SECTION 7

SAFETY

A. RAIL SAFETY

The purpose of railroad safety regulation is to protect the general public, passengers, and employees. The earliest federal regulations were imposed to protect the populace from steam locomotive boiler explosions. Later regulations were promulgated to govern the inspection and maintenance of railroad motive power, rolling stock, and physical plants. Employees also became the focus of federal oversight. More recently, the crashworthiness of rolling stock has become the subject of regulation, as have positive train controls.[1] Growing demand and increased governmental financial support is generating significant expansion of light and heavy rail transit systems.[2]

1. Federal Legislation

Congress first addressed railroad safety in the Safety Appliance Acts of 1893,[3] 1903,[4] and 1910,[5] which required certain equipment on trains, primarily for the safety of the crew, though passenger safety was enhanced as well. They included requirements that the locomotive and a sufficient number of cars in the train be equipped with power brakes, and that they have coupling devices and drawbars, handholds, ladders, running boards, and grab bars.[6] These requirements were supplemented with the Boiler Inspection Act of 1911[7] and the Signal Inspection Act of 1920.[8] The Hours of Service Act of 1907[9] was passed "to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long on an exacting task."[10] These pre-1970 safety statutes are referred to as the "older safety statutes."[11]

The most comprehensive legislation passed by Congress was the Federal Railroad Safety Act of 1970,[12] the purpose of which was "to promote safety in all areas of railroad operations and to reduce railroad related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents…."[13] The Rail Safety Improvement Act of 1988[14] gave DOT direct jurisdiction over employee qualifications, raised maximum civil penalties, and made individuals liable for willful violations.[15] The Rail Safety Enforcement and Review Act of 1992[16] required the Federal Railroad Administration (FRA) to revise its power brake regulations and track safety standards and to evaluate the safety of maintenance of way employees. The Federal Railroad Safety Authorization Act of 1994, known as the "Swift Rail Development Act of 1994,"[17] required FRA to issue passenger safety standards.[18] Thus, FRA has long regulated the nation's railroads for safety purposes.[19] Federal law also provides that rail safety laws and regulations should be nationally uniform to the extent practicable. A state may adopt a more stringent rail safety law or regulation, but only if "(1) it is necessary to eliminate or reduce a local safety or security hazard, (2) it is not incompatible with a federal law, regulation or order, and (3) it does not unreasonably burden interstate commerce."[20]

MAP-21 granted FTA new public transportation safety authority and made significant changes in the law.[21] Specifically, MAP-21:

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[1] Mary J, Davis, JOINT OPERATION OF LIGHT RAIL TRANSIT OR DIESEL MULTIPLE UNIT VEHICLES WITH RAILROADS 6–7, TCRP Report No. 52, Transportation Research Board of the National Academies, Washington, D.C., 1999.

[2] Federico Cura, *Rail Transit Industry Spurs Heavy Activity,* APTA PASSENGER TRANSPORTATION, Feb. 19, 2001, at 8.

[3] 27 Stat. 531, 532 (1893).

[4] 32 Stat. 943 (1903).

[5] 61 Pub. L. No. 133, 36 Stat. 298 (1910).

[6] WILLIAM KENWORTHY, 1 TRANSPORTATION SAFETY LAW PRACTICE MANUAL § 5.1 (Butterworth 1989).

[7] 61 Pub. L. No. 383, 36 Stat. 913, *See* R.J. Corman R.R. Co. v. Palmore, 999 F.2d 149 (6th Cir. 1993).

[8] *See* 66 Pub. L. No. 152, 41 Stat. 498. KENWORTHY, *supra* note 6 §§ 5.2-5.3.

[9] 59 Pub. L. No. 274, 34 Stat. 1415.

[10] *Id*. Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm., 221 U.S. 612, 31 S. Ct. 621, 55 L. Ed. 878 (1911); Atchison, Topeka & Santa Fe Ry. Co. v. United States, 244 U.S. 336 37 S. Ct. 635, 61 L. Ed. 1175 (1917); Chicago & Alton R.R. Co. v. United States, 247 U.S. 197, 38 S. Ct. 442, 62 L. Ed 1066 (1918).

[11] 49 C.F.R. pt. 209, App. A . The "older safety statutes" also include the Locomotive Inspection Act, 45 U.S.C. § 22-34, and the Accident Reports Act, 45 U.S.C. § 38-43. The regulations implementing these statutes are found at 49 C.F.R. pts. 213–236.

[12] Pub. L. No. 91-458. 84 Stat. 971.

[13] Chicago Transit Auth. v. Flohr, 570 F.2d 1305, 1308 (7th Cir. 1977). KENWORTHY, *supra* note 6 § 5.5.

[14] Pub. L. No. 100-342, 102 Stat. 624 (June 22, 1988).

[15] KENWORTHY, *supra* note 6 § 5.6.

[16] Pub. L. No. 102-365, 106 Stat. 972 (Sept. 3, 1992), codified by Pub. L. 103-272, 108 Stat. 745 (July 5, 1992).

[17] Pub. L. No. 103-440, 108 Stat. 4615 (Nov. 2, 1994). 49 U.S.C. §§ 20101 (purpose); 20113 (state enforcement); 20133 (crashworthiness, maintenance, inspection, emergency response procedures, safety operating rules and conditions of passenger cars); 20145 (bridge displacement detection systems); 20146 (institute for railroad safety); 20151 (railroad trespassing and vandalism). The 1994 Act also recodified the Federal Safety Appliance Act, 49 U.S.C. §§ 20301–20306. Phillips v. CXS Transp. Inc., 190 F.3d 285 (4th Cir. 1999).

[18] 49 C.F.R. pts. 209 (railroad safety and enforcement, fitness for duty, and follow-up on FRA recommendations), *id*. at 218 (operating practices, including minimum requirements for protection of railroad employees engaged in inspection, maintenance, and operation of rolling stock), and *id*. at 240 (qualifications and certification of locomotive engineers, including eligibility, testing, training, certification, and monitoring).

[19] The FRA also exercised jurisdiction under the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 *et seq*.

[20] 49 U.S.C. § 20106.

[21] 49 U.S.C. § 5329.

• Provided additional authority to set minimum safety standards and conduct investigations, audits, and examinations;[22]

• Revised and strengthened the State Safety Oversight Program;[23]

• Established new safety performance criteria for all recipients;[24]

• Established performance standards[25] and "Pass/Fail" requirements for new bus models, while including safety performance standards,[26] and required DOT to prepare a bus safety study.[27]

2. FRA/FTA Jurisdiction

The FRA's jurisdiction over railroads is broader than that of the STB under the Interstate Commerce Act,[28] and is not confined to "common carriers by railroad" as defined under that Act.[29] FRA's railroad safety jurisdiction extends to "commuter or other short-haul railroad passenger service in a metropolitan or suburban area," and commuter service formerly operated by Conrail, as well as high-speed intercity rail, but it does not extend to "rapid transit operations in an urban area that are not connected to the general railroad system of transportation."[30] Unfortunately, the statute fails to define these terms.[31]

So, what is the difference between commuter railroad passenger service and rapid transit operations?[32] The question is an important one, for as discussed in Section 9—Labor Law, transit lawyers may wish to avoid exposure to the Federal Employers Liability Act,[33] the Railroad Retirement Act,[34] the Railway Labor Act,[35] and jurisdiction of the FRA, the Surface Transportation Board, and the National Mediation Board.

As noted above, the Federal Railroad Safety Act of 1970 gave FRA authority to regulate all areas of railroad safety,[36] which presumably included rail transit, except the Act explicitly omitted "rapid transit operations in an urban area that are not connected to the general railroad system of transportation."[37] But acting

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[22] *Id.* MAP-21 required that FTA develop safety performance criteria for all modes of public transport and minimum safety performance standards for vehicles not regulated by other federal agencies. FTA must also develop a public transportation safety training and certification program.

[23] MAP-21 required that states establish safety oversight programs for their heavy rail, light rail, and streetcar systems. It also required State Safety Oversight Agencies to be legally and financially independent from the rail systems they oversee and have the ability to enforce federal and state safety laws and regulations. MAP-21 also required FTA to update the State Safety Oversight program to ensure that rail transit systems are satisfying safety requirements. 49 U.S.C. § 5329.

[24] MAP-21 required that FTA recipients develop agency safety plans with performance targets, strategies, and training. MAP-21 § 20021.

[25] MAP-21 required FTA to develop minimum safety performance standards for transit vehicles not regulated by other DOT modal agencies or other federal agencies.

[26] 49 U.S.C. § 5318(e). MAP-21 required FTA to work with bus manufacturers and transit agencies to establish a new pass/fail standard for the bus testing program, which must include new safety performance standards. 49 U.S.C. § 5329(b). *See* Bus Testing: Calculation of Average Passenger Weight and Test Vehicle Weight, 77 Fed. Reg. 74,452 (Dec. 14, 2012). Vehicles that fail to receive a pass rating are ineligible for purchase with federal funds.

[27] MAP-21 § 20021(b). *See generally* MAP-21/ FTA Web site, http://www.fta.dot.gov/map21/ (visited Apr. 17, 2013).

[28] 49 U.S.C. § 10101 *et seq*.

[29] 49 C.F.R. pt. 209, App. A.

[30] 49 U.S.C. § 20102. The statute defines "railroad" as including commuter and high speed ground systems that connect metropolitan areas but does not define them. Prior to 2000, FTA defined a "commuter" service as systems that have as their primary purpose the transportation of commuters to and from work within a metropolitan area, but they do not devote a substantial portion of their service to moving passengers between stations within an urban area. "Rapid transit operations" referred to rail systems that are devoted in substantial part to moving people from point to point within an urban area. As explained below, FRA has amended its definitions to remove the issue of whether a substantial portion of its operations is devoted to moving people from station to station and focused instead on whether such service is a primary or incidental function of its operations. Statement of Agency Policy Concerning Jurisdiction Over the Safety of Railroad Passenger Operations and Waivers Related to Shared Use of the Tracks of the General Railroad System by Light Rail, Part VII (Hereinafter "Statement of Agency Policy"), 65 Fed. Reg. 42,529, 42,532 (July 10, 2000).

[31] The statute defines "railroad" to include "any form of non-highway ground transportation that runs on rails or electromagnetic guideways." 49 U.S.C. 20102. In this definition, FRA believes that "Congress clearly intended to include 'commuter service.'" *Id*., 65 Fed. Reg. at 42,531–32.

[32] One source summarized the difference as follows:

> Railroads are part of a common standard, regulated, interconnected national systems of tracks, interchangeable rolling stock, and operational rules. Rail transit systems are separate metropolitan or state-based entities, whose standards and rules (and even track gauges) can vary. Rail transit vehicles (commuter rail excepted) are considered non-compliant with Federal railroad standards. Railroad tracks, therefore, may connect the metro areas, but not with rail transit systems within the metro areas. Railroads are regulated by [the FRA and STB]. Rail transit regulation is being reorganized by those states with or planning rail transit by Statewide Safety System Program Plans [SSPP]. The SSPP is directed at all modes of rail transit organized by the carriers largely through the American Public Transit Association (APTA) with the sanction [of FTA]. Rail transit regulation, as it will exist, may be largely performed regionally, applying Federal guidelines. Temporary waivers (for demonstrations of non-compliant equipment and special circumstances) and exceptions are granted by FTA.

TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1.

[33] 45 U.S.C. § 51. *See, e.g.,* Felton v. Southeastern Pa. Transp. Auth., 757 F. Supp. 623 (E.D. Pa. 1991).

[34] 45 U.S.C. § 231 *et seq*..

[35] 45 U.S.C. § 151.

