral decision of the National Railroad Adjustment Board is also extremely limited.\(^{114}\)

While an employer’s unilateral implementation of changes to its employees’ existing rates of pay, rules, and working conditions can occur under the RLA, just as it can occur under the NLRA, the RLA’s process for addressing contractual bargaining is procedurally more highly structured. An employer that unilaterally attempts to alter the terms of an existing contract or implement new terms must establish that the collective bargaining agreement between the parties has given the employer the power to do so. If this is the case, the dispute is deemed “minor” and the employer may unilaterally implement the policy and later arbitrate the decision before the Board. As the Supreme Court explained in Consolidated Rail Corp. v. Railway Labor Executives’ Ass’n,\(^{115}\)

if an employer asserts a claim that the parties’ agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is arguably justified by the

\(^{102}\) 45 U.S.C. §152, Seventh.

\(^{103}\) Section 156 is the codified version of RLA § 6.


\(^{109}\) 45 U.S.C. § 156.


\(^{111}\) 45 U.S.C. § 156.

\(^{112}\) Consolidated Rail Corp. v. Railway Labor Executives’ Ass’n, 491 U.S. 299, 302 (1989). Section 6 requires employers and union to “give at least thirty days’ written notice of an intended change in agreements affecting rates of pay, rules, or working conditions...” 45 U.S.C. § 156. After the receipt of such notice, the parties must within 10 days establish a “time and place” where the parties can bargain over the implementation of the contested policy. Id. This bargaining session must occur within the 30 days provided for in the notice. Id. The parties can enlist the services of the National Mediation Board in the event they cannot solve their dispute. 45 U.S.C. § 155. The employer cannot unilaterally implement the contested policy until “the controversy has been finally acted upon” by the Mediation Board. 45 U.S.C. § 156.

\(^{113}\) Consolidated Rail Corp. v. Railway Labor Executives’ Ass’n, 491 U.S. at 302-03.

\(^{114}\) Id. at 304.

\(^{115}\) Id. at 310.
terms of the parties’ agreement...the employer may make the change and the courts must defer to the arbitral jurisdiction of the Board.

Absent the imposition of a new term or the change of an existing one being considered a “minor” dispute, however, the employer must maintain the status quo while exhausting the required procedures of Section 6. Failure to do so is subject to injunctive relief by the district courts.\footnote{116}

C. Carrier Survey

As part of this study, a targeted, but informal, survey was sent to transit agencies and carriers, motor carriers, and railroads for the purposes of compiling general demographic information, as well as carrier-specific operational information concerning individual carrier experiences in applying DOT drug and alcohol testing requirements.\footnote{117} Although scientific methods were not used to conduct the survey and, therefore, the responses are not scientifically reliable, the responses nonetheless provide useful information and some insight into the testing programs of unionized carriers under the DOT’s regulations. It must also be pointed out, however, that the responses to the survey varied significantly from carrier to carrier, as well as widely among the three modes, with the majority of the information received from transit carriers.

The survey was sent to a total of 435 carriers, of which 397 were transit agencies potentially subject to FTA regulations, 20 were motor carriers subject to the testing requirements of the new Federal Motor Carrier Safety Administration (FMCSA) (formerly within FHWA), and eight were railroads subject to the requirements of the FRA. Of these, responses were received from 154 transit carriers (38.8 percent response), 12 motor carriers (60 percent response), and two railroads (25 percent response).

Appendix B provides a summary of all of the survey responses. The following highlights the more significant responses from a demographic standpoint, with the number of carriers that provided a specific response indicated in parenthesis. Additionally, some of the information developed from the survey was thought to be more beneficial to the reader if discussed as part of and in context with the study’s discussion of a particular regulation or testing-related matter and has therefore been deferred to that discussion rather than presented in this section.

Regulating DOT agency. Each of the carriers was asked to identify the DOT agency or agencies whose testing requirements governed their operations. With the exception of the motor carriers of property, where all 11 of the responders indicated that they were subject solely to FMCSA’s regulations, the other carriers addressed by this study—motor carriers of passengers, transit carriers, and railroads—indicated that they were subject to testing requirements of more than one DOT modal administration. In addition to the requirements of FTA (129), 11 transit carriers were also subject to the requirements of FMCSA, and six to the requirements of the FRA. Similarly, three of the intercity motor carriers of passengers were subject to the requirements of the FTA, in addition to FMCSA (5).\footnote{118} In the case of the railroads, two were subject to the FMCSA requirements in addition to the requirements of the FRA.

Interstate versus intrastate carriers. The operations of the survey responders include both interstate and intrastate operations. Nine of the motor carriers of property indicated that they operate in more than one state, while two have operations exclusively within a single state. Ten of the transit agencies advised that they operate in more than one state, but the predominant number of transit operators agencies (124) operate solely within a single state. The two railroad responders operate in more than one state.

Safety-sensitive positions. The positions identified by the responders covered a variety of safety-sensitive functions, including armed security (21), traffic control (18), supervisors (10), engineers (3), and contractors (2). Far and away, however, the positions most represented by the survey were maintenance workers (129), dispatchers (126), commercial motor vehicle drivers (105), and operators of passenger vehicles (83).

Union representation. The carriers that responded to the survey reflect a broad cross-section of union representation. In total, 36 unions provide representation to employees of the carriers that responded to the survey. Of these, the most identified union representative was the International Brotherhood of Electrical Workers (IBEW), which was noted by 85 of the responders. The Amalgamated Transit Union (ATU) was the second-most identified (69), followed by the International Brotherhood of Teamsters (25), and the International Association of Machinists and Aerospace Workers

\footnote{116} Id. at 302–03.
\footnote{117} A copy of the survey questionnaire is provided as Appendix A to this report.
(IAMAW) (13). The American Federation of State, County and Municipal Employees (AFSCME) and the United Transportation Union (UTU) were each identified by ten responders as representing their employees.

Bargaining of policy. When asked whether they had bargained the terms of their drug and alcohol policies with their unions, 78 of the responders said yes; however, 49 indicated they had not negotiated either their drug or alcohol policies with their unions. In those instances where policies were negotiated, 34 of the drug policies and 32 of the alcohol policies were negotiated as part of the carrier's collective bargaining agreement, while in 44 instances for drugs and 49 for alcohol, the policies were negotiated separate and apart from the carriers' collective bargaining agreements.

The most frequently stated reason why policies were not negotiated was the existence of federal regulations (21 for drug policies and 22 for alcohol); by this the author must assume that the responding carriers meant they had adopted the applicable regulations in total and addressed any issues not specifically governed by the applicable regulations outside their collective bargaining agreements. The next most-given reason was the carriers' management rights clause (six for drug and four for alcohol). As for the remaining reasons cited, several carriers indicated that, while their policies were not negotiated with the union, the policies were the result of discussions (three for drug; four for alcohol) or a "collaborative effort" (three for alcohol). One carrier responded that the union had waived negotiations for both drugs and alcohol. Another carrier advised that it had not negotiated its drug or alcohol policies because they are not a mandatory subject of bargaining.

The responders also provided some insight regarding how they had sought to address modifications to their policies as a result of subsequent regulatory changes. These responses derived from questions 8(e) (concerning whether the policy had contained a zipper clause) and 8(h) (which asked whether regulatory changes were automatically incorporated into policies). In the case of zipper clauses, 19 transit carriers indicated that regulatory changes were summarily incorporated into their policies and thus zipper clauses had not been used. For the two motor carriers of property that responded to the question, the changes had to be negotiated with the union, whereas for the one rail carrier responding, no changes were allowed. At the same time, in response to question 8(h), 45 carriers responded that their policies automatically adopted subsequent regulatory changes (37 transit carriers; 2 motor carriers of passengers; 2 motor carriers of property), although two transit agencies noted that the changes still had to be presented to the union. However, 15 of the responses (13 transit; 2 motor carriers of property) indicated that whether regulatory changes were automatically adopted into the policy depended on the specific issue. In 11 instances (10 transit; 1 motor carrier of property), all subsequent regulatory changes had to be bargained.

Subject matters addressed in policies. In the vast majority of instances, the carriers that responded to the survey addressed more subject matters in their policies than merely adopting the federal requirements. Only 15 policies overall (13 transit and 2 motor carriers of property) just adopted the federal requirements. Sixty-seven policies (56 transit; 7 motor property; 2 rail; 2 motor passenger) addressed additional subject matters.

In addition to the federal requirements, 23 specific subject areas were noted by the responders. Of these, the issues most frequently addressed were discipline (56 transit; 7 motor property; 1 rail; 1 motor passenger); the number of positive tests required prior to discharge (43 transit; 7 motor property; 1 rail); confidentiality (35 transit; 4 motor property); positive alcohol rate (33 transit; 5 motor property); test refusals (29 transit; 4 motor property); mandatory rehabilitation (23 transit; 3 motor property; 1 rail); obligation to pay for split specimens (23 transit; 4 motor property); escort procedures (22 transit; 3 motor property); grievance and arbitration (19 transit; 5 motor property; 1 rail); notification of employees of test results (21 transit; 3 motor property); off-duty use of alcohol (23 transit; 1 motor property); the devices used for alcohol testing (18 transit; 4 motor property); off-duty drug use (18 transit; 2 motor property); observed collections (12 transit; 4 motor property); rehabilitation time (15 transit; 1 motor passenger); the standard for being under the influence (12 transit; 4 motor property); laboratories (14 transit; 1 motor property); notification to the union representative when a test is required (12 transit; 2 motor property); carrier to pay for tests (10 transit; 2 motor property); and, union representative to attend reasonable suspicion tests (eight transit; three motor property).

Of the foregoing, the number of times an employee could test positive before being discharged was identified as easily the most difficult issue for carriers and unions to reach agreement on (21 transit; 4 motor property). This was followed by the issues of mandatory rehabilitation (eight transit; one motor property); positive alcohol rate (five transit; two motor property); the standard for being under the influence (five transit; two motor property); and off-duty alcohol use (six transit).

D. Omnibus Employee Testing Act and Implementing Modal Regulations

As previously noted, the Omnibus Testing Act served to codify DOT's preexisting drug testing requirements for motor and rail carriers, while at the same time providing statutory authority for the drug testing of transit workers for the first time. Additionally, the Act called
for the initiation of alcohol testing programs for workers in each of the modes. Like the regulations that preceded the Omnibus Testing Act, DOT’s post-Testing Act requirements followed the same regulatory format previously taken by DOT. Thus, carriers continue being subject to two sets of regulations governing testing.

The procedural testing protocols governing “how” tests are to be conducted by carriers are issued by the Office of the Secretary of DOT (OST) and codified at 49 C.F.R. Part 40. Part 40 applies to all of DOT’s modes and imposes essentially uniform procedures for all of the modes. By comparison, the specific requirements governing the “who, what, and when” to test vary somewhat from mode-to-mode and are issued by the individual modal administrations.

Because of this dichotomy in the format as well as substance of the various DOT regulations governing drug and alcohol testing, the following discussion first provides an overview and analysis of Part 40’s procedural protocols for carriers generally, followed by three separate overviews and analysis of the specific testing requirements imposed by each of the modal administrations to which this report applies: FHWA, FTA, and FRA.


Part 40’s requirements are largely technical in nature and, for the most part, are aimed primarily at the specific details of what carriers are required to do are set forth in the DOT regulations implementing the Omnibus Testing Act rather than in the Act itself; essentially the statute only provided instructions to DOT concerning the subject matters to be addressed in the regulations. For that reason, the report's discussion will focus on the regulatory provisions governing testing rather than the statutory directives.

specimen collectors, laboratories, and other third-party vendors who actually conduct the testing required by DOT, or the individuals and entities who are retained by carriers for services supporting such testing, e.g., medical review officers. While carriers may not actually carry out the requirements of Part 40 themselves, they are nonetheless held responsible for ensuring that all DOT-required tests conducted on their behalf are conducted in full compliance with Part 40. Thus, the details of what Part 40 requires or may permit carriers to do during the testing process can be important not only to the collective bargaining process, but also to the details of individual agreements, plans, or policies that are collectively bargained between carriers and their unions.

Part 40’s requirements address all aspects of the testing process, including the particular bodily fluids that may be tested, the collection and (in the case of drug tests) shipment of specimens, chain-of-custody, the laboratories authorized to analyze drug tests, the analysis and quality assurance and control procedures to be followed by such laboratories, the equipment approved for conducting alcohol tests, quality assurance and control procedures for alcohol testing equipment, and the role and responsibilities of MROs. Overall, Part 40’s requirements are highly prescriptive and leave little room for modification or addition through negotiations. Nonetheless, some aspects of the proce-

119 Drug and alcohol testing requirements have been imposed by six of DOT’s nine modal administrations: FMCSA (regulating motor carriers of property and motor carriers of intercity passengers by bus); FTA (regulating mass transit); FRA (regulating rail carriers); Federal Aviation Administration (regulating airlines); Research and Special Programs Administration (regulating interstate pipelines of hazardous materials); and the Coast Guard (regulating inland and ocean water carriers). While pt. 40 applies in all respects to drug and alcohol tests required by the FTA and FMCSA and alcohol tests required by FRA, pt. 40’s drug testing requirements apply to drug tests required by FRA “to the extent not inconsistent with” FRA’s regulations, 49 C.F.R. § 219.701; for further details refer to the discussion of FRA’s regulations, infra.

120 The specific details of what carriers are required to do are set forth in the DOT regulations implementing the Omnibus Testing Act rather than in the Act itself; essentially the statute only provided instructions to DOT concerning the subject matters to be addressed in the regulations. For that reason, the report's discussion will focus on the regulatory provisions governing testing rather than the statutory directives.

121 This is done through the regulations issued by the individual modal administrations rather than through pt. 40; See 49 C.F.R. § 382.105 (“Each employer shall ensure that all alcohol or controlled substances testing conducted under this part complies with the procedures set forth in part 40 of this title.”) and § 654.5, also 49 C.F.R. § 653.21 (“Each employer shall establish an anti-drug program consistent with the requirements of this part.”) and 49 C.F.R. § 219.715(b) (“Each railroad shall ensure that all alcohol testing conducted under this part complies with the procedures set forth in part 40 of this title.”). But see 49 C.F.R. § 219.701 (“Urine drug testing required or authorized...shall be conducted in the manner provided by this subpart and (to the extent not inconsistent with this part) part 40 of this subtitle A of this title.”).

122 The discussion of DOT’s pt. 40 and modal regulations is intended solely as an overview of the regulations generally and not as a detailed description of each and every requirement they impose. To the extent that further details concerning specific requirements imposed by a particular regulation may be needed, the reader should refer to the specific regulation discussed in the report.
dural protocols are susceptible to negotiation, as discussed below.

1.1 Drug Test Protocols (§§ 40.21–40.39)

a. The Drugs for Which Testing is Required.—At present, DOT requires employees to be tested for five classes of drugs: marijuana, cocaine, opiates, amphetamines, and phencyclidine. Therefore, tests for any additional drugs must be performed under the carrier's own authority. For unionized carriers, this means that tests conducted for any additional controlled substances must be authorized by the carrier's collective bargaining agreement.

b. Drug Test Specimens.—Section 40.21(c) provides that only urine specimens may be used for DOT drug tests. Therefore, with one exception, the use of other specimens, e.g., hair, is not permitted for any DOT-required testing. To the extent a carrier or union would want to test other body specimens, such testing would have to be negotiated. None of the survey respondents indicated that they had addressed testing for additional controlled substances in their policy. This issue was also not addressed in the NMFA.

c. Preparation for Testing in General.—Section 40.23 requires the carrier, together with its certified laboratory, to "develop and maintain a clear and well-

123 49 C.F.R. § 40.21(a). The five drugs are often referred to as the "NIDA-5 panel" or "5-panel." As a general rule, they are the only drugs for which an employee's specimen can be analyzed as part of a DOT test. However, pt. 40 also provides that carriers may test for drugs in addition to the NIDA-5 panel, as long as the test for each specific drug has been authorized by the applicable DOT modal regulations, and the Department of Health and Human Services (DHHS) "has established an approved testing protocol and positive threshold for each such substance." 49 C.F.R. § 40.21(b). FRA is the only modal administration whose regulations currently would permit this. Under 49 C.F.R. § 219.705(c), a reasonable suspicion drug test may be conducted for additional controlled substances with FRA's prior approval. None of the railroads that responded to the survey indicated that their policy would allow them to test for drugs in addition to the NIDA-5 panel.

124 In order to test for controlled substances in addition to the NIDA-5, a carrier would be required to collect two separate urine specimens. The first specimen collected must be the DOT specimen and must be collected in accordance with pt. 40's protocols.

125 The one exception occurs under FRA's regulations, which requires blood to be tested in conjunction with post-accident tests, 49 C.F.R. § 219.205, and also provides an opportunity for an employee to request a blood test to be tested in cases where an alcohol breath test will be used for disciplinary purposes.

Pursuant to § 40.39, only laboratories certified under guidelines issued by DHHS may be used for DOT-
documented procedure" for collecting, shipping, and accessioning urine specimens, incorporating the minimum requirements specified in the regulations. With two exceptions, discussed below, the requirements of § 40.23 are highly prescriptive and, therefore, would not be open to negotiation. Exceptions arise, however, under § 40.23(d) and a related provision, § 40.25.

d. The Specimen Collector.—The "collection site person" is the term Part 40 uses to describe individuals charged with the responsibility for "maintaining the integrity of the specimen collection and transfer process, and for carefully ensuring the modesty and privacy of the donor." Under § 40.23(d)(2), the collection site person may be either a nonmedical person trained to carry out the responsibilities imposed by Part 40, or a licensed medical professional or technician who has received instruction on conducting DOT collections. As such, § 40.23(d)(2) presents a potential issue for bargaining by a carrier and/or union. None of the respondents to the survey indicated that the selection of the specimen collector had been specifically addressed in their policy. This issue was also not addressed by the NMFA.

e. Specimen Adulteration and Observed Collections.—One issue that a number of carriers addressed in their policies was observed collections. Twelve of the transit carriers and four of the motor carriers of property that responded indicated their policies addressed the issue beyond merely adopting DOT's regulations. A bargaining issue relating to observed collections arises under §§ 40.23(d)(3) and 40.25(e).

Section 40.23(d)(3) prohibits an employee's "direct supervisor" from serving as the collection site person for the test of that employee "unless it is impractical for any other individual to perform this function" (emphasis supplied). In conjunction with this, § 40.25(e) requires as a general rule that employees must be given privacy during collection of a urine specimen. An exception to this right is provided under § 40.25(e)(3), when "there is a reason to believe that a particular individual may alter or substitute the specimen to be provided." Under such circumstances, required testing.

For example, § 40.23 requires the use of DOT's chain-of-custody form, clean single-specimen bottles or containers, and a tamper-proof sealing system.

126 See § 40.23(d)(1).

127 49 C.F.R. § 40.25(e)(1). Section 40.25(e)(2) provides four "exclusive" circumstances when an employee can be compelled to submit to an observed collection: (1) the temperature of the worker's specimen falls outside of the normal range (32–38 °C/90–100 °F), and the worker has either declined to allow his/her body temperature to be measured or the worker's body temperature varies by more than 1 °C/1.8 °F from the tempera-
the employee can be required to submit to an observed collection, “under the direct observation of a same gender collection site person.”

Seminole Intermodal Transport, Inc. and Richard A. Ferrel (Seminole) involved the refusal of a male truck driver to submit to a DOT-required observed post-accident specimen collection conducted after the employee's initial specimen and body temperature evidenced that the specimen had probably been altered. Under the terms of the carrier’s collective bargaining agreement, observed collections were expressly prohibited “unless required by DOT regulations” (emphasis supplied). The initial collection was to have been taken by a female nurse at an occupational medical clinic and at the time of the collection, only female staff were present at the clinic. Therefore, when the initial collection provided evidence of tampering, the nurse contacted the carrier’s terminal manager to advise the company that it would be necessary to either escort the employee to a hospital or send a male employee to the clinic to serve as the observer. Because no other male employee was available, the company's president went to the clinic solely to observe the second collection. The employee refused to submit to the second collection, asserting that the company’s president would be “messing with [his] privacy rights.” As a result the driver was fired.

Following the driver's discharge, the union filed an unfair labor practice charge with the NLRB, alleging a violation of Section 8(a)(1) of the NLRA (interfering with the employee's rights under the collective bargaining agreement). Adopting the ALJ’s findings and recommendations, the NLRB held the company had violated Section 8(a)(1) by terminating the driver for refusing to permit the company's president to observe the collection.

According to the ALJ the company's president was a “direct supervisor” of the employee and the company had failed to demonstrate it had been “impractical” for the collection to be observed by someone other than the company's president. The ALJ’s discussion regarding the standard of “impracticable” and the burdens it would likely impose on carriers is especially illuminating and is therefore provided in detail:

...I consider it to be “impracticable” for a motor carrier to utilize someone other than a direct supervisor as an observer only if the motor carrier has made a good faith effort to find someone other than a direct supervisor to be the observer and only if the expense or delay that would be incurred by the use of any of the persons located through such effort would be unreasonable.

Seminole raises the question of whether the terms “direct supervisor” and “impracticable” should be defined in the collective bargaining agreement rather than left to a third party to define. Seminole also suggests that one or both parties to a collective bargaining agreement could benefit by clearly articulating their testing procedures and policies rather than simply incorporating Part 40 by reference. Providing clarity will help to avoid the possibility of having to litigate over an erroneous interpretation of DOT’s procedural protocols by an arbitrator, as happened in Interstate Brands Corp. v. Local 441, or possible misapplication of Part


[131] The ALJ’s decision was summarily upheld by the Board, without substantive comment, after the employer's time to appeal had run and no exceptions to the ALJ’s decision had been filed. In the author's opinion, the ALJ's reading of § 40.23(d)(3) was in error and misapplied its requirements (limiting “direct” supervisors from serving as collection site persons) to the requirements of § 40.25(e) governing observed collections. The latter place no restriction on the observer where a second person is actually functioning as the collector, other than that the observer be of the same gender as the employee.

[132] Slip op. of administrative law judge at 4 (December 2, 1994).

[133] Id. at 3.

[134] It should be noted that the ALJ's findings and recommendations in Seminole were summarily upheld by the Board without substantive comment, following the expiration of the employer's time to appeal the ALJ's findings and recommendations and without any exceptions to the ALJ’s findings and recommendations having been filed by the employer.

[135] In a footnote to this comment, the ALJ quoted Translantic Financing Corp. v. U.S., 363 F.2d 312, 315 (D.C. Cir. 1966): "a thing is impracticable when it can only be done at excessive and unreasonable cost."

[136] In the Interstate Brands case, 10 IER Cases 146 (11th Cir. 1994), the arbitrator went beyond his authority to interpret the collective bargaining agree-
40 as in Seminole. Although no details were provided, 12 of the transit carriers and four of the motor carriers of property that responded to the survey indicated that their policies specifically addressed the observed collection issue.

f. Other Collection Matters.—Aside from the foregoing requirements governing collection privacy and observed collections, §40.25 sets forth DOT's other processing requirements governing collection privacy and observation of collected specimens. Procedures to ensure the integrity and identity of specimens, the procedures for transporting specimens to the laboratory, and procedures to be followed in the event a worker fails to cooperate or requires medical attention. The majority of these requirements are highly prescriptive and provide no room to bargain over. However, one provision has raised a bargaining issue for some carriers that responded to the survey.

All drug tests conducted by motor, transit, and rail carriers must use the “split sample” methodology for collecting urine specimens. Under this procedure, the employee is entitled to request that his or her secondary or “split” sample be sent to a different laboratory for gas chromatography/mass spectrometry analysis in the event that the result of the employee's primary specimen has been verified positive. At the same time, however, §40.25(f)(10)(ii)(H) provides that “[a]ction required by DOT agency regulations as a result of a positive drug test (e.g., removal from performing a safety-sensitive function) is not stayed pending the result of the test result of the split specimen.” Accordingly, since the removal of such employees from safety-sensitive functions is imposed as a fitness for duty requirement rather than as a disciplinary matter, §40.25(f) leaves for negotiation the question regarding what discipline, if any, the carrier may impose during the pendency of the split sample result, apart from required removal of the employee from safety-sensitive activities. Although no details were provided, one transit agency and one motor carrier of property that responded to the study's survey indicated that reassignment of an employee from a safety-sensitive position to a non-safety-sensitive position was addressed by their policy. Reassignment was not addressed in Article 35 of the NMFA. Additionally, 23 of the transit agencies and four of the motor carriers of property that responded to the survey noted that their policy included a provision concerning the employee's obligation for paying for the test of their split sample. On the other hand, 10 transit agencies and two motor carriers of property noted being responsible for paying for tests under their policies.

g. Laboratory Protocols and Analysis Procedures.—DOT's protocols and procedures governing laboratory personnel are set forth in §40.27. The procedures and protocols that laboratories must follow when analyzing drug test specimens are set forth in §40.29.

The subject matters that §40.27 address include the qualifications of the laboratory's director; the assignment of qualified personnel to validate test results; the need for each laboratory to have at least one qualified individual responsible for the laboratory's day-to-day operations and supervision of technical analysts, and the qualifications of such individuals; the requirement that all technicians and nonmedical staff must have the requisite skills and training commensurate to their job; a mandate to make continuing education programs available to meet the needs of lab personnel; and the requisite subject matters to be included in lab personnel files. None of the respondents to the survey indicated negotiating over any of §40.27's requirements, which are highly prescriptive and therefore should not present issues that would be open to negotiation.
The laboratory analysis procedures of § 40.29 include lab security and chain-of-custody procedures to be followed upon the receipt of specimens; the requirements and specific cutoff levels for the initial and confirmatory tests; specimen processing; requirements and procedures for short-term and long-term refrigerated storage; procedures for retesting specimens previously stored or frozen; a prohibition against laboratories subcontracting work out or using outside personnel; the requirement that labs comply with applicable state licensing requirements and be capable of performing both initial and confirmatory tests on premises; and requirements governing the labs' procedures manual, standards and controls, instruments and equipment, remedial actions, availability of personnel to testify, and conflicts of interest.

These requirements are highly prescriptive and, like most other provisions of Part 40, provide little, if any, room for bargaining. Again, none of the carriers responding to the survey noted having experienced any bargaining issues under § 40.29.h.

h. The MRO.—The requirements governing the MRO's qualifications and responsibilities for reviewing and reporting test results are prescribed in § 40.33 and, among other things, include the MRO's responsibility to conduct a final review and verification of all drug tests that the laboratory confirms as “positive” prior to a positive test result being reported to the carrier. Five of the transit carriers and one motor carrier of property that responded to the survey indicated that their policy addressed issues involving the MRO in addition to Part 40's requirements; however, specific details beyond this were not provided.

i. Disclosure of Test Results and Related Medical Information to Third Parties.—Part 40 strictly controls the disclosure of test results and related medical information in three areas. The issue of confidentiality was specifically addressed by 35 of the transit carriers and four of the motor carriers of property that responded to the survey, with no further details provided.

j. Use of a Certified Laboratory.—Section 40.39 directs that carriers may only use laboratories that have been certified by the U. S. Department of Health and Human Services (HHS) for their drug tests. A list of such laboratories is periodically published in the Federal Register for each carrier's benefit and information. Although the survey results do not provide any details, 14 of the transit agencies that responded to the survey indicated that their policies addressed the laboratory issue and one of these agencies listed it as the most difficult issue on which to reach agreement with its union.

164 49 C.F.R. § 40.29(a).
165 49 C.F.R. § 40.29(b).
166 49 C.F.R. § 40.29(e). Under § 40.29, specimens identified as positive during the initial test must be tested a further time in order to be confirmed positive. Two differing testing methodologies must be used. The initial test is conducted using an immunoassay. The confirmatory test must be conducted using gas chromatography/mass spectrometry (GC/MS) techniques. The determination of whether a test is positive is based on whether the test result is above the cut-off level prescribed for each drug.
167 49 C.F.R. § 40.29(f).
168 49 C.F.R. § 40.29(d).
169 49 C.F.R. § 40.29(c). Specimens that are not initially tested within 7 days of receipt must be placed in refrigerated storage pending testing. Id.
170 49 C.F.R. § 40.29(h). Specimens that have been confirmed positive must be placed in long-term storage to ensure they will be "available for any necessary retest during administrative or disciplinary proceedings." Id.
171 49 C.F.R. § 40.29(i).
172 49 C.F.R. § 40.29(j).
173 49 C.F.R. § 40.29(k).
174 49 C.F.R. § 40.29(n).
1.2 Alcohol Testing Protocols (§§ 40.51–40.111).—The protocols for alcohol testing are, like the drug testing protocols, extremely technical and likewise leave little room for negotiation by carriers or unions.

a. Alcohol Test Specimens and Testing Devices.—Initial screens that result in alcohol concentration level of 0.02 or higher must be confirmed by a second test.\(^{167}\) The confirmatory test must test the employee's breath using an evidential breath testing device (EBT) that appears on the “Conforming Products List of Evidential Breath Measuring Devices” issued by the DOT's National Highway Traffic Safety Administration (NHTSA).\(^{168}\) Employers have the option, however, of testing either the employee's breath or saliva specimen for the initial alcohol screen. Employers also have the option of conducting initial screening tests using a nonevidentiary screening device that appears on the NHTSA's “Conforming Products List of Screening Devices to Measure Alcohol in Body Fluids” rather than an EBT.\(^{169}\) Eighteen of the transit carriers and four of the motor carriers of property that responded to the study's survey indicated their policies had specifically addressed the devices' use for testing, although specific details were not provided.

b. The Specimen Collector.—All DOT confirmatory alcohol tests, as well as any initial breath screens conducted on an EBT, must be administered by a breath alcohol technician (BAT) who has satisfied the qualification, training, and proficiency requirements of § 40.51.\(^{170}\) Initial breath screens conducted on nonevidentiary screening devices and saliva screens must be conducted by a screening test technician (STT) or BAT who has satisfied the qualification, training, and proficiency requirements of § 40.93. While Part 40 permits carrier supervisors to serve as the carrier's BAT and/or STT, the “supervisor” of the specific employee being tested is prohibited from conducting the test on that employee, except where another BAT or STT is “unavailable to perform the test in a timely manner.”\(^{171}\) or in any case where the governing modal agency would specifically prohibit the “supervisor” from serving.\(^{172}\) However, neither “supervisor” nor “timely” are defined in either Part 40 or the modal regulations. Thus the clarity issue previously discussed with respect to the Seminole decision is likewise applicable here.\(^{174}\) However, no carrier that responded to the survey indicated that the issue of the specimen collector for alcohol tests had been raised during the negotiation of their policy.

c. The Collection Process.—Part 40's requirements concerning the collection process are also prescriptive and leave little room for negotiation between a carrier and union. They include the specific breath alcohol testing form employers must use when testing with an EBT or nonevidential testing device.\(^{175}\) They also include the detailed step-by-step procedures BATs and STTs must follow when conducting tests and the specific circumstances when breath alcohol tests and nonevidentiary screening tests “shall be deemed invalid.”\(^{176}\) Here again, no carrier that responded to the survey indicated having bargained over the collection process.

d. Inadequate Specimen.—Section 40.69 dictates the procedure to be followed when an employee is unable to provide an adequate amount of breath when being tested using a breath alcohol testing device.\(^{178}\) Under

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\(^{167}\) 49 C.F.R. § 40.63(f). See also § 40.101(e) governing initial screening tests using nonevidentiary devices, which refers back to § 40.63(f), where the initial screening test result using a nonevidentiary testing device equals or exceed 0.02.