[36] 49 U.S.C. § 20103(a) (2004)

[37] 49 U.S.C. § 20102(2)(b). This interpretation was upheld in United States v. Mass. Bay Transp. Auth., 360 F. Supp. 698 (D. Mass. 1973).

upon a petition from APTA[38] in 1975, FRA promulgated a rule excluding rail rapid transit systems from its jurisdiction because of the "many differences between urban rail rapid transit operations and railroad operations."[39]

In *Chicago Transit Authority v. Flohr*,[40] the Chicago Transit Authority (CTA) argued that it did not fall within the definition of a "railroad" under the Railroad Safety Act of 1970, and that the FRA's safety regulations therefore were inapplicable to it. CTA pointed out that its electrically self-powered units were substantially lighter and smaller than railroad cars;[41] that they did not use the rails of any railroad, nor did rail carriers use CTA's lines; that UMTA[42] provided 80 percent of its capital funding and safety regulatory oversight; and that the term "railroad" as it is commonly used does not embrace a rapid transit system. The 7th Circuit U.S. Court of Appeals agreed. It held that the legislative history of the Urban Mass Transportation Act[43] conclusively demonstrated that there was no intent to bring rapid transit systems within the jurisdiction of the FRA. Therefore the CTA was not a "railroad" within the meaning of the Act, and the FRA's regulatory authority with respect to railroad safety does not extend to rail rapid transit.[44]

Yet in *Port Authority Trans-Hudson Corporation v. Federal Railroad Administration*,[45] the D.C. Circuit refused to remove a rail transit operation from FRA jurisdiction although it had eliminated the operator's connections to the "general railroad system of transportation." Thus, in New Jersey, PATH is regulated as a railroad, yet a similar transportation authority, the Port Authority Transportation Company (PATCO), is deemed an "interurban electric railway" not subject to FRA jurisdiction.[46]

Since these cases have been decided, the FRA has issued a rather detailed Policy Statement identifying (what it perceives to be)[47] its jurisdictional perimeters over passenger railroad operations.[48] According to FRA, the nature of the operations rather then the type of the equipment used determines whether the FRA has jurisdiction.[49] According to FRA,

> with the exception of self-contained urban rapid transit systems, FRA's statutory jurisdiction extends to all entities that can be construed as railroads by virtue of their providing non-highway ground transportation over rails or electromagnetic guideways, and will extend to future railroads using other technologies not yet in use.[50]

The FRA believes that "Congress flatly wanted FRA to have and exercise jurisdiction over all commuter operations and to not have or exercise jurisdiction over urban railroad transit operations that stand apart from the general rail system."[51]

The FRA begins its analysis with two presumptions. First, if there is a statutory determination that Congress considers a particular service to be commuter rail for any purpose, FRA deems it to be commuter rail subject to FRA safety jurisdiction.[52] Though it was not a safety statute, all of the commuter legislative and regulatory authorities listed by Congress in the Northeast Rail Service Act of 1981[53] are deemed by FRA to fall under its safety jurisdiction.[54] Second, if the operations consist of a subway or elevated operation with its own tracks on which no other railroad operates, and which has no highway-rail grade crossings, operates within an urban area, and moves passengers within it, it shall be presumed by FRA to be an urban rapid transit system not subject to FRA safety jurisdiction.[55] When neither of these two factors exist, the following criteria (focusing on the system's geographical reach and the frequency of service) are considered on a case-by-case basis:

Indicators of a commuter railroad:

- The system serves an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area.
- The system's primary function is moving passengers back and forth between their places of employment in the city and their homes within the greater metropolitan area, and moving passengers from station to

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[38] Originally, APTA was the "American Public Transit Association." In 2000, it changed its name to the American Public Transportation Association." As of 2010, it had nearly 1,400 member organizations.

[39] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 13.

[40] 570 F.2d 1305 (7th Cir. 1977).

[41] *See* PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 73 (Quorum 1986).

[42] UMTA is the Urban Mass Transportation Administration, which in 1991 was renamed the Federal Transit Administration. Act of Dec. 18, 1991, Pub. L. 102-240, 105 Stat. 2088.

[43] The name of the original Urban Mass Transportation Act was changed to the Federal Transit Act.

[44] Chicago Transit Auth. v. Flohr, 570 F.2d 1305, 1311 (7th Cir. 1977).

[45] 1997 U.S. App. Lexis 37565 (D.C. Cir. 1997).

[46] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 10.

[47] Of course, the courts, or perhaps Congress, will ultimately have the last word on the subject.

[48] Statement of Agency Policy, 65 Fed. Reg. 42,529 (July 10, 2000).

[49] *Id.* 65 Fed. Reg. at 42,531.

[50] 49 C.F.R. pt. 209, App. A .

[51] Statement of Agency Policy, 65 Fed. Reg. at 42,531.

[52] *Id*. at 42532.

[53] Pub. L. No. 97-35, 95 Stat. 357. Under this statute, the term "commuter authority" includes the Metropolitan Transportation Authority, the Connecticut Department of Transportation, the Maryland Department of Transportation, the Southeastern Pennsylvania Transportation Authority, the New Jersey Transit Authority, and the Port Authority Trans-Hudson Corporation. 45 U.S.C. § 1104(3).

[54] 49 C.F.R. pt. 209, App. A.

[55] Statement of Agency Policy, 65 Fed. Reg. at 42,532; 49 C.F.R. pt. 209, App. A.

station within the immediate urban area is, at most, an incidental function.

• The vast bulk of the system's trains are operated in the morning and evening peak periods, with few trains at other hours.

Indicators of urban rapid transit:

• Serves an urban area and may also serve its suburbs.

• The moving of passengers from station to station within the urban boundaries is a major function of the system, and there are multiple station stops within the city for that purpose.

• The system provides frequent train service even outside the morning and evening peak periods.[56]

FRA has jurisdiction over the "general railroad system of transportation"—the network of standard gauge track[57] over which goods may be transported nationwide and passengers may travel between cities and within metropolitan and suburban areas.[58] FRA exercises jurisdiction over all intercity rail passenger operations.[59] If the operations are those of a "commuter railroad," FRA deems them to be within its jurisdiction even if there is no connection to any other railroad—FRA considers the operation to be a part of the general railroad system.[60] Examples of commuter railroads include Metra and the Northern Indiana Commuter Transportation District (Chicago area), Virginia Railway Express and the Maryland Railroad Commuter Authority (MARC) (Washington, D.C., area), and the Port Authority Trans Hudson (New York area).[61] FRA also has jurisdiction over "commuter or other short-haul railroad passenger service in a metropolitan or suburban area."[62] As an example, the FRA identifies "a passenger system designed to move intercity travelers from a downtown area to an airport, or from an airport to a resort area" as within its jurisdictional reach.[63] Thus, a short-haul service subject to FRA jurisdiction extends from an interstate hub (such as an airport) to a downtown location (such as from the Charlotte airport to Charlotte).

Though the FRA has jurisdiction over passenger and freight railroads, it does not have jurisdiction over rail rapid transit systems or light rail transit (LRT)[64] not connected to the general railway network.[65] Thus, urban rapid transit operations generally are not part of the general railroad system. Examples include CTA in Chicago, Metro in Washington, D.C., and the subway systems in New York, Boston, and Philadelphia. Though the type of equipment used is not determinative of urban rapid transit status, the types of vehicles ordinarily associated with rapid transit are street railways, trolleys, subways, and elevated railways.[66]

Though not ordinarily a part of the general railroad system, an urban rapid transit operation may have sufficient connections to that system to warrant the exercise of FRA safety jurisdiction over the transit line to the extent it is connected.[67] The FRA has listed several examples, including:

• An urban rapid transit system sharing track with a railroad. It would be under FRA safety jurisdiction when it operated on the general system, but not when the vehicle moved to the street railway not used by a conventional railroad.

• A railroad crossing at grade[68] where the urban rapid transit line crossed a railroad's tracks.

• An urban rapid transit system using a shared right-of-way with a railroad involving joint control of trains.

• An urban rapid transit system sharing highway grade crossings with a railroad.[69]

But FRA has also made it clear that an urban rapid transit system may seek a waiver from the FRA's safety

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[56] Statement of Agency Policy, 65 Fed. Reg. 42,532; 49 C.F.R. pt. 209, App. A.

[57] Standard gauge track is 4 feet, 8 1/2 inches from rail to rail. Railroad Revitalization and Regulatory Reform Act of 1776, Pub. L. No. 94-210, 90 Stat. 66. Transit rail trackage can be narrower or wider than standard gauge track. For example, San Francisco's MUNI cable car has 3 feet, 6 inch gauge, while BART has 5 feet, 6 inch gauge. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 2–5.

[58] 49 C.F.R. pt. 209, App. A.

[59] *Id*.

[60] Statement of Agency Policy, 65 Fed. Reg. at 42,530 n.2. "A commuter system's connection to other railroads is not relevant under the rail safety statutes. In fact, FRA considers commuter railroads to be part of the general railroad system regardless of such connections." *Id.* at 65 Fed. Reg. 42,544, 49 C.F.R. pt. 209, App. A.

[61] 49 C.F.R. pt. 209, App. A.

[62] 49 U.S.C. § 20102(i)(A)(i).

[63] 49 C.F.R. pt. 209, App. A.

[64] LRT consists of a "broad spectrum of rail transit capable of operating in mixed (street traffic, pedestrian, subway, elevated) environments. Typically LRT is overhead electrically powered and functions flexibly in urban/suburban locations." TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 5.

[65] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 9.

[66] 49 C.F.R. pt. 209, App. A.

[67] *Id*.

[68] A grade crossing is one at the same elevation as the railroad track. Grade crossings are an area of significant safety concern, for many automobiles and trucks have been hit by trains at these locations.

[69] 49 C.F.R. pt. 209, App. A. "FRA has no intention of overseeing rail transit operations conducted separate and apart from general system tracks, *i.e.,* the street portion of that service…. FRA does not currently intend to exercise its jurisdiction over operations outside the shared-track area." Joint Statement of Agency Policy Concerning Shared Use of the Tracks of the General Railroad System by Conventional Railroads and Light Rail Transit Systems, 65 Fed. Reg. 42,527 (June 10, 2000).

regulation if it "is in the public interest and consistent with railroad safety."[70] Waiver petitions are considered by the FRA's Railroad Safety Board.[71] The waiver process is fairly complex; it depends upon subject matter, and may be best suited for demonstrating experimental prototype or foreign noncompliance equipment for a limited duration.[72]

However, FRA has stated it might confer a waiver from its passenger safety regulations[73] for the operation of urban rapid transit light rail cars and heavy conventional rail cars on the general railroad system when there is complete temporal separation between the incompatible equipment,[74] or where safety is assured through other highly competent methods of collision avoidance.[75] In 1999, FRA granted petitions for shared use of rail lines filed by New Jersey Transit[76] and the Utah Transit Authority.[77] It has since granted waivers to the Santa Clara Valley Transit Authority (in San Jose, California), the San Diego trolley, Austin's Capital Metro rail line, and Baltimore's light rail line. This is consistent with the FRA/FTA Joint Policy Statement that strongly encourages the shared use of conventional railroad lines, consistent with railroad safety, to provide increased transportation opportunities for passengers in metropolitan areas.[78]

Similarly, both the San Diego Trolley, Inc., and Baltimore Central Light Rail Line have joint operations with freight railroads, but neither are deemed subject to FRA jurisdiction. Both are considered rail rapid transit.[79] In both instances, light rail runs during the day and freight trains run on the same track throughout the night; passenger and freight vehicles do not comingle or operate concurrently on the same track.[80] Typically, where LRT has been established on freight railroad rights-of-way, the railroad abandons the line and transfers it to the LRT operator, or sufficient space exists on the line to permit adequate spacing between the freight railroad's and LRT track centers. Hence, the line is no longer considered connected to the general railway system, and transit operations on the line are not considered to fall under FRA jurisdiction.[81]

Since 1995, FTA has required states to oversee the safety and security of fixed guideway systems.[82] The rules apply to any rapid transit system, or any portion

[70] 49 U.S.C. § 20103(d).

[71] 49 C.F.R. § 211.9.

[72] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 10. As an example, FRA waiver #H-96-2 allowed Amtrak to perform demonstration runs on Siemens' RegioSprinter DMU, a nonconforming vehicle. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at B-1.

[73] 49 C.F.R. pt. 238.7.

[74] Statement of Agency Policy, 65 Fed. Reg. at 42,533.