\(^{168}\) 49 C.F.R. § 40.53(b).


\(^{171}\) 49 C.F.R. §§ 40.63 and 40.65.

\(^{172}\) 49 C.F.R. § 40.51(b), also 49 C.F.R. § 40.93(f), which incorporates the requirements of § 40.51(b) by reference.

\(^{173}\) Id.

\(^{174}\) The need for clarity may be more critical in the case of alcohol tests than drug tests because of the rapid rate at which alcohol metabolizes in the body and the more limited time frames within which DOT alcohol tests must be conducted. These time frames are much narrower than in the case of drug tests. As discussed in greater detail, infra, reasonable suspicion and post-accident alcohol tests for motor carriers and transit carriers must to be administered within 8 hours, but preferably within 2 hours, following the reasonable suspicion determination or accident. 49 C.F.R. §§ 382.303(b)(1) and 382.307(e)(1), and 49 C.F.R. §§ 654.33(b)(1) and 654.37(d)(1). By comparison, a post-accident drug test is required within 32 hours. 49 C.F.R. §§ 382.303(b)(4) and 653.45(b).

\(^{175}\) See 49 C.F.R. § 40.59 and Appendix A to pt. 40 for EBTs and 49 C.F.R. § 40.99 and Appendix B to pt. 40 for nonevidentiary testing devices.

\(^{176}\) The step-by-step procedures include: the chronology for filling out the appropriate test form; the required use of individually sealed mouthpieces for EBTs and nonevidentiary breath testing devices and individually sealed saliva testing devices; the proper procedure for recording and reporting the test results; and the instructions about not driving or performing a safety-sensitive function. For specific details, see 49 C.F.R. §§ 40.63 and 40.65, governing breath alcohol screening and confirmatory tests, and § 40.101, governing saliva screening tests.

\(^{177}\) 49 C.F.R. §§ 40.79 and 40.107. For further details, refer to footnote 49, supra.

\(^{178}\) In the case of a saliva screen, § 40.101(c)(7) provides that a saliva screen may only be attempted twice for any test and further provides that a breath test is to be conducted in the event that a successful saliva screen is not achieved on the second attempt.
such circumstances, § 40.69 requires the employee to be sent to a licensed physician in order to determine whether a medical condition prevented or could have prevented the employee from providing an adequate amount of breath. Section 40.69 further provides that the employee’s failure to complete the test “shall not be deemed a refusal to take a test” if a licensed physician determines “that a medical condition has, or with a high degree of probability, could have, precluded the employee from providing an adequate amount of breath.” 179 No carrier that responded to the survey noted bargaining issues that arose under § 40.69.

e. Availability and Disclosure of Alcohol Testing Information.—Section 40.81 requires employers to maintain their evidential breath testing records in a secure manner for their employees’ protection. 180 This section also prevents employers from disclosing test-related information to any source unless required by DOT, the National Transportation Safety Board (NTSB) as part of an NTSB accident investigation, 181 as otherwise required by law, 182 or as expressly authorized by an employee in writing, including to a subsequent employer. 183 Section 40.81 also requires employers to permit their employees to obtain copies of the information contained in their respective files, without charge. 184 None of these requirements were identified by any carrier that responded to the survey.

f. Record Retention.—Finally, § 40.83 establishes the retention requirements for records relating to EBTs, BATs, nonevidential testing devices, and STTs. 185 These include the requirement that records concerning the inspection and maintenance of the EBTs and nonevidential testing devices used in screening, 186 employer compliance with the applicable quality assurance plan, 187 and BAT training and proficiency, 188 as well as log books containing the testing result forms, 189 be maintained for at least 2 years. Section 40.83 also requires records pertaining to calibration and calibration checks of EBTs and nonevidential testing devices to be maintained for at least 5 years. 190 The retention times imposed by § 40.83 are minimum times, however, leaving at least the possibility for longer retention times to be negotiated in some cases. However, no carrier that responded to the survey noted having negotiated over the retention requirements of § 40.83, while the NMFA included the requirements in Section O of Article 35 without change.

2. The Testing Requirements for the Individual Modes

DOT’s requirements governing “who, what, and when” to test, prohibited conduct, and consequences for violations are governed by regulations issued by DOT’s individual modal administrations. Some of the modal requirements are the same, but in many instances, they are not.

The requirements of FMCSA 192 and FTA are in a majority of instances the same or quite similar. In fact, FMCSA’s regulations served as the basis for many of FTA’s requirements. For that reason, the following discussion of the modal requirements will begin with a concurrent overview of the FMCSA’s and FTA’s requirements. FRA’s requirements will be considered separately.

2.1 The Requirements of FMCSA (49 C.F.R. Part 382) and FTA (49 C.F.R. Parts 653 and 654).—The requirements imposed by FMCSA and FTA are the minimum standards to be met. Both the FMCSA’s and FTA’s requirements are imposed as “fitness for duty” standards for the affected safety-sensitive employees and as such do not represent or preempt the authority of the regulated carriers to take additional disciplinary action when prohibited conduct occurs. Accordingly, truck and transit carriers and their unions are individually free to negotiate additional requirements independently of the requirements imposed by the gov-

179 49 C.F.R. § 40.69(d)(2)(I). This is sometimes referred to as “shy lung.”
180 49 C.F.R. § 40.81(a).
181 49 C.F.R. §§ 40.81(b), (c), and (d).
182 49 C.F.R. § 40.81(f).
183 49 C.F.R. § 40.81(b).
184 49 C.F.R. § 40.81(g).
185 49 C.F.R. § 40.81(c)
186 In the case of nonevidential testing devices and STTs, the requirements of § 40.83 are made applicable by § 40.111.
187 49 C.F.R. § 40.83(a)(1)
188 49 C.F.R. § 40.83(a)(2)
189 49 C.F.R. § 40.83(a)(3)
190 49 C.F.R. § 40.83(a)(4)
191 49 C.F.R. § 40.83(b)
192 As previously discussed in footnote 34, the motor carrier safety regulatory and enforcement duties previously administered by FHWA’s Office of Motor Carrier Safety have become the responsibility of the new FMCSA. Therefore, further references in this report that would have been made either to the “Federal Highway Administration” or “FHWA” will instead refer to the new Federal Motor Carrier Safety Administration (FMCSA).
193 FMCSA’s drug and alcohol testing and related requirements are combined and appear at 49 C.F.R. pt. 382. The FTA’s drug and alcohol requirements, on the other hand, are imposed as two separate sets of regulations and appear at 49 C.F.R. pt. 653, for drugs, and pt. 654, for alcohol.
governing modal regulation.\textsuperscript{194} Like the provisions of Part 40, many of the FMCSA and FTA requirements are quite prescriptive and similarly minimize the subject matters over which a carrier and its union might be able to negotiate.

One key requirement of both FMCSA and FTA concerns the employer’s required substance abuse policy. Under the requirements of both, each regulated employer is required to promulgate a written policy and supporting materials that explains the applicable requirements of Part 382, or Parts 653 and 654, and the carrier’s policies and procedures for compliance.\textsuperscript{195} Additionally, a copy of their policy and supporting materials must be given to each covered employee, and written notice of the availability of such information must be given to the representative of their employees’ union.\textsuperscript{196}

At a minimum, the policy must include a “detailed discussion” of the following:

- the identity of the carrier’s representative who is responsible for answering questions from covered employees regarding the carrier’s policy;\textsuperscript{197}
- the categories of covered employees who are subject to the requirements of either Part 382 or Parts 653 and 654, whichever governs;\textsuperscript{198}
- a sufficient description of the safety-sensitive functions that are subject to the requirements of Part 382 or Part 654, in order to make clear to the covered employees what period of the day the employee is required to be in compliance;\textsuperscript{199}
- a specific description of the conduct that is prohibited by the FMCSA or FTA regulations, whichever governs;\textsuperscript{200}
- the consequences to covered employees for violating any of the prohibitions of Part 382 or Parts 653 and 654, whichever governs, including the carrier’s obligation to immediately remove such employees from all safety-sensitive functions and the related carrier and employee duties concerning evaluation by a substance abuse professional and subsequent treatment, when necessary;\textsuperscript{201}
- an explanation of what constitutes a refusal to be tested and the consequences for refusing to be tested;\textsuperscript{202}
- the consequences to employees whose alcohol confirmatory test result is 0.02 or greater but less than 0.04;\textsuperscript{203}
- a description of the circumstances under which covered employees will be tested for drugs and/or alcohol;\textsuperscript{204}
- a description of the procedures to be used by the carrier to test for the presence of drugs and/or alcohol, to protect the employee and the integrity of the testing process, to safeguard the validity of test results, and ensure that specific results are attributed to the correct employee;\textsuperscript{205}
- a statement that covered employees must submit to testing administered in accordance with either Part 383 or Parts 653 and 654, whichever governs;\textsuperscript{206} and
- information regarding the effects of drug and alcohol use and abuse on an individual’s health, work, and personal life; the signs and symptoms of a drug or alcohol problem; and the intervention opportunities available to covered employees when a substance abuse problem is suspected, including confrontation, referral to any available employee assistance program, and/or referral to management.\textsuperscript{207}

(1) Identification of the Carrier’s Representative who is Responsible for Answering Policy Questions.—Although the regulations leave such decisions entirely to the discretion of each carrier, neither the survey responses nor case law suggests that this is a subject area that has resulted in problems for unionized carriers.

(2) Categories of “Covered Employees” who are Subject to the Requirements.—FMCSA’s requirements apply solely to drivers of “commercial motor vehicles” who are required to have a commercial drivers license (CDL)

\textsuperscript{194} See FMCSA’s § 382.111, which provides:
Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of drivers, with respect to the use of alcohol, or the use of controlled substances, including the authority and rights with respect to testing and rehabilitation.

Section 654.11 of FTA’s regulations reads essentially the same, but applies only to alcohol. FTA’s § 653.11 governs drug use and provides that “[a]n employer may not impose requirements that are inconsistent with, contrary to, or frustrate the provisions of this part.”

\textsuperscript{195} 49 C.F.R. § 382.601(a) (for motor carriers) and 49 C.F.R. §§ 653.23 and 654.71 (for transit carriers).

\textsuperscript{196} Id., also 49 C.F.R. § 653.27.

\textsuperscript{197} 49 C.F.R. § 382.601(b)(1), § 653.25(a), and § 654.71(b)(1).

\textsuperscript{198} 49 C.F.R. § 382.601(b)(2), § 653.25(b), and § 654.71(b)(2).

\textsuperscript{199} 49 C.F.R. § 382.601(b)(3), and § 654.71(b)(3). The same or a similar requirement is not imposed for drugs by § 653.25.

\textsuperscript{200} 49 C.F.R. § 382.601(b)(4), § 653.25(c), and § 654.71(b)(4).

\textsuperscript{201} 49 C.F.R. § 382.601(b)(9), § 653.25(h), and § 654.71(b)(9).

\textsuperscript{202} 49 C.F.R. § 382.601(b)(8), § 653.25(g), and § 654.71(b)(8).

\textsuperscript{203} 49 C.F.R. § 382.601(b)(10), and § 654.71(b)(10).

\textsuperscript{204} 49 C.F.R. § 382.601(b)(5), § 653.25(d), and § 654.71(b)(5).

\textsuperscript{205} 49 C.F.R. § 382.601(b)(6), § 653.25(e), and § 654.71(b)(6).

\textsuperscript{206} 49 C.F.R. § 382.601(b)(7), § 653.25(f), and § 654.71(b)(7).

\textsuperscript{207} 49 C.F.R. § 382.601(b)(11), and § 654.71(b)(11). The same, or a similar requirement, is not imposed for drugs by § 653.25.
under 49 C.F.R. Part 383. FMCSA's regulations define "commercial motor vehicle" as a single motor vehicle, or combination of vehicles, used to transport property or passengers in commerce, including intrastate commerce, if the vehicle or vehicle combination is one of the following: (i) has a gross vehicle weight rating of 26,001 pounds or more; (ii) has a combination gross vehicle weight rating of 26,001 pounds or more, including a towed unit with a gross weight rating of 10,001 pounds or more; (iii) is used for transporting hazardous materials in a quantity requiring the vehicle to be placarded under DOT's Hazardous Materials Regulations (regardless of the vehicle's size); or (iv) is designed to transport 16 or more passengers, including the driver. Further, FMCSA defines "driver" broadly, to include drivers who are employed on a full-time, casual, intermittent, or occasional basis, as well as drivers who are independent contractors who are either directly employed by or under lease to an employer or who operate a commercial motor vehicle at the direction of or with the consent of an employer. Part 382 does not apply to drivers who have been granted a federal or state waiver from compliance with the commercial driver licensing requirements of 49 C.F.R. Part 383 or drivers who are required to comply with the FTA testing requirements, notwithstanding that they may be required to have a CDL.

FTA's regulations apply to individuals who perform a safety-sensitive function for an entity subject to Parts 653 and 654 and also to individuals applying for or transferring to such positions. FTA's regulations also apply to a volunteer if the person is operating a vehicle designed to transport 16 or more passengers, including the driver.

FMCSA's and FTA's definitions of covered employees are, in general, quite specific and therefore leave little room for negotiation. However, from time to time cases have occurred. See, e.g., United Public Employees, Local v. City and County of San Francisco, holding that the employer's classification of a transit car cleaner as a safety-sensitive employee was outside the scope of the collective bargaining agreement and not arbitrable:

In fact, to allow an arbitrator to exempt an employee in a job classification properly designated as safety-sensitive from drug testing would conflict not only with express provisions of federal law but would seemingly conflict with the San Francisco City Charter, which exempts "the classification and reclassification of positions and the allocation and relocation of positions to the various classifications" from the scope of bargaining and relates them to the exclusive jurisdiction of the civil service commission.