[75] *Id.* at 65 Fed. Reg. 42,535. However, the FRA made it clear that the waiver proponent would bear a high burden of proving that safety would be assured through means other than temporal separation. *Id*. Examples of practical means to enhance light rail safety are discussed in HARRIS W. KORVEY, JOSE I. FARRAN, & DOUGLAS M. MANSEL, INTEGRATION OF LIGHT RAIL TRANSIT INTO CITY STREETS (Transit Cooperative Research Program Report No. 17, Transportation Research Board, 1996), and HERBERT LEVINSON, TED CHIRA-CHAVALA, & DAVID R. RAGLAND, LIGHT RAIL SERVICE: VEHICULAR AND PEDESTRIAN SAFETY (Transit Cooperative Research Program, Research Results Digest, Transportation Research Board, 1999).

[76] Petitions for Waivers of Compliance; Petition for Exemption for Technical Improvements, 64 Fed. Reg. 45,996 (Aug. 23, 1999). In southern New Jersey, New Jersey Transit proposed a joint-use project involving diesel transit over Amtrak and Conrail track. The Hudson-Bergen LRT also shares tracks (former Conrail trackage) with a freight railroad for short distance. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 23.

[77] Petitions for Waivers of Compliance; Petition for Exemption for Technical Improvements, 64 Fed. Reg. 53,435 (Oct. 1, 1999). See Statement of Agency Policy, 65 Fed. Reg. 42,529, 42,540 (July 10, 2000). The Utah Transportation Authority proposed to build an LRT system on the Salt Lake Southern railroad while having freight service provided by RailTex from midnight to 5:00 a.m. The project received FTA funding. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 23.

[78] Statement of Agency Policy, 65 Fed. Reg. 42,526, 42,528 (July 10, 2000). For an argument that the STB has authority to authorize transit rail operations over freight rail rights of way, *see* Charles Spitulnik & Jamie Rennert, *Use of Freight Rail Lines for Commuter Operations: Public Interest, Private Property,* 26 TRANSP. L.J. 319 (1999).

[79] In 1979, the LRT system's parent, the Metropolitan Transit Development Board (MTDB), acquired a railroad with a line that now serves as joint use track for San Diego's LRT and freight. Also that year, MTDB contracted with a freight railroad (the San Diego and Arizona Eastern Railway Company) to provide local freight service operations approved by the ICC. The following year, MTDB created the San Diego Trolley, Inc., as a wholly-owned subsidiary to operate and maintain LRT service over the line. In 1981, LRT operations began over a portion of the South Line. In 1984, the ICC approved change of the freight operator (to RailTex) over the line. By 1999, freight rail service operated over 35 miles of the LRT line, generally from 2:00 a.m. to 4:15 a.m. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 20.

In Baltimore, MTA (the Baltimore Central Light Rail) owns the tracks over which its LRT operates as well as Conrail's freight service on the north end of the system (between midnight and the period before morning MTA services begin). Though no FRA waiver explicitly approves these joint operations, MTA officials take the position that the FRA does not have jurisdiction over the operations because they are predominately light rail. However, MTA takes advantage of FRA track maintenance and signal systems, as does San Diego. FRA inspectors and MTA officials cooperate, with FRA inspectors serving an advisory role. FRA has not attempted to exert formal jurisdiction because freight trains do not constitute a significant portion of the total operations vis-à-vis light rail operations. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 22.

[80] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 2, 9–10.

[81] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 9–10.

[82] 49 C.F.R. pt. 659.

thereof, not subject to FRA's safety jurisdiction.[83] To avoid overlap, the rules are mutually exclusive. If FRA's rules apply, FTA's rules do not; FTA's rules apply only where FRA does not regulate.[84]

3. Regulatory Authority

Today, the Secretary of Transportation holds comprehensive regulatory authority " for every area of railroad safety."[85] To protect safety, the Secretary may take whatever actions deemed necessary, including issuing regulations or orders; conducting investigations; making reports; issuing subpoenas; requiring the production of documents; prescribing record keeping and reporting requirements; and inspecting railroad equipment, facilities, rolling stock, operations, and records.[86] The Secretary may also issue orders compelling compliance with rail safety regulations, impose civil penalties for their violation,[87] request injunctions, or recommend the Attorney General bring a civil action for an issuance of an injunction, enforcement of a subpoena, or collection of a civil penalty.[88] Where an unsafe condition or practice causes an emergency situation creating a hazard of death or personal injury, the Secretary (and by delegation, the FTA Administrator)[89] may immediately issue an Emergency Order imposing restrictions and prohibitions that may be necessary to abate the condition.[90] Examples of instances in which Emergency Orders have been issued are discussed below.

4. Track and Equipment Safety Standards

In the Federal Railroad Safety Authorization Act of 1994, Congress mandated that DOT promulgate regulations addressing the minimum standards for the safety of rail passenger cars, including crashworthiness; interior features (including luggage restraints, seat belts, and exposed surfaces) that might affect passenger safety; maintenance and inspection; emergency response procedures and equipment; and any other rules and conditions that affect safety directly.[91] FRA regulations address railroad passenger equipment design, performance, inspection, testing and maintenance, fire safety, emergency systems, and other safety requirements.[92] Specific regulations address passenger equipment repair, safety glazing, locomotive safety,[93] safety appliances and power brakes,[94] and emergency preparedness.[95] These regulations are issued by FRA; FTA has no regulatory authority to impose such requirements.

DOT is required to maintain a coordinated effort to address the railroad grade crossing problem and take "measures to protect pedestrians in densely populated areas along railroad rights of way."[96] Inspections must be made of automatic train stop, train control, and signal apparatus.[97] Trains must be equipped with an "event recorder" (which records the train's speed, hot box, throttle position, brake application, and any other function necessary to monitor safety of the train's operation)[98] and power brakes.[99] Trains must also be equipped with various safety appliances (including automatic couplers, steps, hand brakes, ladders and running boards, grab irons or handholds, and power brakes),[100] though these requirements specifically do not apply to a "car, locomotive, or train used on a street railway."[101] Locomotives and their repairs must be inspected.[102] DOT must also promulgate track safety

[83] Statement of Agency Policy, 65 Fed. Reg. 42,529, 42,546 (July 10, 2000).

[84] Statement of Agency Policy, 65 Fed. Reg. 42,526 (July 10, 2000).

[85] 49 U.S.C. § 20103(a). KENWORTHY, *supra* note 6 § 5.5. The FRA exercises jurisdiction over rail safety under delegation from the Secretary of Transportation. 49 C.F.R. § 1.49.

[86] 49 U.S.C. § 20107. KENWORTHY, *supra* note 6 § 9.1.

[87] *See* 49 U.S.C. §§ 21301–21304. KENWORTHY, *supra* note 6 §§ 5.503, 9.204 (Butterworth 1989). *See, e.g.,* 49 C.F.R. pt. 238.11—Civil Penalties.

[88] 49 U.S.C. §§ 20111, 20112. Under certain circumstances, states may also bring a civil action to enforce rail safety regulations. 49 U.S.C. § 20113.

[89] 49 U.S.C. § 5329.

[90] 49 U.S.C. § 20104. KENWORTHY, *supra* note 6 § 9.201.

[91] 49 U.S.C. § 20133.

[92] Passenger Equipment Safety Standard, 64 Fed. Reg. 25,540, 25,541 (May 12, 1999); Passenger Equipment Safety Standard, 65 Fed. Reg. 41,284 (July 3, 2000).

[93] In the Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972, Congress required FRA to address locomotive crashworthiness and working conditions. FEDERAL RAILROAD ADMINISTRATION, OVERVIEW OF THE RAILROAD SAFETY REGULATORY PROGRAM AND STANDARDS-RELATED PARTNERSHIP EVENTS 9 (Jan. 28, 2000), RSAC Update pp. 2–3 (Apr. 12, 2001).

[94] The Rail Safety Enforcement and Review Act of 1992 required FRA to revise its power brake regulations. 49 C.F.R. pts. 215, 216, 220, 223, 229, 231, 232, and 238. 64 Fed. Reg. 25540 (May 12, 1999). An additional *Federal Register* rulemaking on the subject addressed the inspection, testing, maintenance, and movement of defective passenger equipment. 65 Fed. Reg. 41,284 (July 3, 2000).

[95] Passenger Train Emergency Preparedness, 63 Fed. Reg. 24,630 (May 4, 1998); Railroad Grade Crossing Safety, 63 Fed. Reg. 36,376 (July 6, 1998).

[96] 49 U.S.C. § 20134. *See, e.g.,* Railroad Grade Crossing Safety, 63 Fed. Reg. 40,691 (July 30, 1998); 49 C.F.R. pt. 392.10 *et seq*.

[97] 49 U.S.C. § 20136.

[98] 49 U.S.C. § 20137. The NTSB noted that data has been lost from event recorders due to fire, water, and mechanical damage. In response, in 1995, the FRA promulgated more refined technical standards. FEDERAL RAILROAD ADMINISTRATION, *supra* note 93, at 8. The event recorder should not be confused with the black box in commercial aircraft. The Norfolk Southern Railroad is beginning use of video and audio cameras in the engineer's compartment. One of the threshold issues for pilot use of the video and audio equipment was acceptability by the railroad labor unions.

[99] 49 U.S.C. § 20141.

[100] 49 U.S.C. § 20302.

[101] 49 U.S.C. § 20301(b)(4).

[102] 49 U.S.C. § 20702.

standards[103] and requirements for signal systems.[104] With respect to tracks, structures, and signals, FRA regulations address track safety,[105] signal and train control,[106] grade crossing signals,[107] and bridge safety.[108] With respect to motive power and equipment, FRA regulations address noise emissions,[109] rear end marking devices,[110] safety glazing,[111] locomotives,[112] and safety appliances.[113]

5. Employee and Operating Safety Standards

Locomotive operators must be licensed in a program requiring minimum training, a comprehensive knowledge of railroad operating practices and rules, and consideration of the individual's motor vehicle driving record.[114] To avoid fatigue (itself a major cause of accidents), dispatchers (operators, train dispatchers, or other train employees who by the use of electrical or mechanical devices dispatch, report, transmit, receive, or deliver orders related to or affecting train movements); signal employees (individuals employed by a railroad carrier engaged in installing, repairing, or maintaining signal systems); and train employees (individuals engaged in or connected with the movement of a train, including hostlers)[115] are subject to certain maximum work hour and minimum off duty rules. Train employees must not be allowed to remain or go on duty unless they have had at least 8 hours off duty during the preceding 24 hours, or if they had been on duty 12 consecutive hours, they have had at least 10 consecutive hours off duty.[116] Certain "whistleblower" legislation[117] has been enacted to protect rail employees who complain to DOT of a rail safety violation or who refuse to work because of hazardous conditions against employer retaliation.[118] Some states also have created an exception to the "employment at will" doctrine for employees who refuse to perform unlawful acts[119] or engage in whistleblowing for safety violations.[120]

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[103] 49 U.S.C. § 20142.

[104] 49 U.S.C. §§ 20501–20505.

[105] 49 C.F.R. pt. 213. Track Safety Standards, 63 Fed. Reg. 33,992, 34,029 (June 22, 1998).

[106] 49 C.F.R. pts. 233 (1999) (FRA reporting requirements for methods of train operation; block signal systems; interlockings; traffic control and cab signal systems; and similar appliances, methods, and systems). 49 C.F.R. pt. 235 (1999) (discontinuance or modification of block signal systems; interlockings; traffic control systems; automatic train stop; train control; or cab signal systems; or other similar appliances, devices, or systems). 49 C.F.R. pt. 236 (1999) (installation, maintenance, inspection, and repair of signal and train control systems; devices and appliances, including roadway signals; cab signals; track circuits; automatic block signal systems; interlockings; automatic train stop; and train control systems).

[107] 49 C.F.R. pt. 234. The regulations also address minimum standards for maintenance, inspection, and testing of highway-rail grade crossing warning systems. Grade Crossing Signal System Safety, 61 Fed. Reg. 31,802 (June 20, 1996).

[108] 49 C.F.R. pt. 213, App. C.