(3) Safety-Sensitive Functions.—Under FMCSA's regulations, the term "safety-sensitive functions" applies solely to the following activities when performed by a "driver": (i) driving; (ii) all time spent waiting to be dispatched at a carrier's or shipper's terminal, plant, facility, or other property, unless the driver has been relieved from duty; (iii) inspecting, servicing, or conditioning equipment; (iv) being in or on a commercial motor vehicle (except when resting in the sleeper berth); (v) loading and unloading, including supervising, assisting, or attending the vehicle; and (vi) repairing, obtaining assistance, or attending a disabled vehicle. Furthermore, a driver will not be considered to be performing a safety-sensitive function for Part 382 purposes unless the driver is "actually performing, ready to perform, or immediately available to perform" such functions. Other activities performed by a driver, or performed outside of the time frames specified, are not subject to Part 382.

FTA's regulations, by comparison, are not restricted to activities performed just by drivers. Under the FTA's regulations, the following activities are "safety-sensitive": (i) the operation of a revenue service vehicle, including when not in revenue service; (ii) the operation of a nonrevenue service vehicle when the driver is required to have a CDL; (iii) controlling a vehicle's dispatch or movement; (iv) maintaining (including repairs, overhaul, and rebuilding) a revenue service vehicle or equipment that is used in revenue service (unless the transit agency receives capital investment funds and is located in an area with a population of less than 50,000 or receives rural area funds and the maintenance services are performed by an outside contractor); or (v) carrying a firearm for security purposes. FTA defines "vehicle" as "a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel" used for mass transit or ancillary services purposes.

Because of the specificity of the FMCSA and FTA definitions of "safety-sensitive functions," there is no room for negotiation and no carrier that responded to

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208 49 C.F.R. § 382.107.
209 Id.
210 49 C.F.R. § 382.103(d).
211 49 C.F.R. §§ 653.7 and 654.7.
212 62 Cal. Rptr. 2d 440 (1997).
213 Id. at 445.
215 FTA's definition of safety-sensitive function was amended on January 5, 1999, to expand the definition of maintenance to include repairs, overhauls, and rebuilding. 64 Fed. Reg. 425 (January 5, 1999). The expanded definition went into effect on February 4, 1999.
216 49 C.F.R. §§ 653.7 and 654.7.
217 Id.
the survey indicated encountering any problem with their union. However, issues have arisen for some others. See, e.g., 19 Solid Waste Department Mechanics v. City of Albuquerque, striking down the city's testing of mechanics, whom the city required to have a CDL even though they were not authorized to drive on city streets.

(4) Prohibited Conduct; The Status of Alcohol Confirmatory Test Results of 0.02 or Greater But Less Than 0.04 Testing as Prohibited Conduct; and What Employee Actions Will Be Considered as a “Refusal to Submit to a Test.”—The conduct prohibited by Part 382 and by Parts 653 and 654 is tied directly to the performance by covered employees of safety-sensitive functions and extends to off duty conduct only where it would adversely affect the employee's performance of safety-sensitive functions.

FMCSA's designation of prohibited drug and alcohol conduct is explicit. FTA is explicit for alcohol-related misconduct, but less so for drugs. The conduct prohibited by Part 653 must be inferred from the provisions describing the consequences for refusing to be tested and testing positive. However, FMCSA and FTA both consider a refusal to submit to a drug test and a verified positive test as "prohibited conduct." FTA's alcohol regulations provide explicit direction to carriers and employees concerning prohibited alcohol conduct and essentially mirror FMCSA's alcohol prohibitions. However, FMCSA's provisions are directed to the driver ("No driver shall..."), while FTA's alcohol prohibitions are expressly directed to transit agencies ("Each employer shall prohibit"). Both § 382.201 and § 654.21 prohibit covered employees from reporting to duty or remaining on duty if they would be required to perform a safety-sensitive function and have an alcohol concentration of 0.04 or greater. In the case of an employee with an alcohol concentration of 0.02 or greater but less than 0.04, however, reporting for duty is not expressly prohibited, while remaining on duty is. In the latter case, a covered employee whose alcohol confirmatory test result is 0.02 or greater, but less than 0.04, is prohibited from performing a safety-sensitive function until the employee tests below 0.02 or until at least the "start of the employee's next regular scheduled duty period, but not less than eight hours following administration of the test." At the same time, § 382.507(b) and § 654.63(b) both expressly prohibit carriers from "tak[ing] any action...against a [covered employee] based solely on test results showing an alcohol concentration less than 0.04," unless the carrier does so under its independent authority.

Both FMCSA and FTA impose prohibitions on covered employees' use of alcohol while on duty, before going on duty, and following an accident. More specifically, both prohibit any use of alcohol by employees while performing a safety-sensitive function; prohibit covered employees from performing safety-sensitive duties within 4 hours after using alcohol; prohibit covered employees from consuming alcohol within 8 hours after the occurrence of an accident that requires testing or until the employee has been tested, whichever first occurs; and prohibit covered employees from refusing to be tested for alcohol when a test is required.

Finally, both agencies classify an employee's refusal to submit to a test as prohibited conduct. In the case of FMCSA's regulations, this is expressly done for both drug and alcohol tests. In the case of FTA's regulations, the prohibition is explicit for alcohol tests, but only implicitly imposed for drug tests.

"Refuse to submit" is defined the same way by FMCSA and FTA and will occur when an employee fails to provide an adequate amount of urine or breath without a valid medical explanation, after the employee has received notice of the requirements for urine and breath testing as required, or when an employee "engages in conduct that clearly obstructs the testing process. In the latter instance, however, neither FMCSA nor FTA specifically define what conduct would "clearly obstruct the testing process" (emphasis supplied). Thus, the regulations leave it to individual carriers to decide what particular actions will be considered "clearly obstructing," either through bargaining, or as a factual issue for the parties to debate (and the trier of fact to decide) in the course of a grievance, arbitration, or litigation. Twenty-nine transit agencies that responded to the survey indicated that they had negotiated policies that went beyond FTA's regulations on the issue of test refusals.

223 See United Parcel Service and Teamsters, Local 710, 101 La. 589 (1993), reinstating driver solely because company's "zero tolerance" standard, which was lower than DOT's, had not been articulated to the driver with sufficient clarity in the company's policy.
224 49 C.F.R. § 382.205 and § 654.23.
225 49 C.F.R. § 382.207 and § 654.25.
226 49 C.F.R. § 382.209 and § 654.27.
227 49 C.F.R. § 382.211 and § 654.29.
228 49 C.F.R. § 382.211.
229 49 C.F.R. § 654.29.
230 See 49 C.F.R. § 653.35.
231 49 C.F.R. §§ 382.107, 653.7, and 654.7.
232 Id.
(5) Consequences to Covered Employees for Violations of the Prohibitions of Part 382 or Parts 653 and 654, Including to Employees Whose Alcohol Confirmatory Test Results are 0.02 or Greater but Less Than 0.04 or Who Refuse to be Tested, and The Carrier’s Obligation to Remove Employees from Their Safety-Sensitive Duties and the Employee’s Evaluation, Testing and Treatment Requirements.—FMCSA and FTA’s regulations impose prohibited conduct and the resulting consequences as fitness-for-duty standards, not as disciplinary requirements. See, e.g., Vons Companies, Inc., 106 LA. 740 (1996) (DOT’s regulations “contain no mandate for immediate discharge for offenders who test positive on a Random Drug and Alcohol [sic] test”). As such, disciplinary actions such as suspensions without pay and terminations of employment must be negotiated between the carrier and the union.

Under the regulations of FMCSA and FTA, covered employees who engage in prohibited conduct are prohibited from performing any safety-sensitive function and must refrain from engaging in such functions until they comply with the requirements for referral, evaluation, and rehabilitation. Under the latter, both agencies require covered employees who engage in prohibited conduct to be evaluated for a substance abuse problem prior to being permitted to again perform a safety-sensitive function and to submit to and test negative on a return-to-duty alcohol and/or drug test prior to performing a safety-sensitive function again. Additionally, every FTA-covered employee must submit to a minimum of six unannounced follow-up tests during the first 12 months after returning to work and additional follow-up testing for up to 60 months in the event such additional testing is determined to be necessary by a substance abuse professional. By comparison, FMCSA requires follow-up testing only for employees who are diagnosed as having an alcohol or substance abuse problem, in which case FMCSA’s requirement is the same as FTA’s. Although the survey responses did not provide specific details, discipline was identified as the most difficult policy issue to negotiate with their unions by 40 transit agencies and six property motor carriers and transit agencies. Among the specific disciplinary issues that carriers have negotiated are whether a covered employee may be terminated immediately following the commission of prohibited conduct (or at least some prohibited conduct), or must be subjected to progressive discipline, and the action the carrier may take against an employee whose confirmatory test result shows an alcohol concentration of 0.02–0.039. Additionally, § 653.37(b)(2) expressly provides that “[t]he choice of substance abuse professional and assignment of costs shall be made in accordance with employer/employee agreements and employer policies.”

(6) The Circumstances under which Covered Employees Will Be Tested.—FMCSA and FTA both require drug and/or alcohol tests to be conducted as follows: (a) “pre-employment” drug test; (b) a drug and/or alcohol test following certain accidents; (c) drug and alcohol tests on a “random” basis; (d) drug and/or alcohol tests based on “reasonable suspicion;” (e) “return-to-duty” drug and/or alcohol tests; and (f) “follow-up” drug

233 49 C.F.R. § 382.501, §§ 653.35(a) and 654.61. For commercial motor vehicle drivers subject to FMCSA’s regulations, the prohibition against the performance of any safety-sensitive function extends to driving commercial motor vehicles with a gross vehicle weight rating of 10,001 pounds or more, but less than 26,001 pounds, 49 C.F.R. §§ 382.501(a) and 382.501(c).

234 49 C.F.R. §§ 382.503 and 382.605 (applicable to drug and alcohol-related offenses committed by truck drivers), §§ 654.75 and 653.37 (applicable to transit employees who test positive for drugs or refuse to be tested), and §§ 654.63 and 654.75 (applicable to alcohol-related offenses by transit employees).

235 49 C.F.R. § 382.605(b), § 653.37(b)(1), and § 654.75(b).

236 49 C.F.R. § 382.605(c)(1), § 654.75(b), and § 654.75(c). Further, in the case of return-to-duty alcohol tests, under both agency regulations the test result must be 0.02 or less. 49 C.F.R. § 382.605(c)(2) and § 654.75(c)(1).

237 49 C.F.R. §§ 653.63 and 654.75(c).

238 49 C.F.R. § 382.605(c)(2). Violations of pt. 382 can result in the imposition of a civil fine or criminal penalty to a driver or carrier. See 49 C.F.R. § 382.507.

239 For example, Section 3 J of Article 35 of the NMFA permits the immediate termination of a driver whose reasonable suspicion drug test is positive, while in the case of other positive test results the driver must be given an opportunity for reinstatement.

240 Section 4 L of Article 35 of the NMFA permits a driver to test positive three times (i.e., 0.04 or greater for alcohol but less than the state’s limit for driving while under the influence) before being terminated, while imposing suspensions ranging between 24 hours and 30 days.

241 For example, Section 4 L of Article 35 of the NMFA imposes a 24-hour suspension the first time a driver’s alcohol test result is between 0.02 and 0.039; a 5 calendar day suspension the second time; a 15 calendar day suspension the third time; and termination of the driver the fourth time an alcohol test result is between 0.02 and 0.039.
and/or alcohol tests. The requirements for each test are discussed below:

(a) Preemployment drug tests. Drivers subject to Part 382 must be tested and test negative for drugs prior to the first time they perform a safety-sensitive function for the carrier.\(^{242}\) By comparison, FTA's covered employees must submit to and have a negative drug test result before they are hired for a safety-sensitive position (“An employer may not hire an applicant to perform a safety-sensitive function”).\(^{243}\) As previously discussed, the drug and alcohol testing of applicants for employment is not a mandatory subject of bargaining. Star Tribune and The Newspaper Guild of the Twin Cities.\(^{244}\) Accordingly, carriers have the ability to implement preemployment testing of applicants unilaterally without the need to negotiate beforehand. No responder to the survey indicated encountering problems over this issue.

(b) Post-accident drug and alcohol tests. Both FMCSA and FTA require alcohol and drug tests to be administered “as soon as practicable,”\(^{245}\) but no later than 8 and 32 hours, respectively, following an accident. Their regulations differ, however, concerning the specific circumstances for testing.

Under Part 382, a drug and alcohol test is always required whenever a driver is involved in a fatal accident. For nonfatal accidents for which the driver receives a citation for a moving violation, a test is required if there was a personal injury to the driver or another individual that required immediate medical treatment away from the accident scene, or one or more of the vehicles involved in the accident was disabled and had to be transported from the scene by another vehicle.\(^{246}\)

Under FTA’s regulations, a post-accident drug and alcohol test is always required for the surviving covered employee who was operating the mass transit vehicle at the time of a fatal accident,\(^{247}\) and also for “any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.”\(^{248}\) For nonfatal accidents, a drug and alcohol test is also always required for the covered employee who was operating the mass transit vehicle at the time of the accident, “unless the employer determines, using the best information available at the time of the decision, that the covered employee’s performance can be completely discounted as a contributing factor to the accident.”\(^{249}\) Employers must also test “any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.”\(^{250}\)

The responses to the survey did not identify that motor carriers or transit agencies experienced any bargaining issues or problems over implementing the post-accident testing provisions.

(c) Random testing. Both FMCSA and FTA require covered employees to be tested on a random basis.\(^{251}\) Under FMCSA’s regulations, random tests must be conducted at an annual testing rate equal to a percentage of the carrier’s “average number of driver positions”\(^{252}\) published by FMCSA each year. FTA’s annualized rate for random tests is based on an FTA-designated percentage of a carrier’s covered employees.\(^{253}\) Currently, both agencies have designated an annualized rate of 50 percent for drug tests\(^{254}\) and 10 percent for random alcohol testing.\(^{255}\) The testing rate designated by each agency is a minimum rate, however. None of the survey responses indicated that any carrier has negotiated a higher random testing rate for drugs or alcohol with its union. For example, Sections 3B and 4E of Article 35 of the NMFA require drivers to be randomly tested at the rate established by FMCSA.

Several related bargaining issues concerning random testing have come up for carriers in the trucking industry. One concerns FMCSA’s restriction of random alcohol tests to those periods when the employee is performing safety-sensitive functions, “just before” the driver is to perform safety-sensitive functions, and “just after” the driver has ceased performing such functions.\(^{256}\) For motor carriers subject to the NMFA, the term “just before” means “within one (1) hour prior to starting the tour of duty” and “just after” was negotiated to mean “immediately after completing the tour of duty.”\(^{257}\) None of the responders to the survey indicated that their policies similarly addressed this issue.

The NMFA also prohibits participating carriers from requiring “city employees” to go for a random drug or alcohol test before their shifts are to begin if the collection site is open during or immediately following an

\(^{242}\) 49 C.F.R. § 382.301(a).
\(^{243}\) 49 C.F.R. § 653.41(a).
\(^{244}\) 295 NLRB 543 (1989).
\(^{245}\) 49 C.F.R. §§ 382.303(a), 653.45, and 654.33.
\(^{246}\) 49 C.F.R. § 382.303(b).
\(^{247}\) 49 C.F.R. §§ 653.45(a) and 654.33(a).
\(^{248}\) Id.
\(^{249}\) 49 C.F.R. §§ 653.45(a)(2)(i) and 654.33(a)(2)(ii), and §§ 654.33(b)(i) and 654(b)(ii).
\(^{250}\) Id.
\(^{251}\) 49 C.F.R. §§ 382.305, and §§ 653.47 and 654.35.
\(^{252}\) 49 C.F.R. § 382.305(b)(1).
\(^{253}\) 49 C.F.R. §§ 653.47(a) and 654.35(a).
\(^{255}\) Id.
\(^{256}\) 49 C.F.R. § 382.305(m) and § 654.35(i).
\(^{257}\) NMFA, art. 35, § 4 E.
employee's shift, and further prohibit a carrier from requiring an employee to drive his or her personal vehicle from the terminal to the collection site.\textsuperscript{258} None of the responders to the survey indicated that this was a subject addressed in their policies. Another issue related to random testing concerns the compensation an employee is to be paid if he or she is required to submit to a random test. The issue of paying employees for off-duty random testing was identified as being among the most difficult issues to negotiate by one responder to the survey. Under Article 35, Sections 3 L and 4 N of the NMFA, participating carriers are required to compensate their drivers “regular straight time hourly rate of pay provided that the test is negative” for all time spent at the collection site, and for travel time one way to or from the collection site, if the driver is going to or from work and the site is reasonably en route between the driver’s home and the terminal, or for travel time both ways, if the collection site is not reasonably en route between the driver’s home and the terminal. Sections 3 L and 4 N of Article 35 further require drivers to be compensated time-and-a-half for all time past 8 hours “[w]hen an employee is on the clock and a random [drug or alcohol] test is taken any time during the employee’s shift.”

(d) Reasonable suspicion testing. FMCSA and FTA require covered employees to be tested whenever the carrier has a “reasonable suspicion” to believe the employee has engaged in prohibited conduct. Such suspicion must be based on the personal and contemporaneous observations of the employee’s appearance, behavior, speech, or body odors by a supervisor who has been trained in the signs and symptoms of drug abuse and alcohol misuse.\textsuperscript{259} Eleven of the carriers that responded to the survey (eight transit carriers and three motor carriers of property) indicated that their policies address the right of the union to be present, or at least be informed, whenever an employee is directed to take a reasonable suspicion test, although no specific details were provided. Sections 3 A and 4 H of Article 35 of the NMFA require this to be done “in the presence of a union shop steward.”\textsuperscript{260}

A second issue that has been raised under the reasonable suspicion testing requirement is an employer’s right to escort an employee to and from the test site. Twenty-two of the transit agencies and three of the motor property carriers that responded to the study’s survey include an escort provision in their policies. Three of the responding transit agencies also placed it among the most difficult issues upon which to reach agreement. Additionally, two of the transit agencies that responded identified the right of the employee’s representative to attend the reasonable suspicion test among the most difficult of their policy issues upon which to reach agreement. The escort issue is not addressed at all in the NMFA’s provisions concerning reasonable suspicion drug testing (Section 3 A), but is addressed in Section 4 H of Article 35, governing reasonable suspicion alcohol testing (“In the event the Employer requires a probable suspicion test,\textsuperscript{261} the Employer shall provide transportation to and from the testing location.”).

(e) Return-to-duty and Follow-up testing. Covered FTA and FMCSA employees who engage in drug or alcohol prohibited conduct must submit to a return-to-duty test and follow-up testing before they will be permitted to return to duty requiring the performance of a safety-sensitive function.\textsuperscript{262} However, these return-to-duty and follow-up testing requirements are fitness-for-duty standards, not disciplinary requirements. Neither FTA nor FMCSA requires employees who engage in prohibited conduct to be discharged, instead leaving that decision to the employer. As such, whether a transit or motor carrier employee will be subject to such testing will depend on the employer’s collectively bargained disciplinary policy.

According to the survey responses, employee discipline was the most identified subject to have been negotiated (56 transit agencies, 7 motor carriers of property, 1 rail carrier, and 1 motor carrier of passengers). It was also identified as the most difficult issue on which to reach agreement by 40 transit agencies and six motor

\textsuperscript{258} Id. Article 35 §§ 3 L and 4 N.

\textsuperscript{259} 49 C.F.R. § 382.307, §§ 653.43 and 654.37. Although the triggering event is the employer’s belief that an employee has engaged in prohibited conduct, it must also be remembered that FTA's designation of prohibited drug conduct is narrower than FMCSA's. See discussion, infra.

\textsuperscript{260} Section 3 A of art. 35, governing reasonable suspicion drug tests, requires the shop steward’s presence “if possible” in a parenthetical statement (“the Employer may require the employee (in the presence of a union shop steward, if possible”). Section 4 H, on the other hand, which governs reasonable suspicion alcohol testing, mandates the shop steward’s presence and also deletes the parenthetical (“the Employer may require the employee, in the presence of a union shop steward”).

\textsuperscript{261} Sections 3A and 4H of art. 35 of the NMFA use the terms “probable suspicion” and “reasonable cause” interchangeably, while at the same time defining the terms using the criteria imposed under § 382.307 of the FMCSA’s regulations.

\textsuperscript{262} 49 C.F.R. § 382.309, §§ 653.49 and 654.39.
carriers of property. However, no details concerning the nature of the discipline, including the extent to which employees have an opportunity to return to duty, were provided.

As previously noted, however, a number of courts have rejected public policy challenges to arbitral decisions reinstating safety-sensitive employees because the regulations do not require an employee's termination following a violation. Public policy arguments by employers have also been rejected by the courts where the terms of the collective bargaining agreement have been imprecise in defining "just cause." See, e.g., Kennecott Utah Copper Corp. v. Becker, upholding a truck driver's reinstatement after testing positive for marijuana where there was no evidence of on-the-job impairment and therefore no just cause under the terms of the collective bargaining agreement.263 The other hand, in Appeal of Amalgated Transit Union, Local 717, the Supreme Court of New Hampshire flatly rejected having to decide whether the employee's termination contravened the bargaining agreement, stating that "even if it did, we hold that strong public policy would prevent enforcement of that CBA provision."264

(7) Description of the procedures to be used by the carrier to test for the presence of drugs and/or alcohol, to protect the employee and the integrity of the testing process, to safeguard the validity of test results, and to ensure that specific results are attributed to the correct employee.265—Details of the drug and alcohol testing procedures carriers must follow are described in Part 40; specific collective bargaining issues were discussed previously in this paper.

(8) A statement that covered employees must submit to testing administered in accordance with either Part 383 or Parts 653 and 654, whichever governs.—No carrier that responded to the survey mentioned this requirement.

(9) Information regarding the effects of drug and alcohol use and abuse on health, work and personal life; the signs and symptoms of a drug or alcohol problem; and, the intervention opportunities available to covered employees when a substance abuse problem is suspected, including confrontation, referral to any available employee assistance program, and/or referral to management.266—Although none of the survey responses mentioned that the issue of intervention opportunities available to employees had been a problem area, 15 transit agencies and one motor carrier of passengers indicated that the issue of rehabilitation time had been covered in their policies (without providing further details). Of the 15 transit agencies, two classified this as the most difficult issue upon which to reach agreement. Further, the NMFA addresses the opportunity for drivers to take a leave prior to being tested,267 as well as the opportunity for drivers who test positive (other than for a reasonable suspicion test) to elect a "one-time lifetime evaluation and/or rehabilitation."268

The one exception concerns FMCAs's record retention requirements, which are the same as FTA's.269 They are also quite specific and detailed. While none of the survey responses mentioned the requirements, Section 30 of Article 35 of the NMFA specifically requires the participating motor carriers to retain for 2 years their records of inspection and maintenance for each EBT used for testing, the documentation of compliance with the EBT's Quality Assurance Program, and the records of BAT training and proficiency testing. Section 30 also requires the participating carriers to maintain their EBT calibration records for 5 years.

2.2. Federal Railroad Administration, 49 C.F.R. Part 219.—The FRA's requirements apply, in general, to all Class I, II, and III railroads that operate rolling equipment on a standard gauge track that is part of the general railroad system of transportation, or that provide commuter or other short-haul rail passenger services in a metropolitan or suburban area.270 Although some are similar to the FMCAs's or FTA's, most FRA requirements are more specific and leave very little room for bargaining.

Each railroad that is subject to Part 219 is required to provide educational materials that explain Part 219 and the carrier's policies and procedures for compliance. The minimum requirements for the materials are set forth at §219.23(e) and are highlighted below.

263 195 F.3d 1201 (10th Cir. 1999). In upholding reinstatement, the court observed that although few would quarrel with the fact that an employer is not required "to await the occurrence of an accident before discharging an employee who tests positive for drug use...we question whether a federal court's finding of a violation in every positive drug test case...can be squared with the Supreme Court's admonition that case-specific facts matter and it is the province of the arbitrator, not the courts, to find such facts." Id. at 1207.


265 49 C.F.R. §382.601(b)(6), §653.25(e), and §654.71(b)(6).

266 49 C.F.R. §382.601(b)(11) and §654.71(b)(11). Although the same or a similar requirement is not imposed by §653.25 with respect to drugs, it would make sense for a transit carrier that is subject to pt. 653 to include a similar provision for drugs in its policy.

267 Article 35, §§3 H and 4 K.

268 Article 35, §§3 I and 3 J and §§4 K (leave of absence prior to testing) and 4 L (disciplinary action based on positive test results).

269 49 C.F.R. §382.401, §653.71, and §654.51.

270 49 C.F.R. §219.3(a). For the exceptions from compliance with pt. 219, refer to §§219.3(b) and 219.3(c).
Subject to the Requirements of Part 219

(2) The Classes or Crafts of Employees Who are Subject to the Requirements of Part 219. Under FRA’s regulations, “covered employee” refers to those persons who have been assigned to perform service subject to the Hours of Service Act (45 U.S.C. 61-64b) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service. This has not been a problem area according to the survey.

(3) Sufficient Information about the Safety-Sensitive Duties to Make Clear the Period of the Work Day When Covered Employees are Required to be in Compliance. Section 219.23(e)(3) specifies that the period of the day for which compliance with Part 219 is required is “that period when the employee is on duty and is required to perform or is available to perform covered service.” Neither the survey results nor case law suggest this requirement has been problematic to rail carriers.

(4) Specific Information Concerning the Conduct that is Prohibited, the Consequences for Covered Employees Found to have an Alcohol Concentration of 0.02 or Greater but Less than 0.04, and, What Employee Conduct will be Considered “A Refusal to Submit to an Alcohol or Drug Test.” The conduct prohibited by Part 219 is tied directly to an employee’s performance of safety-sensitive functions, and thus is similar to conduct prohibited by FMCSA and FTA. However, FRA prohibits employees from using alcohol within 4 hours of reporting for a covered service or after receiving no notice to report for a covered service, whichever period of time is less. Also, FRA extends prohibited conduct to all substances listed on Schedules I through V of 21 C.F.R. §§1301–1316, not just the NIDA-5 drugs, and also does not prohibit a railroad from “imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of this part or for any other purposes.” Neither the survey results nor case law reviewed for this report indicate where implementation of these provisions has been problematic for rail carriers.

(5) Consequences to Covered Employees for Violations of the Prohibitions of Part 219. Including to Employees Whose Alcohol Confirmatory Test Results are 0.02 or Greater but Less than 0.04 or Who Refuse to be Tested; the Carrier’s Obligation to Remove Such Employees from Safety-Sensitive Functions and the Employee’s Related Obligations Regarding Evaluation, Testing, and Treatment. Like FMCSA and FTA, the consequences imposed for engaging in conduct prohibited by FRA are imposed as fitness-for-duty standards, not as discipline. Pursuant to §219.104(a), employees who engage in conduct prohibited under Part 219 or another DOT agency’s drug or alcohol misuse regulation must be removed from their safety-sensitive duties immediately. Employees whose alcohol confirmatory test result is 0.02–0.039, must be removed from service or prevented from service “until the start of employee’s next regularly scheduled duty period, but not less than eight hours following administration of the test.” Further, employees who refuse to submit to a test are automatically disqualified from performing safety-sensitive duties for a period of 9 months. FRA has

271 49 C.F.R. § 219.23(e)(1).
272 49 C.F.R. § 219.23(e)(2).
273 49 C.F.R. § 219.5.
274 49 C.F.R. § 219.23(e)(3).
275 49 C.F.R. §219.23(e)(4).
276 49 C.F.R. §219.23(e)(11).
277 49 C.F.R. §219.23(e)(9).
278 Under § 219.101(a), covered employees are prohibited from using or possessing alcohol or controlled substances “while assigned by a railroad to perform covered service.” Further, § 219.101(a) prohibits employees from reporting for covered service, going on duty, or remaining on duty in a covered service when the employee is under the influence or impaired by alcohol or a controlled substance, or the employee has an alcohol concentration of 0.04 or greater.
specified that the 9-month required disqualification "does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct."\textsuperscript{288}

In contrast to the FMCSA and FTA, FRA imposes mandatory hearing procedures for railroads to follow whenever a covered employee contests the validity of a drug or alcohol test result,\textsuperscript{289} which does not "abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to the removal or other adverse action taken as a consequence of a positive test result in a test authorized or required by this part."\textsuperscript{290}

In this regard, the survey responses identified employee discipline, mandatory rehabilitation, the number of positive tests required prior to discharge, and grievance and arbitration as issues that responders had negotiated in their policy beyond FTA's requirements. However, no details were provided.

(6) The Circumstances Under Which Covered Employees Will Be Tested.—

(a) Preemployment drug tests. Under FRA's regulations, railroads are required to conduct a preemployment drug test prior to the first time that an applicant for a covered position performs a covered service for the carrier.\textsuperscript{291} No rail carrier that responded to the survey noted that this requirement had caused problems.