[109] 49 C.F.R. pt. 210.3. These regulations are applicable to the noise emitted by moving rail cars and locomotives. They are inapplicable to (1) street, suburban, or interurban electric railways not connected to the general railroad system of transportation; (2) sounds emitted by warning devices such as horns, whistles, or bells when operated for safety purposes; (3) special-purpose equipment located on or operated from rail cars; (4) steam or engines; or (5) gas turbine powered locomotives, or inert retarders.

[110] 49 C.F.R. pt. 221 (1999) (minimum requirements for rear end marking devices for passenger, commuter, and freight trains). Lit visible markers are required on the rear of each passenger and commuter train. 49 U.S.C. § 20132. Separate requirements exist for locomotive visibility, 49 U.S.C. § 20143, and railroad car visibility, 49 U.S.C. § 20148.

[111] 49 C.F.R. pt. 223 (1999) (minimum requirements for glazing materials to protect rail employees and passengers from injury as a result of objects striking windows of locomotives, passenger cars, and cabooses).

[112] 49 C.F.R. pt. 229 (1999) (minimum standards for locomotives, including inspection and testing procedures and safety requirements for brake, draft, buff strength/crashworthiness, suspension, electrical systems, cab equipment, and MU "locomotives," though steam-powered locomotives are exempt). The Association of American Railroads (AAR) has published S-580, a standard for crashworthiness. Though not law, AAR S-580 is considered a recommended practice, from which deviations are carefully scrutinized by FRA. In fact, FRA looks to the engineering specifications and technical standards developed by a number of private associations, including the American Railway Engineering Association, the American Public Transit Association, the Institute of Electrical and Electronic Engineers, the American Society of Civil Engineers, the Construction Specification Institute, the American Society of Mechanical Engineers, and the American National Standards Institute. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 11.

[113] 49 C.F.R. pt. 231 (1999) (requirements for various appliances in a railroad car, such as handholds, hand-brakes, and sill steps). As a follow up to Emergency Order No. 15, which addressed the local whistle bans on the Florida East Coast Railroad between Jacksonville and Miami, the Swift Rail Development Act of 1994 required FRA to issue regulations requiring use of train horns at highway-rail crossings. FEDERAL RAILROAD ADMINISTRATION, *supra* note 82, at 21.

[114] 49 U.S.C. § 20135. Bridge safety equipment must be provided to protect maintenance-of-way employees. 49 U.S.C. § 20139.

[115] 49 U.S.C. § 21101.

[116] 49 U.S.C. § 21103. Separate requirements exist for signal employees, 49 U.S.C. § 21104, and dispatching service employees, 49 U.S.C. § 21105.

[117] 45 U.S.C. § 441. Maxfield v. Coe Rail, Inc., 1994 U.S. Dist. Lexis 8616 (E.D. Mich. 1994). The Federal Railroad Safety Authorization Act's protection of "whistleblowers" is limited to situations involving enforcement of the federal railroad safety laws. Mahler v. N.J. Transit Rail Operations, Inc., 239 N.J. Super. 213, 570 A.2d 1289 (1990).

[118] 49 U.S.C. § 20109. KENWORTHY, *supra* note 6 § 5.504.

[119] *See, e.g.,* Adams v. George W. Cochran & Co., 597 A.2d 28, 32 (D.C. 1991).

[120] Gray v. Citizens Bank of Washington, 602 A.2d 1096 (D.C. App. 1992); Taylor v. WMATA, 109 F. Supp. 2d 11 (D.C. 2000).

Amtrak, which operates a number of commuter rail operations, must maintain a rail safety system program for employees.[121] Amtrak, SEPTA, New Jersey Transit, and several freight railroads (including Conrail) have formed the Northeast Operating Rules Advisory Committee (NORAC) to create a unified Book of Rules governing operations in the Northeast Corridor.[122] Clarity and uniformity of rules, elimination of contradictions, and enhanced communications help employees who must navigate trains on common rails, and thereby improve safety and operational efficiency.[123]

With respect to operating practices, the FRA has promulgated regulations addressing bridge and roadway workers,[124] operating rules and practices,[125] alcohol and drugs,[126] radio communications,[127] hours of service,[128] engineer certification,[129] and passenger train emergency preparedness.[130]

6. Accident Investigations and Emergency Orders

Rail accidents involving death or injury to an individual or damage to equipment or roadbed resulting from the carrier's operations[131] must be reported to DOT[132] and, if they cause serious personal injury or

[121] 49 U.S.C. § 24313 provides:

> In consultation with rail labor organizations, Amtrak shall maintain a rail safety system program for employees working on property owned by Amtrak. The program shall be a model for other rail carriers to use in developing safety programs. The program shall include—(1) periodic analyses of accident information, including primary and secondary causes; (2) periodic evaluations of the activities of the program, particularly specific steps taken in response to an accident; (3) periodic reports on amounts spent for occupational health and safety activities of the program; (4) periodic reports on reduced costs and personal injuries because of accident prevention activities of the program; (5) periodic reports on direct accident costs, including claims related to accidents; and (6) reports and evaluations of other information Amtrak considers appropriate.

The railroad safety laws of 49 U.S.C. § 10101 are applicable to Amtrak. 49 U.S.C. § 24301(d).

[122] The unified rules allow commingling of a number of different passenger and freight operations including:

- High-speed passenger trains (Amtrak Metroliners).
- Intercity passenger trains (Amtrak Northeast Direct and long distance intercity services).
- Diesel locomotive-hauled (or push-pull) commuter trains (MARC, NJT, CONNDOT, MBTA).
- Electric locomotive hauled push-pull commuter trains (NJT, SEPTA, MARC).
- Electric multiple-unit commuter trains (NJT, SEPTA).
- Self-propelled diesel multiple unit trains (e.g., RDC: SPV-2000; MARC; SEPTA, LIRR, MN, NJT).
- Passenger terminal, switching, and yard operations (Amtrak/LIRR and formerly Washington Union Terminal).
- Numerous freight operations.

TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 2–13. In selecting and scheduling projects in the Northeast Corridor, Amtrak must give safety-related items highest priority. 49 U.S.C. § 24902(b)(1). It must pay 20 percent of the cost of eliminating highway grade crossings in the Northeast Corridor. 49 U.S.C. § 24906(b).

[123] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 9–10.

[124] 49 C.F.R. pt. 214 .

[125] 49 C.F.R. pt. 217 (1999) (railroads must file their operating rules and practices with FRA, and must instruct their employees in operating practices). 49 C.F.R. pt. 218 (1999) (minimum requirements for railroad operating practices, including minimum requirements for protecting employees engaged in inspection, maintenance, and operation of rolling stock).

[126] 49 C.F.R. pt. 219 (1999) (minimum standards for control of drug use and alcohol misuse, such as drug prohibition and drug and alcohol testing). Roadway Worker Protection, 61 Fed. Reg. 65,959 (Dec. 16, 1996).

[127] 49 C.F.R. pt. 220 (1999) (minimum standards for operation of radio communications in railroad operations, including basic railroad operating rules, radio communications, recordkeeping, and transmission of train orders). Railroad Communications, 63 Fed. Reg. 47,182 (Sept. 4, 1998).

[128] 49 C.F.R. pt. 228 (1999) (reporting and record-keeping requirements of hours of service for certain railroad employees; standards and procedures for construction or reconstruction of employee sleeping quarters).

[129] 49 C.F.R. pt. 240 (1999) (minimum requirements for eligibility, training, testing, certification, and monitoring of locomotive engineers; requirement for an FRA-approved certification program, certification process, and implementation and administration thereof). Qualification for Locomotive Engineers, 63 Fed. Reg. 50,626 (Sept. 22, 1998). Rules addressing agency practice and procedure relative to engineer certification appeals were promulgated in 1995. As of this writing, issues surrounding procedures on the properties, offenses warranting decertification, periods of decertification, operation of specialized equipment, and related issues are pending. FEDERAL RAILROAD ADMINISTRATION, *supra* note 93, at 8.

[130] 49 C.F.R. pt. 239.

[131] The regulation defines accidents and incidents that must be reported as:

> (1) Any impact between railroad on-track equipment and an automobile, bus, truck, motorcycle, bicycle, farm vehicle, or pedestrian at a rail-highway grade crossing; (2) Any collision, derailment, fire, explosion, act of God, or other event involving operation of railroad on-track equipment (standing or moving) that results in reportable damages greater than the current reporting threshold to railroad on-track equipment, signals, track, track structures, and roadbed; (3) Any event arising from the operation of a railroad that results in: (i) Death of one or more persons; (ii) Injury to one or more persons that requires medical treatment; (iii) Injury to one or more employees that requires medical treatment or results in restriction of work or motion for one or more days, one or more lost work days, transfer to another job, termination of employment, or loss of consciousness; or (iv) Occupational illness of a railroad employee as diagnosed by a physician.

49 C.F.R. § 225.5.

[132] The regulations call for reporting via telephone:

> (a) Each railroad must report immediately by toll free telephone, Area Code 800-424-0201, whenever it learns of the occurrence of an accident/incident arising from the operation of the railroad that results in the: (1) Death of rail passenger or employee; or (2) Death or injury of five or more persons. (b) Each report must state the: (1) Name of the railroad; (2) Name, title, and telephone number of the individual making the report; (3) Time, date, and location of accident/incident; (4) Circumstances of the accident/incident; and (5) Number of persons killed or injured. 49 C.F.R. § 225.9. Monthly written reports are also re-

death, must be investigated by DOT (otherwise investigation is discretionary).[133] Major transportation accidents are also investigated by the National Transportation Safety Board (NTSB), and rail transit systems must report to it.[134]

Following an accident investigation, the DOT may issue an Emergency Order. As an example, after 14 railroad accidents killing 19 people and injuring 226 in early 1996, then-DOT Secretary Federico Peña issued Emergency Order No. 20,[135] requiring improvements in train signals, communications, and emergency exits.[136] It required that intercity and passenger commuter railroads adopt operating rules providing for reduced speeds where delays exist between distant signals and signals at interlocking or controlled points; emergency exit marking and emergency window testing was also required.[137]

One of the accidents involved a collision on February 16, 1996, between MARC and Amtrak trains in Silver Spring, Maryland, killing 11 passengers and crew, and injuring 26. FRA's Emergency Order required that several interim measures be taken pending the NTSB report.[138] Two involved train operations and were implemented within 24 hours. A third involved the inspection of emergency exits.[139] Within 5 days of the accident, MARC announced $5.6 million in window and door safety enhancements.[140]

The Emergency Orders sometimes gain national visibility. For example, after the Silver Spring accident and the DOT Emergency Order, Tri-Rail ordered its trains to slow down on stretches between Haileah and West Palm Beach, Florida.[141]

7. Inspections and Civil Penalties

The FRA employs more than 400 inspectors operating in nearly 50 offices throughout the nation; the states employ another 100 inspectors who participate in enforcing federal rail safety laws and regulations. They inspect rail equipment and track and signal systems and operations, and investigate hundreds of complaints each year that allege violations of federal law.[142] Again, however, FRA has no jurisdiction over transit except for commuter rail, and FTA has no provisions for imposing penalties for such violations.

Congress has authorized the Secretary of Transportation (and by delegation, the FRA) to issue civil penalties for violation of DOT safety laws and regulations.[143]

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quired. 49 C.F.R. § 225.11. Reports are divided into three categories: (1) highway/rail grade crossings; (2) rail equipment; and (3) death, injury and occupational injury. 49 C.F.R. § 225.19. Special reporting requirements are imposed where human factors were a cause of the accident. 49 C.F.R. § 225.12. If drug use or alcohol abuse may have been a causal factor, additional reporting is required. 49 C.F.R. § 225.17. Additional requirements exist for late reports. 49 C.F.R. § 225.13. Forms are listed in 49 C.F.R. § 225.21. Accident reports are available for public inspection. 49 C.F.R. § 225.7. However, the following events need not be reported:

> (a) Casualties that occur at highway-rail grade crossings that do not involve the presence or operation of on-track equipment, or the presence of railroad employees then engaged in the operation of a railroad; (b) Casualties in or about living quarters not arising from the operation of a railroad; (c) Suicides as determined by a coroner or other public authority; or (d) Attempted suicides. 49 C.F.R. § 225.15.