(b) Post accident toxicological testing. FRA's regulations require rail carriers to conduct "toxicological testing" following the occurrence of one or more of the following: a "major train accident,"\textsuperscript{292} an "impact accident,"\textsuperscript{293} a "fatal train accident,"\textsuperscript{294} or a "passenger train accident."\textsuperscript{295} The determination that the conditions triggering a post-accident test have occurred are to be made by a railroad representative who was not directly involved in the accident.\textsuperscript{296} FRA's regulations are quite detailed and impose specific procedures that leave no room for further negotiation. They include the procedures to be followed for: sample collection and handling;\textsuperscript{297} laboratory analysis and follow-up;\textsuperscript{298} including the required use of the laboratory designated by the FRA for analyzing post-accident tests;\textsuperscript{299} requirements governing the confidentiality and disclosure of post-accident test results;\textsuperscript{300} and the right of an employee to respond to the results of the employee's test prior to the preparation of a final report concerning the accident,\textsuperscript{301} and, the employee's right to notice and a hearing prior to being disqualified for covered service in the event the employee is determined to have refused to submit to a post-accident test.\textsuperscript{302} Further, FRA's post-accident requirements specifically toll provisions in carrier collective bargaining agreements that impose a maximum time period for charging an employee with a rule violation during the interval between an accident and the date on which the carrier receives notification of the test result.\textsuperscript{303}

One significant, major difference between FRA's post-accident testing requirements and those of FMCSA and FTA is that FRA requires testing of a blood sample following accidents,\textsuperscript{304} whereas blood testing is never per-
mitted by FMCSA or FTA. Likewise, breath alcohol testing following an accident, which is required by FMCSA and FTA, is optional for railroads ("the railroad may also require employees to provide breath for testing...[if] such testing does not interfere with timely collection of required samples."\textsuperscript{305})

(c) For-cause testing. FRA requires a for-cause alcohol and/or drug test whenever a railroad has reason to believe a covered employee has engaged in prohibited conduct, based on the railroad’s “specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee.”\textsuperscript{306} For alcohol tests, the required observations must be made by a supervisor who has been trained in accordance with § 219.11(g).\textsuperscript{307} For drug tests, the required observations must “be made by at least two supervisors, at least one of whom is trained in accordance with § 219.11(g).”\textsuperscript{308}

FRA’s regulations also require for-cause tests when a supervisor has reason to believe an “employee’s acts or omissions contributed to the occurrence or severity” of a reportable accident/incident,\textsuperscript{309} or the employee’s direct involvement in certain specified rule violations indicates possible drug or alcohol use.\textsuperscript{310} FRA’s regulations are quite detailed and leave no room for negotiation. No survey response indicated that the regulation caused problems.\textsuperscript{311}

(d) Random testing. FRA’s random testing requirements impose the same duties on railroads as FMCSA’s and FTA’s requirements do on highway and transit carriers, with two major differences. First, each railroad’s random testing program must be submitted to and approved by FRA prior to implementation.\textsuperscript{312} Additionally, the minimum random testing rates for FRA drug and alcohol tests have varied slightly from the minimum rates imposed by FMCSA and FTA.\textsuperscript{313} No rail carrier that responded to the survey indicated that the random testing requirements had been problematic.

(e) Return-to-covered service and follow-up testing. Return-to-service drug and alcohol tests are required by FRA only “if the substance abuse professional determines that such testing is necessary as a condition for returning the particular employee to service.”\textsuperscript{314} FRA’s follow-up testing requirements are the same as FMCSA’s and require testing only when counseling or treatment has been deemed necessary by a substance abuse professional.\textsuperscript{315} Again, no problems or issues were noted by the survey.

(7) Description of the procedures to be used by the carrier to test for the presence of alcohol and drugs, to protect the employee and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.—Testing required under FRA’s regulations must be conducted in accordance with the requirements of Subpart H of Part 219\textsuperscript{316} and also Part 40, to the extent that Part 40’s mandates are not inconsistent with Part 219.\textsuperscript{317} Nonetheless, FRA incorporated many of Part 40’s requirements by reference and many of the other requirements of Subpart H essentially mirror Part 40. None of the rail carriers that responded to the survey identified any problems with FRA’s procedural requirements.

(8) A statement that covered employees must submit to alcohol and drug tests administered in accordance with Part 219.— No railroad that responded to the survey suggested that the inclusion of this statement in its policy has been problematic.

(9) Information regarding the effects of alcohol use and abuse on health, work, and personal life; the signs and symptoms of an alcohol problem (the employee’s or a coworker’s); available methods for evaluating and

\textsuperscript{305} 49 C.F.R. § 219.203(a)(1)(ii).
\textsuperscript{306} 49 C.F.R. §§ 219.300(a)(1) and (2).
\textsuperscript{307} 49 C.F.R. § 219.300(b)(1).
\textsuperscript{308} 49 C.F.R. § 219.300(b)(2).
\textsuperscript{309} 49 C.F.R. § 219.301(b)(1).
\textsuperscript{310} 49 C.F.R. §§ 219.301(b)(3) and (c). For further details concerning rule violations, see § 219.301(b)(3).
\textsuperscript{311} FRA’s for-cause regulations also impose detailed procedures governing the collection of drug and alcohol test samples (§ 219.302).
\textsuperscript{312} 49 C.F.R. § 219.601. Pursuant to § 219.602(d), each carrier is required to “publish to each of its covered employees, individually, a written notice that they are subject to random drug testing under” pt. 219. For further details concerning the content of such notice, see § 219.602(d).
\textsuperscript{313} The FRA’s 1999 rate for both random drug and alcohol tests was 25 percent, while FTA and FMCSA imposed different rates for drug tests (50 percent) and alcohol tests (10 percent) for 1999. FRA’s random alcohol test rate was reduced to 10 percent for the year 2000, however. 64 Fed. Reg. 72289 (1999).
\textsuperscript{314} 49 C.F.R. § 219.104(d).
\textsuperscript{315} 49 C.F.R. § 219.104(e). Like FMCSA, FRA permits such testing for a 60-month period, and requires a minimum of six follow-up tests during the first 12 months following the employee’s return to duty. Follow-up testing after the first six is only permitted if the substance abuse professional determines such testing is necessary. Id.
\textsuperscript{317} 49 C.F.R. § 219.701(a).
E. Relationship with State Testing Requirements

Many states and several local governments have laws that govern drug or alcohol testing by employers in that state. Although DOT's testing requirements, in general, preempt such state and local laws, 35 carriers indicated, in response to the study's survey, that they were in some way subject to state testing laws. Additionally, 85 respondents to the survey indicated they were not subject to any state testing law, while 31 said they did not know whether they were subject to any state testing law. The 35 carriers that indicated being subject to a state law identified the following states: Arizona, California, Connecticut, Florida, Iowa, Louisiana, Maine, Maryland, Minnesota, New York, Ohio, Pennsylvania, South Carolina, and Wisconsin. No details were provided by any responder, however.

Currently 14 states (Connecticut, Hawaii, Iowa, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, North Carolina, Oklahoma, Oregon, Rhode Island, and Vermont) and the cities of Boulder, Colorado, and San Francisco, California, have mandatory testing laws with which employers, in general, must comply as a condition precedent to testing employees in that jurisdiction. Of these mandatory state laws, only Iowa, North Carolina, and Boulder, Colorado, expressly provide that compliance with their laws is not required when an employer conducts tests required by DOT’s regulations. Aside from such state statutes and local ordinances, court decisions have also affected the ability of an employer to test. However, these cases have addressed the legality of a particular type of drug and alcohol test, e.g., a random one, under the state’s constitution or privacy law rather than prescribed particular testing requirements as the statutes and ordinances have done.

Whether DOT-regulated employers in the remaining jurisdictions are subject to a state or local requirement depends upon the extent to which the applicable DOT modal regulation preempts state or local laws. More specifically, in the case of the FMCSA and FTA regulations, state and local testing requirements are preempted if simultaneous compliance with the state or local requirement and the federal requirement “is not possible,” or where compliance with the state or local requirement creates “an obstacle to the accomplishment and execution of” the federal requirement. The first test is commonly referred to as the “conflict test,” while the latter is known as the “obstacle test.” In the case of FRA’s regulations, state and local testing requirements “covering the same subject matter” as FRA requirements are preempted unless the state or local requirements are “directed at a local hazard that is consistent with” the requirements of Part 219 and “does not impose an undue burden on interstate commerce.” From a strict evidentiary standpoint, FRA’s preemption standard is generally considered to be a broader standard and therefore more difficult for state and local laws to overcome than the standard applied by the FTA and FMCSA. Thus, in general, FRA’s standard is generally considered more likely to result in the preemption of state and local requirements than the preemption standard applied by FTA and FMCSA.

In general, failure to comply with a specific state or local testing requirement has not been an issue for the

321 Iowa Code § 730.5 subsection 2 (1998); N.C. Gen. Stat. § 95-235 (1995); Boulder Municipal Code § 12-3-4. In addition to such state mandatory testing laws, a number of other states, including Arizona, Florida, and Ohio, have voluntary laws. Compliance with such voluntary testing laws can result in a percentage reduction in the employer’s workers’ compensation insurance premium and/or in a rebuttal presumption that the employee was under the influence of drugs or alcohol at the time of the accident in the case of applications for workers’ compensation benefits.

322 49 C.F.R. §§ 382.109, 653.9, and 654.9.

vast majority of transportation employers to date. Nonetheless, the preemption question was considered in two recent court decisions involving DOT testing—Thomas O’Brien v. Massachusetts Bay Transportation Authority (O’Brien), and Follmer v. Deluth, Missabe and Iron Range Railway Co. (Follmer). Both cases should therefore serve as an effective reminder to carriers and unions alike that state law requirements may apply and affect a DOT carrier’s program and should therefore be taken into account when the policy is being negotiated.

In O’Brien, the transit agency’s random drug and alcohol testing requirements were attacked on the basis that they violated the Massachusetts Declaration of Rights. Although the court rejected the argument, holding that Massachusetts law conflicts with the federal requirements and therefore was preempted, the court observed that the “regulations promulgated under the Testing Act contemplate the possibility that a state may enact tougher requirements—and they do not preclude a state from doing so.”

In Follmer, the court held that Minnesota’s law, which restricts the employer’s right to terminate employees who test positive, was not preempted by the FRA’s regulations. Under Minnesota law, employers are required to give employees who test positive for the first time an opportunity to be evaluated and, if determined appropriate, to participate in rehabilitation. Although Follmer involved a challenge to the railroad’s termination of a railroad employee in a non-safety-sensitive position, the railroad had argued that the broad preemption imposed by the FRA’s regulations for safety-sensitive employees also extended to the testing of noncovered employees under the railroad’s CBA policy. The court did not agree. Notwithstanding that Follmer dealt with the testing of a noncovered employee, the case is important because it sheds light on public policy since DOT’s regulations do not prohibit the termination of such employees nor prohibit their reinstatement after completing the required evaluation, treatment, and testing imposed under applicable modal requirements. See, e.g., Pepsi-Cola Albany Bottling Co. v. International Brotherhood of Teamsters, Local 669 (arbitrator’s reinstatement of driver was not against public policy since DOT’s regulations do not prohibit reinstatement). In this regard, Maine, Minnesota, Rhode Island, and Vermont prohibit employers, in general, from terminating an employee who tests positive for drugs or alcohol unless the employee is first given an opportunity to be evaluated and participate in an appropriate treatment program. Further, an employer that fails to comply is subject to possible punitive damages and/or a fine or other penalty.

Responders to the survey identified 17 subject areas where a state law has affected their testing programs. Of the carriers that provided such information, transit agencies indicated their programs were affected by 16 of the 17 subject areas identified. Motor carriers of passengers identified three subject areas, and motor carriers of property identified one subject area.

The most-identified subject area concerns the discipline to be imposed upon a covered employee who tests positive. As previously noted, DOT’s requirements impose fitness-for-duty standards, not disciplinary requirements. Thus, although a covered employee who tests positive would be considered unfit for duty by DOT and therefore prohibited from engaging in safety-sensitive functions, DOT’s regulations do not require the termination of such employees nor prohibit their reinstatement after completing the required evaluation, treatment, and testing imposed under applicable modal requirements. See, e.g., Pepsi-Cola Albany Bottling Co. v. International Brotherhood of Teamsters, Local 669 (arbitrator’s reinstatement of driver was not against public policy since DOT’s regulations do not prohibit reinstatement). In this regard, Maine, Minnesota, Rhode Island, and Vermont prohibit employers, in general, from terminating an employee who tests positive for drugs or alcohol unless the employee is first given an opportunity to be evaluated and participate in an appropriate treatment program. Further, an employer that fails to comply is subject to possible punitive damages and/or a fine or other penalty.

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325 162 F.3d 40 (1st Cir. 1998).
326 585 N.W.2d 87 (Minn. Ct. App. 1998).
327 Supra note 325 at 45.
328 49 C.F.R. § 219.13(a).
330 585 N.W.2d at 87 (Minn. Ct. App. 1998).
331 Id. at 92, citing CSX Trans., Inc. v. Easterwood, 507 U.S. 658 at 664.665.
332 The issue of discipline vis-a-vis state law requirements was identified by 11 transit agencies and one motor carrier of passengers. Additionally, three transit agencies specifically identified the issue of required rehabilitation prior to discharge as a state law issue affecting their programs.
The second program area most identified by responders as being affected by state requirements concerns the employer's notification to employees of their test results. In this regard, several states have requirements that do not appear to be preempted by any of the modal requirements.

Under Louisiana's mandatory testing law, employees have, upon written request, a right of access within 7 working days to records relating to their drug tests and other records of any relevant certification, review, or proceedings relating to the suspension or revocation of a certification. In Maryland, employers must, within 30 days of the test, provide personally or by certified mail, a copy of the test result, notice of the availability of a retest at the employee's expense, and the anticipated disciplinary action.

The third program area most identified by responders as being affected by state requirements concerns the responsibility of the employer versus employees to pay for the tests, including transportation to and from the test site. With the exception of § 219.303(e)(1) of FRA's regulations, which requires a railroad to provide transport to and from the collection site in the case of a blood test taken by an employee to rebut the results of a positive reasonable suspicion breath test result, DOT's regulations do not require the employer to pay, or otherwise address or "cover" (in the case of FRA's regulations) this issue. As such, whether federal law preempts a state or local law governing the party responsible for paying for tests is open to debate. While not all states have laws that expressly govern this area, where such laws exist they generally require the employer to pay for the cost of any test the employer requires an employee to take. This would include a test that DOT requires an employee to take. Customarily, this has meant that the employer is responsible for the cost of the initial and confirmatory test and the employee is made to pay for the cost of any retest, including the split-specimen. In New York State, Rhode Island, and San Francisco, however, the employer is required to pay for the split-specimen test. Additionally, Oklahoma requires the employer to pay for the employee's transportation costs to the collection site if the test is conducted at a location other than the employee's normal work site. Although no details were provided concerning exactly how the state law affected the responder's program, the remaining testing program areas that were identified by at least one responder as being affected by state law were the following: alcohol testing; criminal sanctions; use of consortiums; test information obtained from prior employers; laboratories; medical disclosure form; the medical review officer; obligation to test; privacy; testing procedures; and time for rehabilitation.

F. Overview of Other Federal Statutory and Regulatory Requirements Governing Drug and Alcohol Use and Testing

In addition to the NLRA and RLA, several other Federal laws may also substantively affect the DOT-required testing programs of carriers in the highway, transit, and rail sectors of the transportation industry. The following is an overview of those other Federal laws.