[133] 49 U.S.C. §§ 20703, 20901. 49 C.F.R. pt. 225. *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); U.S. v. Mass. Bay Transp. Auth., 360 F. Supp. 698 (D. Mass. 1973).

[134] *See* Federal Railroad Administration—49 C.F.R. pt. 225—Miscellaneous Amendments to the Federal Railroad Administration's Accident/Incident Reporting Requirements; Final Rule—75 Fed. Reg. 68862 (Nov. 9, 2010). Though the NTSB has no direct regulatory authority, it may investigate accidents, report findings, and make recommendations. NTSB findings may support termination of an employee responsible for an accident. *See, e.g.,* Doll v. Port Auth. Trans-Hudson Corp., 92 F. Supp. 2d 416 (D. N.J. 2000).

[135] Commuter and Intercity Passenger Railroads, Including Public Authorities Providing Passenger Service, and Affected Freight Railroads; Emergency Order Requiring Enhanced Operating Rules and Plans for Ensuring the Safety of Passengers Occupying the Leading Car of a Train, 61 Fed. Reg. 6876 (Feb. 22, 1996); [Same: With Appropriate Amendments] 61 Fed. Reg. 8703 (Mar. 5, 1996); 49 C.F.R. pt. 238.

[136] *Pena Asks for More Train Control,* ADVANCED TRANSPORTATION TECHNOLOGY NEWS (Mar. 1996).

[137] FEDERAL RAILROAD ADMNISTRATION, *supra* note 93.

[138] NTSB found the probable cause of the January 6, 1996, collision of the WMATA train with a standing train at the Shady Grove station at Gaithersburg, Maryland, as the failure of WMATA

> management and board of directors (1) to fully understand and address the design features and incompatibilities of the automatic train control system before establishing automatic train operation as the standard operating mode at all times and in all weather conditions, (2) to permit operating department employees…to use their own experience, knowledge and judgment to make decisions involving the safety of Metrorail operations, and (3) to effectively promulgate and enforce a prohibition against placing standby trains at terminal stations on the same track as incoming trains.

The NTSB report can be found at www.ntsb.gov/doclib/reports/1997/RAR9702.pdf.

The NTSB found the probable cause of the February 9, 1996, collision and derailment of two New Jersey Transit commuter trains near Secaucus, N.J., as "failure of the train 1254 engineer to perceive correctly a red signal aspect because of his diabetic eye disease and resulting color vision deficiency, which he failed to report to New Jersey Transit during annual medical examinations." TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at la-2, 3.

[139] FRA Emergency Order No. 20, 61 Fed. Reg. 6876 (Feb. 22, 1996).

[140] Prepared Statement of Maryland Transportation Secretary David Winstead Before the U.S. House Subcomm. on Railroads, Comm. on Transp. and Infrastructure, at 89 (Mar. 5, 1996). *See also* Prepared Testimony of NTSB Chairman James Hall Before the Senate Comm. on Commerce, Science, and Technology (Feb. 27, 1996).

[141] *Tri-Rail Trains Obey U.S. Slow-Speed Order,* Miami Herald, Feb. 23, 1996, at p. 2 BR.

[142] 49 C.F.R. pt., 209 App. A.

[143] *See, e.g.,* 49 C.F.R. pt. 238, App. A, Schedule of Civil Penalties.

In determining whether a violation warrants a civil penalty recommendation, the field inspector considers: (1) the inherent seriousness of the situation; (2) the kind and degree of safety hazard the situation poses; (3) any harm already caused; (4) the railroad's or individual's general level of compliance disposition; (5) their history of compliance, particularly at the specific division or location of the involved railroad; (6) whether a remedy other than a civil penalty is more appropriate; and (7) such other factors as the immediate circumstances make relevant. Discretion at the field and regional level is important to ensure "that the exacting and time-consuming civil penalty process is used to address those situations most in need of the deterrent effect of penalties."[144] At the commuter rail transit agency, the penalty settlement process is handled by local counsel, or if the amounts are small, by nonlawyers.

A civil penalty recommendation at the field level is reviewed at the regional level by a specialist in the subject matter involved who determines whether the recommendation is consistent with safety enforcement policy in similar circumstances. In close cases, guidance is sought from FRA's Office of Safety. In practice, field staff who come across novel issues run them through FRA headquarters in Washington, D.C. Technically and legally sufficient violation reports deemed by the regional office to be consistent with FRA's national enforcement policy are forwarded to FRA's Office of Chief Counsel, where they are reviewed by that office's Safety Division.[145] The Office of Chief Counsel has its own safety division, distinct from FRA's Office of Safety.

If the violation was committed by a railroad, a penalty demand letter is issued that summarizes the claims, encloses the violation report and all relevant evidence, and explains that the railroad may pay in full or submit (orally or in writing) information in defense or mitigation. Settlement conferences may be held in which FRA may adjust or amend penalties. Of course, not all carriers to whom violation reports are issued accept the inspector's findings, plead guilty, or settle. In reality, there are many contested inspection reports.

If the violation was committed by an individual (a "manager, supervisor, official, or other employee or agent of a railroad") who has committed a willful[146] violation of FRA safety statutes or regulations, the FRA field inspector initially determines the best method of ensuring compliance. This method may be "an informal warning, a more formal warning letter issued by the Safety Division of the Office of Chief Counsel, recommendation of a civil penalty assessment, recommendation of disqualification or suspension from safety-sensitive service, or, under the most extreme circumstances, recommendation of emergency action."[147] Where the field inspector determines a civil penalty recommendation to the Office of Chief Counsel is warranted, he or she so informs the individual in writing. If the Office of Chief Counsel determines the case is meritorious, he or she will issue a civil demand letter informing the individual that discussion of any defenses or mitigating factors is encouraged, and that the individual may wish to obtain representation through an attorney and/or a labor representative. If a settlement cannot be reached, the FRA may issue a letter informing the individual it intends to ask the Attorney General to sue for the initially proposed amount, though in practice it rarely invokes the assistance of the Justice Department.[148] The FRA believes that indemnification of a civil penalty by a railroad or labor union would be inconsistent with the intent of Congress that the penalty have a deterrent effect on violations.[149]

The FRA takes the position that the statute does not require a formal, trial type administrative adjudication under Sections 556 and 557 of the APA. However, should a railroad or individual refuse to settle, they are entitled to a trial de novo in federal district court should the Attorney General sue to collect the civil penalty.[150]

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[144] 49 C.F.R. pt. 209, App. A.

[145] *Id*.

[146] The FRA has jurisdiction only over "willful" violations. Neither negligence nor strict liability concepts are relevant to the determination. The FRA describes a willful violation as

> an intentional, voluntary act committed either with knowledge of the relevant law or reckless disregard for whether the act violated the requirements of the law. Accordingly, neither a showing of evil purpose…nor actual knowledge of the law is necessary to prove a willful violation, but a level of culpability higher than negligence must be demonstrated.

49 C.F.R. pt. 209, App. A (1999), citing Trans World Airlines v. Thurston, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985), Brock v. Morelly Bros. Constr., Inc., 809 F.2d 161 (1st Cir. 1987), and Donovan v. Williams Enters., Inc., 744 F.2d 170 (D.C. Cir. 1984). Further, "A willful violation entails knowledge of the facts constituting the violation, but actual, subjective knowledge need not be demonstrated. It will suffice to show objectively what the alleged violator must have known of the facts based on reasonable inferences drawn from the circumstances." 49 C.F.R. pt. 209, App. A . However, a subordinate is not deemed to have committed a safety violation under protest where his or her superior directly orders the action; in such circumstances, the supervisor may have committed the willful violation. *Id*.

[147] 49 C.F.R. pt. 209, App. A.

[148] *Id*. In practice, the Justice Department is unlikely to take on an FRA case unless the issue is serious, such as an employer lying and threatening employees in a case involving falsification of hours of service or discharging and punishing an employee for being honest on an accident report form. Most violations do not have this element of employer culpability. Hence, FRA tends to negotiate settlements without resorting to litigation.

[149] *Id*. The FRA enjoys nonreviewable prosecutorial discretion whether to impose penalties for safety violations. *See* Railway Labor Executives Ass'n v. Dole, 760 F.2d 1021, 1024 (9th Cir. 1985).

[150] 49 C.F.R. pt. 209, App. A.

8. Drug and Alcohol Testing

Drug and alcohol testing regulations[151] were promulgated by the FRA and FTA after evidence revealed that between 1975 and 1984, of 791 fatalities caused by rail employees, 37 (or 4.1 percent) resulted from accidents involving alcohol or drug abuse. The FRA concluded that this figure likely was low given underreporting by the railroad industry.[152]

Congress required that railroads conduct pre-employment, reasonable suspicion, random, and post-accident testing of all employees in safety-sensitive functions for the use of a controlled substance[153] and alcohol.[154] Under the DOT regulations, the employer must ensure that the following drugs are tested for: marijuana, cocaine, opiates, amphetamines, and phencyclidine.[155] Consumption of these drugs is strictly prohibited.[156] Congress also authorized promulgation of regulations permitting periodic recurring testing of rail employees conducting safety-sensitive functions. Employees must be disqualified or dismissed under DOT regulations if found to have used or been impaired by alcohol while on duty, or to have used a controlled substance except as allowed for medical purposes by law.[157] However, individual privacy is to be protected.[158] Privacy is discussed at length in the preamble to the drug and alcohol testing regulations. Rehabilitation programs must also be established.[159] DOT shall also promulgate guidelines establishing comprehensive standards for testing and laboratory procedures to be applied to controlled substances, as well as laboratory certification and de-certification standards.[160]

To the extent that an FTA recipient operates a railroad subject to the jurisdiction of FRA, it must follow FRA drug and alcohol regulations,[161] rather than the applicable FTA regulations,[162] for its railroad operations.[163] Similarly, for those few FTA recipients operating marine vessels, FTA and U.S. Coast Guard regulations[164] coordinate on safety and security issues with respect to maritime operations.[165] However, since the requirements for railroad employees[166] are substantially similar to those for transit employees, discussed in detail later in this section, they are only briefly addressed here.

Contractors providing services involving the performance of safety-sensitive activities must also comply with the drug and alcohol regulations.[167]

9. State Safety Oversight of Rail Fixed Guideway Public Systems

Prior to 1991, there were no federal laws or regulations governing the safety of local rail transit systems not subject to FRA safety jurisdiction. That year, NTSB recommended that FTA establish a program of state safety oversight of rail transit agencies.[168] Congress addressed the issue in ISTEA by requiring FTA to issue regulations requiring that states having rail fixed guideway mass transportation systems "not subject to regulation by the Federal Railroad Administration" establish a state safety oversight program.[169] FTA regulations went into effect in January 1997 and were revised in 2005. The new rules became effective in 2006.[170] By 2000, 22 State Safety Oversight Agencies were designated to implement these rules for 35 rail transit systems operating in 21 states and the District of Columbia. By 2005, the State Safety Oversight Community included 26 jurisdictions (including the District

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[151] 49 C.F.R. pt. 219 . Certain foreign railroads and small railroads are exempt from these regulations. *Id*. at pt. 219.3(c).

[152] Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 579 (9th Cir. 1988).

[153] A "controlled substance" is anything so designated under Section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802, by the Secretary of Transportation.

[154] 49 U.S.C. § 20140(b)(1)(A).

[155] 49 C.F.R. § 655.21(b).

[156] 49 C.F.R. § 655.21(c).

[157] 49 U.S.C. § 20140(b)(1)(B). Sometimes employees claim they are using prescribed medication. *See, e.g.,* Bell v. Metropolitan Transit Auth. of Harris County, 1999 Tex. App. Lexis 4063 (Tex. App. 1999), Burka v. N.Y. City Transit Auth., 739 F. Supp. 814 (S.D. N.Y. 1990).

[158] 49 U.S.C. § 20140(c)(1). Results of tests and medical information must be kept confidential. 49 U.S.C. § 20140(c)(4).

[159] 49 U.S.C. § 20140(d).

[160] 49 U.S.C. § 20140(c)(2). All testing must be done under a "scientifically recognized method of testing capable of providing quantitative information about alcohol or a controlled substance." 49 U.S.C. § 20149(c)(4).

[161] 49 C.F.R. pts. 219 and 382 (1999), and 49 C.F.R. § 655.83.

[162] 49 C.F.R. pt. 655.

[163] 49 C.F.R. § 655.3(b).

[164] 33 C.F.R. §§ 95.040, 177.07 (1999), and 46 C.F.R. §§ 1.01-10, 4.05-10, 16.101, 16.107, 16.201, 16.203, 16.220, 122.206.

[165] Formerly a part of DOT, the Coast Guard was transferred to the Department of Homeland Security (DHS) after the events of Sept. 11, 2001. DOT and DHS coordinate their operations in the arena of safety and security. *See* Dep't of Homeland Security, Transportation Systems Sector-Specific Plan (2010). On March 1, 2003, the Coast Guard was transferred from DOT to the nascent DHS). http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS21125_06032003.pdf.

[166] *See* 49 U.S.C. § 20140. *See also* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802.

[167] 49 C.F.R. pt. 655; 49 U.S.C. § 5331. FTA Circular 4220.1F at IV-20.

[168] FTA, State Safety Oversight Program Annual Report for 2005 (2006).

[169] 49 U.S.C. § 5330. The regulations appear at 49 C.F.R. pt. 659. Rail Fixed Guideway Systems: State Safety Oversight, 70 Fed. Reg. 22,562 (Apr. 29, 2005).

[170] 49 C.F.R. pt. 659 (1999), as amended in 2005. Rail Fixed Guideway Systems; State Safety Oversight, 70 Fed. Reg. 22, 562 (Apr. 29, 2005).

of Columbia and Puerto Rico).[171] By 2010, the DOT Volpe Center Web site listed 29 jurisdictions having established such agencies. Since FTA requires all states with New Starts programs or existing systems to be compliant, it is anticipated that most states will establish oversight programs.[172]

Under the DOT State Rail Safety Oversight regulations,[173] states must play a major role in rail safety enforcement and investigation.[174] The regulations require states that had no rail oversight program to develop a program and submit it to FTA for approval.[175] Prior to the promulgation of these regulations, there were several states in which rail systems operated with no rail safety oversight program; because the particular systems were not subject to FRA jurisdiction, no governmental entity was regulating the safety of these systems. FTA stepped in to require states to establish rail safety oversight programs that contained certain minimum components.[176]

FTA oversees State Safety Oversight for Rail Fixed Guideway Systems under 49 C.F.R. 659. The regulations require that states designate an independent State Safety Oversight Agency (SSOA) to oversee the safety of rail systems not regulated by FRA. FTA provides SSOA's training and technical assistance. Where a state agency has been certified by DOT as authorized to oversee rail safety practices for equipment, facilities, and rolling stock within that state, it may enforce these requirements.[177] FTA regulations define a "rail fixed guideway system" as any "light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley or automated guideway" that receives federal funding under FTA's formula program for urbanized areas and is not regulated by FRA.[178] The state oversight agency reports to FTA.[179] States that have fixed rail mass transportation systems not regulated by FRA are required to establish and implement a safety program plan that establishes safety requirements, lines of authority, levels of responsibility and accountability, and methods of documentation.[180] Those regulations[181]

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[171] FTA, State Safety Oversight Program Annual Report for 2005 (2006).

[172] States with "New Starts" programs must have a functional Oversight Program in place in full compliance with 49 C.F.R. pt. 659. FEDERAL TRANSIT ADMIN., COMPLIANCE GUIDELINES FOR STATES WITH NEW STARTS PROJECTS 1, 4 (June 2000). The State Oversight Agency must require the transit agency to include safety in all planning, design, and construction of a New Starts system, in the form of a statement of safety standards that must be satisfied, including a clear and comprehensive list of criteria that must be incorporated into the design process. The transit agency should also be required to perform an appropriate hazard analysis in the planning, design, and construction phases. Based on implementation of these two requirements, the transit agency should be required to identify those elements critical to the safety of the new operation—processes whose recognition, control, performance, or tolerance is essential to the safe operation of the system. The transit agency must also develop a "safety certification plan" to ensure that elements critical to safety are properly designed and constructed. Finally, the State Oversight Agency should provide formal documentation certifying the safety of the New Starts system. *Id*. at 23–24.

[173] FTA's revised 49 C.F.R. pt. 659, Rail Fixed Guideway Systems; State Safety Oversight rule became effective on May 1, 2006.

[174] KENWORTHY, *supra* note 6 § 5.501.

[175] These are the required elements of a State Safety Oversight (SSO) program:

• Designating an SSO agency (§ 659.9);

• Developing a program standard and supporting procedures (§ 659.15);

• Requiring, reviewing and approving rail transit agency System Safety Program Plans (SSPPs) (§ 659.17 and § 659.19);

• Requiring, reviewing and approving rail transit agency System Security Plans (Security Plans) (§ 659.21 and § 659.23);

• Requiring an annual cycle for rail transit agencies to review SSPPs and Security Plans to determine if they should be updated (§ 659.25);

• Requiring and overseeing implementation of the rail transit agency internal safety and security audit program and requiring, reviewing, and approving annual reports and certifications from rail transit agencies (§ 659.27);

• Requiring and overseeing implementation of the rail transit agency hazard management process (§ 659.31);

• Requiring and receiving notification of accidents meeting the revised Part 659 thresholds (§ 659.33);

• Conducting investigations of accidents meeting the revised Part 659 thresholds (§ 659.35);

• Conducting Three-Year safety and security reviews at rail transit agencies (§ 659.29);

• Requiring, reviewing, approving, and tracking corrective action plans for findings from accident investigations and Three-Year reviews (§ 659.37); and

• Reporting to FTA (§ 659.39).

FTA, Implementation Guidelines for 49 C.F.R. pt. 659 (2006).

[176] 49 C.F.R. § 659.19.

[177] 49 U.S.C. § 20105.

[178] 49 C.F.R. § 659.5 .

[179] 49 C.F.R. § 659.39.

[180] 49 U.S.C. § 5330(c)(1). FTA regulations, "Rail Fixed Guideway Systems; State Safety Oversight," 49 C.F.R. pt. 659. The FTA's State Safety Oversight Program identifies eight distinct functions that must be performed:

1. Oversight Agency Designation and Authority. 49 C.F.R. § 659.21.

2. Oversight Agency Program Management. 49 C.F.R. §§ 659.23, 659.47, 659.31, and 659.45.

3. System Safety/Security Program Standard Preparation and Adoption and Rail Fixed Guideway System Safety/Security Program Plan Review and Approval Process. 49 C.F.R. §§ 659.31, 659.33.

4. Accident/Unacceptable Hazardous Conditions Investigations and Corrective Actions. 49 C.F.R. §§ 659.39, 659.41, and 659.43.

5. Three-Year Safety Reviews. 49 C.F.R. § 659.37.

6. Requiring and Reviewing RFGS Internal Safety Audit Process Reporting. 49 C.F.R. § 659.35.

provide that they apply where FRA does not regulate.[182] In other words, the regulations cover rail operations that are not subject to FRA jurisdiction, but do not apply to portions of rail systems that are subject to FRA jurisdiction, so as to avoid duplicate coverage while ensuring that no rail fixed guideway systems slip through the cracks.

A state must designate an oversight agency to review, approve, and monitor implementation of the plan; investigate hazardous conditions and accidents;[183] and require corrective action to eliminate those conditions.[184] The state rail safety oversight plan must be written, and on occasion, the local transit agency has penned the plan on behalf of the state so as to avoid risking FTA funds. Periodic audits and safety reviews, as well as reporting and investigations, are required.[185]

FTA conveys to the states the authority to "require, review, approve and monitor" RTA's implementation of its System Safety Program Plan (SSPP).[186] An SSOA must conduct an on-site review at least once every 3 years,[187] at each rail transit agency (RTA) in its jurisdiction. In conducting their 3-year safety reviews, states are authorized to make findings on whether the RTA is implementing its SSPP effectively and whether the SSPP needs to be updated. In its Program Standard, the oversight agency must describe "the process and criteria to be used at least every three (3) years in conducting a complete review of each affected RTA's implementation of its SSPP." The Program Standard must also include "the process to be used by the affected RTA and the oversight agency to manage findings and recommendations from this review."[188] The SSOA "must

7. Oversight Agency Certification and Reporting to FTA. 49 C.F.R. §§ 659.45, 659.49.

8. Hazard Management Process, 49 C.F.R. § 659.25.

FEDERAL TRANSIT ADMIN., *supra* note 172, at 5. The State Oversight Agency (SOA) must: (1) develop a System Safety Program Standard (SSPS); (2) require, review and approve, and monitor the implementation of the SSPS that complies with the Oversight Agency's Program Standard at each rail transit system; (3) require each rail transit system to report accidents and unacceptable hazardous conditions within a specified period of time to the SSA; (4) require the rail transit system to implement a corrective action plan; (5) conduct on-site visits at each rail transit system not less than every 3 years to perform a formal safety review; (6) require the rail transit system to conduct safety audits according to the Internal Safety Audit Process detailed in the APTA Manual (Checklist Number 9); and (7) report to FTA. *Id*. at 5–7.

In turn, the rail transit system must, at minimum: (1) develop an SSPP that complies with the SOA's Program Standard; (2) classify hazardous conditions according to the APTA Manual Hazard Resolution Matrix; (3) report any accident or unacceptable hazardous condition within the time frame established by the SOA; (4) obtain the SOA's approval of a Corrective Action Plan and implement the Plan so as to minimize, control, correct, or eliminate the unacceptable hazardous condition; (5) conduct safety audits that comply with the Internal Safety Audit Process specified in Checklist Number 9 of the APTA Manual; (6) draft and submit to the SOA a report summarizing the results of the safety audit process. *Id*. at 7.

[181] 49 C.F.R. pt. 659.3 .

[182] FTA Rail Safety Oversight Statute—49 U.S.C. § 5331; FTA regulations, "Rail Fixed Guideway Systems; State Safety Oversight," 49 C.F.R. pt. 659; 67 Fed. Reg. 44,091 (July 1, 2002).

[183] According to FTA, "The oversight agency is not only responsible for developing its own investigatory procedures, it is responsible for determining how it will investigate. An oversight agency may contract for this service…." Rail Fixed Guideway Systems; State Safety Oversight, 60 Fed. Reg. 67,034 (Dec. 27, 1995).

[184] 49 U.S.C. § 5330(c)(2); 49 C.F.R. § 659.21 . A state must oversee the safety of rail fixed guideway systems through a designated oversight agency. 49 U.S.C. § 5330; 49 C.F.R. § 659.1 (1999); 60 Fed. Reg. 67046 (Dec. 27, 1995). The oversight agency must develop a system safety program standard that requires the transit agency to address the personal security of its passengers and employees. 49 C.F.R. § 659.31. As an example of such state rail fixed guideway safety oversight programs, see the Colorado statutory scheme at C.R.S. § 40-18-101 *et seq*., or Florida's at FLA. STAT. § 341.061 *et seq*. (2000), or Oregon's at OR. REV. STAT. §§ 479.950, or Ohio's at OHIO REV. CODE ANN. § 5501.55. (The state of Washington requires that each regional transit authority that owns or operates a rail fixed guideway system to submit a system safety and security program plan to the state DOT, to implement and comply with it, and to notify the state DOT of an accident, unacceptable hazardous condition, or security breach within 24 hours and investigate them. WASH. REV. CODE § 81.112.180. In Texas, the state DOT oversees safety and security of rail fixed guideway mass transportation systems, and requires it to establish, implement, and oversee a safety program that includes transit agency oversight, accident investigation, data collection, and reporting. The transit agency must

> (1) develop a system safety plan that complies with the department's safety program plan standards; (2) conduct an annual internal safety audit and submit the audit report to the department; (3) report accidents and unacceptable hazardous conditions to the department in writing or by electronic means acceptable to the department; (4) minimize, control, correct or eliminate any investigated unacceptable hazardous condition as required by the department; and (5) provide all necessary assistance to allow the department to conduct appropriate on-site investigations of accidents and unacceptable hazardous conditions.