1. Drug-Free Workplace Act of 1988

The Drug-Free Workplace Act of 1988 (DFWA) applies to employers with federal contracts for "the procurement of property or services of a value of $25,000 or more from any Federal agency" and also to recipients of Federal grants without limitation on the amount of the grant. The DFWA's objective of drug-free workplaces is achieved predominantly by employee education accomplished through the implementation of employee

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336 This issue was identified by 10 transit agencies.
342 Although information was provided by responders concerning the states with laws affecting the responders' programs and the subject areas that those state laws concerned, further details concerning the individual responders' interpretation of the relevant state law and why they believed it was applicable was not provided. As a result, it is not clear to the author why the following subject areas were identified: "alcohol testing," "obligation to test," return to duty alcohol test," and "testing procedure."
343 In some instances, State law may also apply. Refer to Section E of this report for a discussion of how state laws may also affect a carrier's testing program.
345 Section 5152, 102 STAT. 4304. As a result of a complex set of administration interpretative rulings regarding the federal procurement regulations, the dollar threshold has been administratively increased to $100,000 for contracts and grants that do not involve security matters. Fundamentally, however, the federal contractor or grantor agency will determine whether compliance with the DFWA is required as a condition of a contract or grant award and notice of such will be set forth in the contract or grant.
346 Section 5153, 102 STAT. 4306.
employer drug-free “awareness programs.” However, the DFWA does not require employers to test as a condition of compliance.

Although testing is not required, many of the DFWA’s anti-drug requirements complement requirements imposed by the DOT regulations implementing the Omnibus Testing Act. For example, the regulations issued under the DFWA and Omnibus Testing Act each include provisions concerning the subject matter to be provided to employees as part of their substance abuse education and requirements that govern employees who commit drug-related violations. Accordingly, a transportation employer that is subject to the DFWA, in addition to the Omnibus Testing Act, might consider incorporating its corporate rule and procedures to comply with the requirements of both laws simultaneously and consistently.


Section 114 of the Hazardous Materials Transportation Authorization Act of 1994 directed DOT to issue regulations governing the minimum safety information that prospective motor carrier employers must obtain and prior motor carrier employers must give regarding applicants for commercial motor vehicle driver positions. Specifically, Section 114 requires past employers to provide information of which they are aware concerning an applicant’s failure, during the prior 3 years, to have completed a mandatory rehabilitation program or an applicant’s use of illegal drugs or alcohol following completion of such a program. Implementation of Section 114 had not occurred as of the publication of this report. It remains to be seen, therefore, whether and how the requirements of Section 114 might affect the testing programs of motor carrier employers.

3. Americans With Disabilities Act and Rehabilitation Act of 1973

The Americans With Disabilities Act (ADA) and the Rehabilitation Act of 1973 impose requirements that govern the employment rights of users of drugs and alcohol and thus can potentially affect the testing programs of organized transportation carriers under DOT’s regulations.

The ADA incorporates many of the discrimination standards of the regulations implementing Section 504

347 At a minimum, the required awareness programs must include the employer’s distribution of information to its employees concerning: (i) the dangers of drug abuse in the workplace; (ii) the employer’s policy on maintaining a drug-free workplace; (iii) available drug counseling, rehabilitation, and employee assistance programs; and (iv) the penalties to be imposed on an employee for drug abuse violations, which include “the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance” in the workplace. Additionally, the DFWA requires that employees who are convicted for a workplace violation of a criminal drug statute must either be disciplined “up to and including discharge” or “satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.” The Act also requires employers and grantees to certify their compliance with the Act’s requirements, and subjects them to suspension, termination, and/or debarment in the event of a false certification. For further details, see Section 5152(b), 102 S.TAT. 4305 (applicable to contractors), and Section 5153(b), 102 S.TAT. 4306 (applicable to grantees).

348 Regulations implementing the DFWA are issued on an agency-by-agency basis. See e.g., 49 C.F.R. pt. 29 for DOT’s implementing regulations; 32 C.F.R. pt. 25 for the regulations of the Department of Defense, and 48 C.F.R. subparts 9.4, 23.5, and 52.2 for the General Services Administration regulations governing federal procurement, in general.


351 Title I of the ADA, 42 U.S.C. §§ 12110–117, applies to employers in the private sector and also to State and local governments with 15 or more employees. State and local governments with fewer than 15 employees are subject to the employment requirements of Title II of the ADA, 42 U.S.C. § 12131. The Department of Justice (DOJ) has responsibility for enforcement of Title II. Pursuant to DOJ’s implementing regulation concerning employment, 28 C.F.R. § 35.140, State and local governments with 15 or more employees are to be governed by the Equal Employment Opportunity Commission’s (EEOC) regulations implementing Title I of the ADA, 28 C.F.R. § 35.140. DOJ’s regulation further provides that State and local governments with fewer than 15 employees are to be governed by the regulations implementing § 504 of the Rehabilitation Act of 1973, 28 C.F.R. pt. 41.
of the Rehabilitation Act of 1973.\footnote{352} While the Rehabilitation Act's language may differ slightly from its ADA counterpart,\footnote{353} the courts have relied upon applicable Rehabilitation Act precedents when interpreting the ADA.\footnote{354} For that reason, and also because the majority of transportation carriers are subject to the requirements of the ADA, the following discussion will focus primarily on the ADA and EEOC's implementing regulations for Title I.\footnote{355}

The ADA, in general, prohibits private and public-sector employers and their labor unions\footnote{356} from discriminating against any employee or applicant who is a "qualified individual with a disability."\footnote{357} For purposes of determining whether an employee or applicant is a "qualified individual with a disability," the ADA draws a distinction in its treatment of alcoholics and drug users. In the case of alcohol, "a person who currently uses alcohol is not automatically denied protection simply because of the alcohol use."\footnote{358} By contrast, employ-

\footnote{352}{Pub. L. No. 93-112, tit. V, § 504, 84 Stat. 394. Section 504 applies to the recipients of federal financial assistance (without regard to the number of employees), including federal contractors and most transit agencies.}

\footnote{353}{Section 504 prohibits discrimination against an "otherwise qualified individual with handicaps," whereas Title I of the ADA refers to a qualified individual with a disability." As DOJ explained in the preamble to its regulations implementing tit. I, the substitution of the latter for the former in the ADA was an effort by Congress to use terminology "most in line with the other provisions of Federal law."}

\footnote{354}{See, e.g., Collings v. Longview Fibre Co., 63 F.3d 828, 832 (9th Cir. 1995).}

\footnote{355}{29 C.F.R. pt. 1630.}

\footnote{356}{Section 3(2) of the ADA, 42 U.S.C. § 12111(2), defines the entities subject to the ADA's requirements (i.e., "covered entity") to include labor organizations and joint labor-management committees. "Labor unions are covered by the ADA and have the same obligations as the employer to comply with its requirements."}


\footnote{358}{"Qualified individual with a disability" is defined in § 3(8), 42 U.S.C. § 12111(8), as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."}

\footnote{359}{40 U.S.C. § 12114(b). According to the EEOC, [i]f an employer perceived someone to be addicted to illegal drugs based on rumor and groggy appearance of the individual, but the rumor was false and the appearance was a side-effect of a lawfully prescribed medication, this individual would be "regarded as" an individual with a disability (a drug addict) and would be protected from discrimination based upon that false assumption. If an employer did not regard the individual as an addict, but simply as a social user of illegal drugs, the individual would not be "regarded as" an individual with a disability and would not be protected by the ADA.}

\footnote{360}{Id. See also Family and Medical Leave Act discussion, infra.}
plied more narrowly than the broad language of the statute at first suggests. This is because the meaning of "current" was not specifically defined in the statute.

The courts and EEOC have opted for a functionally broad construction of the phrases "currently engaging in" and "no longer engaging in such use," rejecting the proposition that the ADA's exclusion of "current use" is limited solely to use that occurs on the day of the adverse employment action.363 As the EEOC has explained, "current" means "the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem. It is not limited to the day of use, or recent weeks or days, in terms of employment action. It is determined on a case-by-case basis."364 (Emphasis supplied.) Similarly, in Shafer v. Preston Memorial Hospital Corp.,365 the court held that the ADA's safe harbor does not apply to "an employee who illegally uses drugs during the weeks and months prior to her discharge, even if the employee is participating in a drug rehabilitation program and is drug-free on the day she is fired."366 (emphasis supplied). See also Collings v. Longview Fibre Co.367 (employees who were drug-free on the day they were discharged, but who used drugs during the weeks and months prior to their discharge, held to be current users), Salley v. Circuit City Stores368 ("Here, given the Plaintiff's long history of heroin addiction, which featured repeating periods of treatment and relapse, and especially in light of Plaintiff's admissions regarding his regular heroin use in the months leading up to his discharge, the Defendant could reasonably conclude as of the date of the Plaintiff's discharge that Plaintiff was actively engaged in illegal drug use.") and McDaniel v. Mississippi Baptist Medical Center369 (employee's 6 weeks of abstention held to be insufficient to trigger ADA protection; "a supervised rehabilitation program can continue long past inpatient treatment and a definition of 'no longer engaging in such use' can be read to mean that the person has been in recovery long enough to have become stable.").

While placing some limitations on the right of employers to exclude users of drugs and alcohol from the workplace, the ADA at the same time empowers employers with authority to: (i) prohibit the illegal use of drugs and alcohol at the workplace; (ii) prohibit employees from being under the influence of alcohol and engaging in the illegal use of drugs at the workplace; (iii) require employees to behave in conformity with requirements established under the Federal Drug-Free Workplace Act; (iv) hold drug users and alcoholics to the same standard for job qualification or job performance and behavior as the employer does other employees; and (v) require employees to comply with the DOT's regulations governing drug and alcohol use and testing.370 For example, in Williams v. Widnall,371 the court rejected the plaintiff's claim of protection under the Rehabilitation Act and upheld the termination of a former Air Force employee who claimed that his threats to a supervisor and coworkers were the result of his alcoholism. However, an employer would violate the ADA by imposing greater sanctions on an alcoholic employee who is often late because of his or her alcoholism than it does on other employees for the same misconduct.

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363 See Teahan v. Metro-North Commuter Railroad Co., 951 F.2d 511 (2d Cir. 1991), cert. denied, 506 U.S. 815, 113 S. Ct. 54 (1992) (a case that considered § 706(8)(B) of the Rehabilitation Act of 1973, a provision similar to § 104 of the ADA) is sometimes cited for the proposition that a employee who is in rehabilitation on the day he or she is terminated is not a current user. See, e.g., Shafer v. Preston Memorial Hospital Corp., 107 F.3d 274, 279 (4th Cir. 1997) and Salley v. Circuit City Stores, 7 AD Cases 852, 857 (E.D. Pa. 1997). Reference to Teahan for that proposition is in error. While Teahan holds that the relevant time to assess the employee's status as a current user is the date on which the termination occurs, the decision is nonetheless consistent with the broader interpretation of Teahan to § 104 by the EEOC and courts. See discussion infra. As the Teahan court went on to explain: "[I]f an employer can reasonably establish that, on the date an employee is finally terminated, his substance abuse problem is such as to prevent him from performing his essential duties, the employee is a 'current substance abuser' excluded from the [statutes] coverage." 951 F.2d at 520. See also Cowan v. Manhattan and Bronx Surface Transit Operating Auth., 961 F. Supp. 37, 41 (E.D. N.Y. 1997) ("An employer is justified in considering the strong possibility of relapse even though there is evidence of recovery.").


365 107 F.3d 274 (4th Cir. 1997).

366 Id. at 279.


370 42 U.S.C. 12114(c).

371 79 F.3d 1003 (10th Cir. 1996).

372 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A
An employer is also "prohibited from taking any action through a labor agreement that it may not take itself." Consequently, "[a] party would have no right under the NLRA to insist on adherence to contract terms that are, on their face, violative of the ADA." This means employers must be able to identify and distinguish between DOT testing provisions that are mandatory—to which the ADA’s conflict defense would apply—and provisions where DOT has left some discretion—to which the conflict defense would not apply.

4. Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA) requires employers with 50 or more employees to provide eligible employees up to 12 weeks of unpaid and job-protected leave for a "serious health condition," including for the treatment of substance abuse. At the same time, the FMLA permits an employee to be disciplined, including terminated from employment, for substance abuse, regardless of whether the employee is presently taking FMLA leave, if the employer has an established policy that is applied in a nondiscriminatory manner that has been communicated to all employees and the policy provides the specific circumstances under which employees may be terminated for substance abuse and the termination was imposed pursuant to that policy. As a result, employers can adopt at least 12 months (they need not be 12 consecutive months); (2) an employee must have worked for at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave; and (3) the employee must work at a location that has 50 or more employees at that location, or at a location that qualifies as a "multiple worksite." 29 C.F.R. § 825.110. A "multiple worksite" is two or more locations within 75 road or water miles of each other that, in the aggregate, have 50 or more employees working at those locations; it is not necessary for all of those employees to be "covered employees." 29 C.F.R. § 825.111. In the case of transportation employees who do not have a fixed worksite, however, their home base worksite is the location "from which their work is assigned, or to which they report." 29 C.F.R. § 825.111(g).

The FMLA requires that upon returning to work from leave, an employee is entitled to be returned to the same position the employee held when the leave commenced, or to an equivalent position "with equivalent benefits, pay, and other terms and conditions of employment." 29 C.F.R. § 825.214. Further, reinstatement is required "even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence." Id. Moreover, the rights provided by the FMLA may not be diminished by a collective bargaining agreement (CBA). 29 C.F.R. § 825.700(a). "For example, a provision of a CBA that provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by the FMLA." Id.

As a general rule, every employer with 50 or more employees is subject to the FMLA. However, not every employee of those employers may be eligible for FMLA leave. In order to be an "eligible employee," the following threshold requirements must be satisfied: (1) an employee must have been employed by the employer for
vice employees in their testing policies that an employee's request to take FMLA leave for substance abuse treatment must be made prior to the time an employee is directed to take a test required by DOT regulations (or, for that matter, required by the employer under its independent authority).

Although none of the carriers responding to the study survey mentioned including such a provision in any of their policies, or even that the issue had been raised during negotiations, such a provision is included in Section 3 H of Article 35 of the National Master Freight Agreement.

II. CONCLUSION

Although the DOT's modal drug and alcohol testing regulations governing safety-sensitive employees in the transit, motor carrier, and rail industries (including requirements for random testing) have faced court challenge on a number of occasions on constitutional and other grounds, ultimately they have withstood the test of these challenges and been upheld as constitutionally valid requirements. These decisions have left carriers regulated by DOT with the responsibility to adopt policies and implement testing programs in accordance with DOT's requirements. For unionized carriers, this has also meant the need for their policies to be adopted and administered in a manner consistent with the requirements of the National Labor Relations Act, Railway Labor Act, or a "mini" state labor law.

By and large, DOT's regulations are highly prescriptive and as such have "filled in" the majority of the elements and details that transportation employers need to follow in setting up and administering their testing programs. DOT's requirements were also designed to protect the privacy rights of the individuals being tested. Nonetheless, DOT's procedural requirements under Part 40 and modal regulations have left open a number of areas that individual carriers may choose to address under their independent authority. In the case of unionized carriers, this means the DOT's regulations have left certain decisions regarding a carrier's program to be addressed through the carrier's collective bargaining process. In most cases, this has meant that the resolution of such open policy issues could not be resolved by the carrier unilaterally but instead had to be negotiated with the carrier's union.