TEX. TRANSP. CODE § 455.005(d).

[185] The transit agency must submit an annual safety audit. 49 C.F.R. § 659.35. It must also report accidents and unacceptable hazardous conditions to the oversight agency. 49 C.F.R. § 659.39. The oversight agency must investigate accidents and unacceptable hazardous conditions unless the National Transportation Safety Board has done so, 49 C.F.R. § 659.41(b) (1999), and require that the transit agency "minimize, control, correct or eliminate" the hazardous condition. 49 C.F.R. § 659.43. The transit agency must prepare an annual transit safety audit report, which is submitted to the state oversight agency. 49 C.F.R. § 659.35. The oversight agency must perform a safety review of the transit agency at least every 3 years. 49 C.F.R. § 659.37.

[186] 49 U.S.C. § 5330.

[187] *See* FTA, Recommended Best Practices for States Conducting Three-Year Safety Reviews (Mar. 1, 2009), http://www.fta.dot.gov/documents/SSO_Three_Year_Review_RBP_3-26-09-final.pdf.

[188] 40 C.F.R. § 659.15(b)(4).

review the RTA's implementation of its SSPP" and "must prepare and issue a report containing findings and recommendations resulting from that review, which, at a minimum, must include an analysis of the effectiveness of the SSPP and a determination of whether it should be updated."[189]

DOT may investigate a condition in FTA-financed rail equipment, facilities, or operations that it believes may cause a serious hazard of death or injury.[190] At least every 3 years it must conduct an on-site safety review of the transit agency's implementation of its system safety program plan.[191] If it determines that such a hazard is present, the DOT requires the local transit provider to submit a plan to correct it. The DOT also may withhold financial assistance until such plan is approved and implemented.[192]

If such a rail transit system operates in more than a single state, the affected states may designate an agency (other than the mass transportation authority) to provide uniform safety standards and enforcement.[193] For example, Maryland, Virginia, and the District of Columbia have established a joint state oversight agency to regulate their interstate rail fixed guideway systems.[194] The oversight agency must certify annually to FTA that it has complied with FTA's regulations.[195] Failure to comply with these requirements authorizes the DOT to withhold up to 5 percent of the state's fiscal year urbanized funds until compliance is achieved.[196]

Some states have delegated the authority to regulate carrier safety and other modes of transportation, including grade crossings and signaling, to the state Public Utilities Commission (PUC) (known in a few states as the Railroad Commission).[197] Some states vest jurisdiction over employee safety in a state regulatory agency.[198] But this, of course, does not supercede a state's responsibility to designate an State Oversight Agency to fulfill its Part 659 duties.

Under MAP-21, the DOT Secretary is directed to establish a National Public Transportation Safety Plan[199] that includes: (1) safety performance criteria for all modes of public transportation; (2) the definition of the term "state of good repair"; (3) minimum safety performance standards for public transportation vehicles used in revenue operation; and (4) a public transportation safety certification training program for federal and state employees who conduct safety audits and examinations of public transportation systems and public transportation agency employees directly responsible for safety oversight.[200]

States and recipients must also establish Public Transportation Agency Safety Plans.[201] The state safety

[189] 49 C.F.R. § 659.29 of FTA's SSO rule specifies that the SSO agency must require corrective action plans (CAPs) from the RTA for findings from Three-Year Safety Reviews, and each CAP should identify the action to be taken by the RTA, 49 C.F.R. § 659.37.

[190] This broad authority arises from 49 U.S.C. § 5329 and is not necessarily directly connected to the State Oversight Agency authority in § 5330.

[191] 49 C.F.R. § 659.37.

[192] 49 U.S.C. § 5330(b). However, this is separate from the § 5330 authority, which caps the withholding to 5 percent. If FTA concludes that a state is not in compliance or has not made adequate efforts to comply, it may withhold up to 5 percent of the amount apportioned to the state or affected urbanized area under FTA's formula program for urbanized areas.

[193] 49 U.S.C. § 5330(d).

[194] *See* www.tristateoversight.org.

[195] 49 C.F.R. § 659.49.

[196] 49 U.S.C. § 5330(b); 49 C.F.R. § 659.7 .

[197] *See, e.g.,* CAL. PUB. UTIL. CODE § 768 (2001):

> The commission may, after a hearing, require every publicutility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public. The commission may prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signaling. The commission may establish uniform or other standards of construction and equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand. The Department of the California Highway Patrol shall have the primary responsibility for the regulation of the safety of operation of passenger stage corporations. The commission shall cooperate with the Department of the California Highway Patrol to ensure safe operation of these carriers.

See also CAL. PUB. UTIL. CODE § 778 (2001): "The commission shall adopt rules and regulations…relating to safety appliances and procedures for rail transit services operated at grade and in vehicular traffic."

[198] For example, Maryland vests "exclusive jurisdiction involving all areas of railroad [labor] safety and health" in its Labor Commissioner. MD. CODE ANN. LABOR & EMPLOYMENT § 5.5-104 (2013). California vests jurisdiction over the "occupational safety and health of employees of rail rapid transit systems, electric interurban railroads, or street railroads" in the California Division of Industrial Safety. CAL. LAB. CODE § 6800 (2013). *See* San Francisco Bay Area Rapid Transit District v. Division of Occupational Safety & Health, 111 Cal. App. 3d 362, 168 Cal. Rptr. 489 (1980).

[199] 49 U.S.C. § 5329.

[200] *Id.*

[201] The plan must include:

> (A) a requirement that the board of directors (or equivalent entity) of the recipient approve the agency safety plan and any updates to the agency safety plan;
>
> (B) methods for identifying and evaluating safety risks throughout all elements of the public transportation system of the recipient;
>
> (C) strategies to minimize the exposure of the public, personnel, and property to hazards and unsafe conditions;
>
> (D) a process and timeline for conducting an annual review and update of the safety plan of the recipient;
>
> (E) performance targets based on the safety performance criteria and state of good repair standards…;
>
> (F) assignment of an adequately trained safety officer who reports directly to the general manager, president, or equivalent officer of the recipient; and
>
> (G) a comprehensive staff training program for the operations personnel and personnel directly responsible for safety of the recipient.

plans and programs must be reviewed and certified by the DOT Secretary to determine "whether or not each State safety oversight program meets the requirements of this subsection and the State safety oversight program is adequate to promote the purposes of this section."[202]

A state that has a rail fixed guideway public transportation system within its jurisdiction not subject to regulation by FRA, or a rail fixed guideway public transportation system in the engineering or construction phase not subject to FRA regulation, must establish a State Safety Oversight Program.[203]

The state must also establish an SSOA that:

> (i) is financially and legally independent from any public transportation entity that the State safety oversight agency oversees;
>
> (ii) does not directly provide public transportation services in an area with a rail fixed guideway public transportation system subject to the requirements of this section;
>
> (iii) does not employ any individual who is also responsible for the administration of rail fixed guideway public transportation programs subject to the requirements of this section;
>
> (iv) has the authority to review, approve, oversee, and enforce the implementation by the rail fixed guideway public transportation agency of the public transportation agency safety plan…;
>
> (v) has investigative and enforcement authority with respect to the safety of rail fixed guideway public transportation systems of the eligible State;
>
> (vi) audits, at least once triennially, the compliance of the rail fixed guideway public transportation systems in the eligible State subject to this subsection with the public transportation agency safety plan required… ; and
>
> (vii) provides, at least once annually, a status report on the safety of the rail fixed guideway public transportation systems the State safety oversight agency oversees to—
>
> (I) the Federal Transit Administration;
>
> (II) the Governor of the eligible State; and
>
> (III) the board of directors, or equivalent entity, of any rail fixed guideway public transportation system that the State safety oversight agency oversees. [204]

A state that has within its jurisdiction a rail fixed guideway public transportation system that operates in more than a single eligible state shall establish a Program for Multi-State Rail Fixed Guideway Public Transportation Systems. [205]

State programs must be certified by DOT. If the DOT Secretary determines that a state program does not meet the requirements of certification, he or she must so inform the state and allow it to resubmit the safety oversight program for approval. If, after resubmission, the DOT Secretary determines the program still does not comply with federal requirements, the Secretary may withhold funds.[206] The Secretary must also annually report to Congress on the implementation of the state safety oversight program.[207]

B. FTA SAFETY INITIATIVES

An important priority of DOT and FTA is to "promote the public health and safety by working toward the elimination of transportation-related deaths, injuries, and property damage."[208] In May of 2000, the FTA published its first Safety Action Plan.[209] The plan included a number of initiatives, including: (1) enhancing its data collection and analysis processes;[210] (2) developing safety program activities relating to human factors;[211] (3) formulating transit system design stan-

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Id.

[202] 49 U.S.C. § 5329(e)(7). "If the Secretary determines that a State safety oversight program does not meet the requirements of this subsection and denies certification, the Secretary shall transmit to the eligible State a written explanation and allow the eligible State to modify and resubmit the State safety oversight program for approval." Failure to correct authorizes the DOT to withhold funds. *Id*.

[203] The program must be one in which the state:

> (A) assumes responsibility for overseeing rail fixed guideway public transportation safety;
>
> (B) adopts and enforces Federal and relevant State laws on rail fixed guideway public transportation safety;
>
> (C) establishes a State safety oversight agency;
>
> (D) determines, in consultation with the Secretary, an appropriate staffing level for the State safety oversight agency that is commensurate with the number, size, and complexity of the rail fixed guideway public transportation systems in the eligible State;
>
> (E) requires that employees and other designated personnel of the eligible State safety oversight agency who are responsible for rail fixed guideway public transportation safety oversight are qualified to perform such functions through appropriate training, including successful completion of the public transportation safety certification training program established under subsection (c); and
>
> (F) prohibits any public transportation agency from providing funds to the State safety oversight agency or an entity designated by the eligible State as the State safety oversight agency.

[204] 49 U.S.C. § 5329.

[205] *Id.*

[206] 49 U.S.C. § 5329(e)(7).

[207] 49 U.S.C. § 5329(e)(8).

[208] FEDERAL TRANSIT ADMIN., FTA SAFETY ACTION PLAN, HIGHLIGHTS AND NEW DIRECTIONS: FTA'S ROLE IN SAFETY (2000). SSOA program and TRACS initiatives also focus on employee fatigue and post-mortem testing.

[209] See summary located at http://www.fta.dot.gov/TSO/12537_12963.html.

[210] This included recommending changes to the National Transit Database facilitating collection of accident and incident causal data, and improving the Safety Management Information Statistics and Drug and Alcohol Management Information System databases.

[211] FTA delivered a series of Fatigue Awareness Seminars at transit agencies, sponsored a Fatigue Awareness Symposium and four Substance Abuse Seminars, and issued a best practices manual on implementation of the drug and alcohol testing programs.

dards;[212] (4) revising the State Safety Oversight rule;[213] (5) working with the industry to improve bus safety;[214] and (6) promoting innovative solutions to safe transportation to reduce deaths, injuries, and property damage.[215] Though not promulgated in the form of binding rules, though some may be, they do provide important guidance to transit providers. FTA augmented it with the publication of a *Rail Transit Safety Action Plan* in 2006. FTA's *Rail Transit Safety Action Plan* lists its Top 10 priorities for improving rail transit safety:

- Priority Number 1: Reducing collisions with other vehicles.
- Priority Number 2: Reducing collisions with pedestrians and trespassers.
- Priority Number 3: Improving compliance with operating rules.
- Priority Number 4: Reducing the impacts of fatigue on transit workers.
- Priority Number 5: Reducing unsafe acts by passengers in transit stations.
- Priority Number 6: Improving safety of transit workers.
- Priority Number 7: Improving safety for passengers with disabilities.
- Priority Number 8: Removing debris from tracks and stations.
- Priority Number 9: Improving emergency response procedures.
- Priority Number 10: Improving safety data acquisition and analysis.