In addition to DOT's requirements, other federal laws such as the ADA and FMLA and to a lesser extent, state testing laws, have also imposed duties or limitations on employers that have affected individual carrier testing programs. This is particularly so with respect to whether an employee must be given an opportunity to seek appropriate treatment prior to termination following a positive test and whether an employee must be offered voluntary leave in order to obtain rehabilitation for a substance abuse problem.

Even though DOT's regulations are highly prescriptive and were designed and intended to establish modal requirements that would be uniformly administered by carriers within the same transportation mode, and across the modes in the case of Part 40, this study's survey showed that there has not been one uniform approach that the responding carriers took in setting up their programs or in the optional elements included. While the majority of responders indicated that the terms of their program had been the result of bargaining with their union, there were also a fair number of carriers that were able to implement programs without the need to bargain beforehand, citing the federal regulations as the principal reason. Likewise, while some carriers summarily adopted the federal requirements, the majority of the responding carriers went beyond the minimum requirements imposed by DOT, citing more than 20 additional subjects that had been addressed in one or more policies.

The purpose of this study was to look at the relationship between the labor laws, the bargaining duties that they impose on employers, and the effect of those duties on the implementation of DOT requirements by unionized carriers. Neither the survey nor the case law reviewed suggests that unionized transportation employers have confronted widespread problems or have otherwise been significantly impeded in implementing DOT's requirements as they concurrently comply with applicable labor law. Nonetheless, problems have occurred.

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380 DOL's regulation allowing this was adopted in response to the trucking industry, which had advised DOL that the FMLA was being used by drivers to avoid having to submit to a DOT-required drug or alcohol test, particularly random tests. See preamble to the final FMLA rule, 60 Fed. Reg. 2180, 2194 (1995). The notice permitted by the DOL's regulations could also be extended beyond the time an employee is notified to take a test and could also require employees to request leave prior to engaging in other drug or alcohol-related conduct prohibited under the employer's policy; for example, if the employer's policy permits the employer to conduct unannounced inspections of company or employee property for the presence of illegal drugs, the employer's policy could also provide that FMLA leave must be requested prior to the employer's detection of illegal drugs during such an inspection.
Irrespective of the specific subject involved, where problems have occurred, case law suggests they can be traced to a carrier’s unilateral implementation of its policy, or to policy language that lacked sufficient clarity, which thereby left arbitrators and occasionally the courts to be the final interpreters of a program best left to negotiation between the carrier and its union. This was especially the case in the area of discipline, particularly regarding the question of whether proof of an employee’s impairment must be established prior to termination, or whether evidence of violations of the DOT’s drug or alcohol regulations alone will suffice.

In the end, however, the study found that, except for discipline, the collective bargaining process has had little effect on the implementation and administration of testing programs by unionized carriers. In this regard, however, the experiences that carriers and unions reported they have had with respect to the implementation and administration of their DOT-required testing programs, or which are chronicled in the case law, have essentially been no different than the individual and collective experiences that carriers and unions have customarily confronted when dealing with other non-testing subjects.
### Appendix A

**Cross Reference for Citations to 49 C.F.R. Part 40**

Schedule to Be Effective August 1, 2001

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TRANSPORTATION RESEARCH BOARD DRUG AND ALCOHOL TESTING SURVEY

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1. Which of the following modes of transportation is the carrier engaged in: (check all applicable)

- [ ] public transit (bus, light rail, rapid rail)
- [ ] paratransit
- [ ] motor carrier of property
- [ ] heavy-rail
- [ ] other (specify)

2. Which DOT agency regulates some or all of carrier’s operations: (check all applicable)

- [ ] Federal Transit Admin. (FTA)
- [ ] Federal Highway Admin. (FHWA)
- [ ] Federal Railroad Admin. (FRA)

3. What is the geographical scope of the carrier’s operation: (check all applicable)

- [ ] inner city
- [ ] regional
- [ ] state wide
- [ ] national
- [ ] other (specify)

4. Does carrier operate in more than one state?

- [ ] Yes
- [ ] No

Does carrier have workers (employees and/or independent contractors) who perform “safety-sensitive” functions who are required to be either drug or alcohol tested under DOT regulations?

- [ ] Yes
- [ ] No

a. If “Yes”, indicate which of the following safety-sensitive functions are being performed: (check all applicable)

- [ ] drivers of commercial motor vehicles
- [ ] operators of passenger vehicles other than a commercial motor vehicle (FTA)
- [ ] operators of light or rapid rail (FTA)
- [ ] transit dispatch (FTA)
- [ ] maintenance (FTA)
- [ ] armed security (FTA)
- [ ] traffic control (dispatch; block operator) (FRA)
- [ ] signal maintenance (FRA)
- [ ] engineer (FRA)
- [ ] trainmen (FRA)
- [ ] other (please specify):

6. If the answer to Q. 3 is “Yes”, indicate whether the carrier has implemented a drug and/or alcohol testing program for any of those workers?

a. Drug

- [ ] Yes
- [ ] No

If “No”, please explain:

b. Alcohol

- [ ] Yes
- [ ] No

If “No”, please explain:

c. If the answer to a. or b. is “Yes”, indicate which DOT agency’s testing regulations apply? (check all applicable)

- [ ] FTA
- [ ] FHWA
- [ ] FRA

d. If the answer to a. or b. is “Yes”, indicate whether the carrier’s testing program is subject to any state law(s) governing testing (in addition to the federal):

- [ ] Yes
- [ ] No
- [ ] Do not know

(over)
e. If the answer to d. is "Yes", identify the state(s): ________________________________

f. If the answer to d. is "Yes", indicate which provisions of your program were affected by the state law: (check all applicable)

[ ] discipline, including discharge
[ ] mandatory opportunity for rehabilitation before discharge
[ ] the amount of time an employee may take for rehabilitation
[ ] how employee is notified of a positive test
[ ] carrier's obligation to pay for tests
[ ] other: (specify)

7. a. Are any of the carrier's safety-sensitive workers unionized? [ ] Yes [ ] No

b. If "Yes", indicate the union(s); which represent those workers: [ ] American Train Dispatchers Association;
[ ] Brotherhood of Locomotive Engineers; [ ] Brotherhood of Railroad Signalmen; [ ] Carmen Division; [ ] IBT;
[ ] International Association of Machinist and Aerospace Association; [ ] International Brotherhood of Boilermakers
and Blacksmiths; [ ] International Brotherhood of Electrical Workers; [ ] International Brotherhood of Firemen
and Oilers; [ ] Maintenance of Way Employees; [ ] Sheetmetal Workers International Association [ ] Transportation
Communications Union; [ ] United Transportation Union; [ ] TWU; [ ] other(s) (specify)

8. For unionized operations:

a. If the carrier has a drug testing policy, indicate if it was bargained with the union. [ ] Yes [ ] No

(i) If "yes", indicate with which union(s): ______________________________________

(ii) If "yes", indicate whether the resulting policy was negotiated as part of a collective bargaining agreement (CBA)
or as a separate side-agreement with the union. [ ] as part of CBA [ ] as separate agreement

(iii) If "yes", indicate in which year the negotiated agreement went into effect _______ and the length of theagreement's term (in years): _______________________

(iv) If "no", indicate why the policy was not bargained with the union: _______________________

b. If the carrier has an alcohol testing policy, indicate if it was bargained with the union. [ ] Yes [ ] No

(i) If "yes", indicate with which union(s): ______________________________________

(ii) If "yes", indicate whether the resulting policy was negotiated as part of a collective bargaining agreement (CBA)
or as a separate side-agreement with the union. [ ] as part of CBA [ ] as separate agreement

(iii) If "yes", indicate in which year the negotiated agreement went into effect _______ and the length of theagreement's term (in years): _______________________

(iv) If "no", indicate why the policy was not bargained with the union: _______________________

c. If the carrier has bargained its drug and/or alcohol policy with a union, does the negotiated agreement merely adoptthe requirements of the regulations, or does the agreement address subjects beyond what is specifically required by thefederal regulations? [ ] adopts regulations [ ] covers other subjects.
If other subjects, please indicate which subjects are covered in your agreement(s) (check all applicable):

[ ] discipline, including discharge
[ ] the amount of time an employee may take for rehabilitation
[ ] the number of times employee may test positive before can be discharged
[ ] union representative's right to be notified of a test before occurs
[ ] whether an employee must be "under the influence" to be discharged
[ ] employee's off-duty use of alcohol
[ ] which DOT-approved laboratory carrier can use
[ ] which DOT-approved devices can be used for alcohol testing
[ ] carrier's obligation to pay for testing the split-specimen
[ ] procedures governing escort of employee to test site
[ ] grievances and arbitration procedures
[ ] other: (specify)

[ ] mandatory opportunity for rehabilitation before discharge
[ ] how employee is notified of a positive test
[ ] what constitutes "positive" alcohol test for discharge purposes
[ ] union representative's right to attend reasonable suspicion test
[ ] employee's off-duty use of drugs
[ ] observed collection procedures (in addition to Part 40)
[ ] which MRO carrier can use
[ ] right of employee to be reassigned to a non-safety-sensitive position
[ ] carrier's obligation to pay for other testing-related costs
[ ] specific conditions under which employee will be considered to have refused to be tested
[ ] confidentiality regarding carrier's disclosure of test results

d. If the negotiated agreement covers drug and/or alcohol testing, do those provisions apply only to employees or do they also include applicants? [ ] employees only [ ] includes applicants

e. If the carrier has bargained its drug and/or alcohol policy with a union, does the agreement have a zipper clause?

[ ] Yes [ ] No If “yes”, what provision has been made for regulatory changes which occur during term of the agreement? [ ] CBA does not allow for [ ] allows for (explain): ____________________________

f. Has the union expressly waived its right to bargain on any drug and/or alcohol testing issues? [ ] Yes [ ] No If “yes”, indicate which issue(s):

[ ] discipline, including discharge
[ ] the amount of time an employee may take for rehabilitation
[ ] the number of times employee may test positive before can be discharged
[ ] union representative’s right to be notified of a test before occurs
[ ] whether an employee must be "under the influence" to be discharged
[ ] employee's off-duty use of alcohol
[ ] which DOT-approved laboratory carrier can use
[ ] which DOT-approved devices can be used for alcohol testing
[ ] carrier's obligation to pay for testing the split-specimen
[ ] procedures governing escort of employee to test site
[ ] grievances and arbitration procedures
[ ] other: (specify)

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[ ] carrier's obligation to pay for other testing-related costs
[ ] specific conditions under which employee will be considered to have refused to be tested
[ ] confidentiality regarding carrier's disclosure of test results

(over)
g. If the carrier has bargained its drug and/or alcohol policy with a union, indicate which of the following issues was the most difficult to reach agreement on (check all applicable):

- [ ] discipline, including discharge
- [ ] the amount of time an employee may take for rehabilitation
- [ ] the number of times employee may test positive before can be discharged
- [ ] union representative's right to be notified of a test before occurs
- [ ] whether an employee must be "under the influence" to be discharged
- [ ] employee's off-duty use of alcohol
- [ ] which DOT-approved laboratory carrier can use
- [ ] which DOT-approved devices can be used for alcohol testing
- [ ] carrier's obligation to pay for testing the split-specimen
- [ ] procedures governing escort of employee to test site
- [ ] grievance and arbitration procedures
- [ ] other: (specify)

[ ] mandatory opportunity for rehabilitation before discharge
[ ] how employee is notified of a positive test
[ ] what constitutes "positive" alcohol test for discharge purposes
[ ] union representative's right to attend reasonable suspicion test
[ ] employee's off-duty use of drugs
[ ] observed collection procedures (in addition to Part 40)
[ ] which MRO carrier can use
[ ] right of employee to be reassigned to a non-safety-sensitive position
[ ] carrier's obligation to pay for other testing-related costs
[ ] specific conditions under which employee will be considered to have refused to be tested
[ ] confidentiality regarding carrier's disclosure of test results

h. If the carrier has bargained its drug and/or alcohol policy with the union, does the agreement allow for automatic changes to the policy in the event of regulatory changes, or must all regulatory changes be bargained in full:

- [ ] automatic
- [ ] all must be bargained in full
- [ ] depends on specific issue (please explain):

i. If you are aware of any reported or unreported court decisions involving your agency or another agency which could provide data for this survey, please attach a copy of the decision(s) or provide name of case, court, docket number and date, or citation.

9. For non-union operations:

a. Does the carrier have a drug and/or alcohol testing policy? [ ] Yes [ ] No If "yes", indicate which of the following issues the policy covers (check all applicable):

- [ ] discipline, including discharge
- [ ] the amount of time an employee may take for rehabilitation
- [ ] the number of times employee may test positive before can be discharged
- [ ] union representative's right to be notified of a test before occurs
- [ ] whether an employee must be "under the influence" to be discharged
- [ ] employee's off-duty use of alcohol
- [ ] which DOT-approved laboratory carrier can use
- [ ] which DOT-approved devices can be used for alcohol testing
- [ ] carrier's obligation to pay for testing the split-specimen
- [ ] procedures governing escort of employee to test site
- [ ] grievance and arbitration procedures
- [ ] other: (specify)

[ ] mandatory opportunity for rehabilitation before discharge
[ ] how employee is notified of a positive test
[ ] what constitutes "positive" alcohol test for discharge purposes
[ ] union representative's right to attend reasonable suspicion test
[ ] employee's off-duty use of drugs
[ ] observed collection procedures (in addition to Part 40)
[ ] which MRO carrier can use
[ ] right of employee to be reassigned to a non-safety-sensitive position
[ ] carrier's obligation to pay for other testing-related costs
[ ] specific conditions under which employee will be considered to have refused to be tested
[ ] confidentiality regarding carrier's disclosure of test results
b. If you are aware of any reported or unreported court decisions involving your agency or another agency which could provide data for this survey, please attach a copy of the decision(s) or provide name of case, court, docket number and date, or citation.
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Statewide 3
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Dispatch 2
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Driver of CMV 6
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NCHRP PROJECT 20-6 ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Panel SP20-6. The Panel is chaired by Delbert W. Johnson (formally with Office of the Attorney General of Washington). Members are Grady Click, Texas Attorney General’s Office; Donald L. Corlew, Office of the Attorney General of Tennessee; Lawrence A. Durant, Louisiana Department of Transportation and Development; Brelend C. Gowan, California Department of Transportation; Michael E. Libonati, Temple University School of Law; Marilyn Newman, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, Boston, Massachusetts; Lynn B. Obernyer, Duncan, Ostrander and Dingess, Denver, Colorado; Julia L. Perry, Federal Highway Administration; James S. Thiel, Wisconsin Department of Transportation; Richard L. Tiemeyer, Missouri Highway and Transportation Commission; Richard L. Walton, Office of the Attorney General of the Commonwealth of Virginia; Steven E. Wermcrantz, Wermcrantz Law Office, Springfield, Illinois; and Robert L. Wilson, Arkansas Highway and Transportation Department. Edward V.A. Kussy provides liaison with the Federal Highway Administration, and Crawford F. Jencks represents the NCHRP staff.

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