C. DRUG AND ALCOHOL ABUSE AND MISUSE

1. Introduction

FTA recipients must establish an anti-drug program and test employees performing safety-sensitive functions for misuse of alcohol or controlled substances. Employees who test positively must be removed from their safety-sensitive positions.

In *Amalgamated Transit Union v. Skinner*,[216] the D.C. Circuit held that DOT lacked statutory authority to mandate uniform national safety standards on local transit authorities by regulation.[217] The court read the statute and its legislative history to command case-by-case development of local solutions to safety hazards, even if the problems were experienced in a number of transit systems. The court said, "It was not designed to proceed via national, impersonal rulemaking procedures which produced a federally-mandated solution that might or might not be responsive to concerns at the local level."[218] The Court concluded:

> Congress has chosen not to give [FTA] direct regulatory authority over urban mass transit safety to the extent that would justify imposing a mandatory drug testing program on the employees of state, local, and private operating authorities. We hold accordingly that [FTA] exceeded its statutory authority over safety matters by imposing through rulemaking uniform, national requirements on local transit authorities....[219]

As a result of that decision, Congress passed the Omnibus Transportation Employee Testing Act of 1991 [Omnibus Testing Act].[220] The Testing Act mandates that FTA grant[221] recipients establish a multifaceted anti-drug and -alcohol misuse testing, education, and awareness program. The Act requires that FTA recipients test employees in safety-sensitive positions for misuse of alcohol or controlled substances (defined by DOT to be marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP)), as a condition of receiving FTA funds.[222] The primary objective of transportation-related drug and alcohol testing statutes and regulations is to prevent, through detection and deterrence, alcohol and controlled substance users from performing safety-sensitive functions so as to avoid personal injury and property damage,[223] for safety is a paramount public interest in transportation. FTA initially promulgated separate regulations for drug abuse[224] and alcohol misuse [225] and then in 2001 consolidated rules for both in a single set of regulations.[226] Recognizing that the regulatory matrix here is complex, FTA has published its let-

[212] FTA published *Compliance Guidelines for States with New Starts Projects* (June 2000), http://www.fta.dot.gov/documents/NewStarts.pdf and *Hazard Analysis Guidelines for Transit Projects* (Jan. 2000), http://www.fta.dot.gov/documents/HAGuidelines.pdf. FTA also coordinated the development of standardized light rail transit grade crossing signage with FHWA, and developed a Joint Policy on Shared Use Track with FRA.

[213] In 2006, FTA revised 49 C.F.R. pt. 659 (State Safety Oversight Rule), requiring that each rail transit agency address compliance with operating rules and procedures in its SSPP and supporting safety program.

[214] FTA offered alternatives fuels bus safety training courses, and facilitated the development of bus safety courses.

[215] FTA has disseminated State Safety Oversight Program best practices, sponsored courses related to transit safety and security, and partnered with the industry to sponsor education and research. FEDERAL TRANSIT ADMIN., *supra* note 208.

[216] 894 F.2d 1362 (D.C. Cir. 1990).

[217] *Id.*

[218] *Id*. at 1369.

[219] *Id.* at 1372.

[220] Pub. L. No. 102-143, tit. V, 105 Stat. 917 (1991). FTA usually inserts the term "Omnibus" to distinguish it from other drug testing statutes.

[221] These requirements apply to recipients of funds under 49 U.S.C. §§ 5307, 5309, and 5311.

[222] *See generally* Jill Dorancy-Williams, *The Difference Between Mine and Thine: The Constitutionality of Public Employee Drug Testing,* 28 N.M. L. REV. 451 (1998).

[223] Amendment to Definition of Substance Abuse Professional, 61 Fed. Reg. 9969, 9970 (Mar. 12, 1996).

[224] 49 C.F.R. pt. 653 (since revoked).

[225] 49 C.F.R. pt. 654 (since revoked).

[226] 49 C.F.R. pt. 655.

ter opinions in this area on its Web site,[227] and several are summarized in this section. Many have also been incorporated into its regulations, which were updated in 2006.[228]

2. Drug Abuse and Alcohol Misuse Statutes and Regulations

The Testing Act[229] required the Secretary of Transportation to promulgate regulations for the testing of employees for drugs and alcohol in four sectors of the transportation industry. The four affected DOT administrations are the Federal Motor Carrier Safety Administration (FMCSA) (with jurisdiction over the trucking industry), FAA (airlines),[230] FRA (railroads),[231] and FTA (transit).[232] The U.S. Coast Guard (now a part of the Department of Homeland Security) also implements Part 40. Another DOT administration, the Research and Special Programs Administration (RSPA), also issued regulations regarding drug and alcohol testing of employees in the pipeline industry, even though the Act did not so require.[233] As noted previously, in *Skinner,*[234] UMTA was sued as to its initial drug and alcohol testing regulations, and the D.C. Circuit ruled that UMTA had no legislative authority to promulgate the regulations. The Testing Act was the result, approximately 2 years later.

The Testing Act required the Secretary of Transportation to develop a program that directs recipients of FTA funds[235] to conduct random drug and alcohol testing of "mass transportation employees responsible for safety-sensitive functions."[236] Under FTA's regulations, a "covered employee" is one who performs or will perform a safety-sensitive function.[237] The regulations define a "safety-sensitive function" as: (1) operating a revenue service vehicle (whether or not it is in revenue service); (2) operating a nonrevenue service vehicle when required to be operated by a driver holding a Commercial Driver's License; (3) controlling the dispatch or movement of a revenue service vehicle; (4) maintaining a revenue service vehicle or equipment used in maintenance thereof (including repairs, rebuilding, and overhaul of such vehicles);[238] or (5) carrying a firearm for purposes of security.[239] The employer must determine whether the employee is performing a safety-sensitive function, keeping in mind that the decision should be made based on the type of work performed, rather than the job title.[240]

Recipients of federal aid for mass transit projects must abide by the requirements of the Testing Act and the regulations promulgated by FTA. Failure to do so jeopardizes a recipient's eligibility for federal financial assistance.[241] The regulations provide, "A recipient will be ineligible for further FTA financial assistance if the recipient fails to establish and implement an anti-drug and alcohol misuse program in accordance with this part."[242] If a recipient has a *program*, it is eligible for federal financial assistance; if it does not have a *program*, it is ineligible. The establishment of a program determines an applicant's eligibility for financial assistance. Individual violations of the regulations (e.g., failure to report, failure to have proper testing procedures, failure to conduct a sufficient number of random drug tests, failure to test certain employees performing safety-sensitive functions) do not make a recipient ineligible for all federal financial assistance; rather, FTA's practice is to inform the recipient that its program is deficient and to instruct the recipient to correct the deficiencies. Failure to do so or to correct all of the deficiencies could result in the loss of a portion of federal financial assistance. As a practical matter, (1) FTA and recipients alike go to extraordinary lengths to

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[227] "Dear Colleague Letters" may be viewed through a search of FTA letters archives.

[228] 49 C.F.R. pt. 655

[229] Pub. L. No. 102-143, tit. V, 105 Stat. 952 (1991)

[230] 14 C.F.R. pt. 120.

[231] See discussion above.

[232] U.S. DOT regulations, "Drug-Free Workplace Requirements (Grants)," 49 C.F.R. pt. 29, subpt. F (1999), as modified by 41 U.S.C. §§ 8103 *et seq*.

[233] American Trucking Assocs. v. Federal Highway Admin., 51 F.3d 405 n.l (4th Cir. 1995).

[234] 894 F.2d 1362 (D.C. Cir. 1990).

[235] These requirements apply to recipients of funds under 49 U.S.C. §§ 5307, 5309, and 5311; see 49 U.S.C. 5331(b)(A). Recipients may include transit operators, states, metropolitan planning organizations (MPOs), and third-party contractors that provide safety-sensitive functions. States and MPOs that manage transit providers, but do not themselves perform transit operations, must ensure that the transit provider provides a certificate of compliance. Taxi companies and maintenance contractors performing safety-sensitive functions that contract with FTA recipients are also subject to the drug and alcohol regulations. Volunteers fall under the regulations only if they hold a commercial driver's license to operate a vehicle, or when they receive remuneration in excess of the actual personal expenses they incur in performing volunteer service. Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations, 66 Fed. Reg. 41996 (Aug. 9, 2001). FEDERAL TRANSIT ADMIN., FTA DRUG AND ALCOHOL REGULATION UPDATES, Issue 19, at 1-6 (Summer 2001).

[236] 49 U.S.C. § 5331(b)(1)(A) [the Testing Act].

[237] 49 C.F.R. § 655.4. *See generally,* ROBERT HIRSCH, DRUG & ALCOHOL TESTING—A SURVEY OF LABOR-MANAGEMENT RELATIONS (Transit Cooperative Research Program, Legal Research Digest No. 16, Transportation Research Board, 2001).

[238] This fourth category explicitly is inapplicable to employers funded under 49 U.S.C. §§ 5307 or 5309, are in an area of less than 200,000 in population, and contract out such services, or receive funding under 49 U.S.C. § 5311 and contract out such services. 49 C.F.R. § 655.4. Thus, maintenance contractors of FTA recipients serving areas of 200,000 or less in population are exempt from these regulations. FEDERAL TRANSIT ADMIN., *supra* note 208, at 4.

[239] 49 C.F.R. § 655.4.

[240] FEDERAL TRANSIT ADMIN., *supra* note 208, at 3.

[241] *See* 49 U.S.C. § 5331(g).

[242] 49 C.F.R. § 655.83(c).

maintain the eligibility for FTA financial assistance; (2) FTA invokes the loss of federal financial assistance only after repeated warnings and as a last resort; and (3) recipients are very careful to never let the situation get to the point where federal financial assistance will be lost (especially when the competition for federal discretionary funds is so intense).

3. Applicability of the Drug and Alcohol Regulations

Covered Employers. FTA's drug and alcohol regulations apply to any entity that receives FTA funding under Sections 5307, 5309, or 5311 of Title 49 of the U.S.C. (urbanized area formula, capital funding, and nonurbanized area programs, respectively). This may include transit agencies, subrecipients, operators, and contractors of transit agencies (such as taxi contractors), states, and MPOs.[243] The issue is whether the entity receives such funding, not whether FTA operating or capital funds were used to acquire or operate a particular vehicle or facility. If the entity receives such funding, then all its safety-sensitive employees are subject to these regulations, whether or not federal funds were spent on the particular vehicles or facilities in which they work.[244] In making a grant, the federal government acquires an interest in the entire project and not just those portions directly funded by the grant.[245] With respect to vehicles for which FTA funds were used in the acquisition or purchase, the rules apply to recipients throughout the useful life of such equipment.[246]

Covered Employees. The regulations apply to any employee performing a safety-sensitive function within the coverage of the regulations, regardless of the source of funding.[247] However, the regulations apply only to employees performing safety-sensitive functions. A "safety-sensitive function" includes any of the following (as previously noted, the first five functions are specified in FTA's regulations; the remaining ones are from FTA opinion letters interpreting the regulations).

- Operating a revenue service vehicle, even when not in revenue service;
- Operating a nonrevenue service vehicle, when required to be operated by an individual holding a Commercial Driver's License;
- Controlling the dispatch or movement of a revenue service vehicle;
- Workers involved in ongoing daily, or on a routine basis, maintenance (including repairing, overhauling, or rebuilding) of revenue service vehicles or equipment (including engine and parts rebuilding and overhaul);[248]
- Employees who carry a firearm for security purposes;[249]
- Maintenance contractors that rebuild and return components to a grantee;[250]
- Contractors or direct employees engaged in the maintenance, overhauling, and rebuilding of revenue service engines, parts, vehicles, and equipment (e.g., engine blocks, crankshafts, hydraulic cylinders, pumps, and hydraulic lines);[251]
- Contractors that performs overhaul/rebuilding work on a regular, although infrequent, basis, irrespective of whether there is a long-term contract between the contractor and the grantee;[252]
- Employees of a contractor who replaced employees of a grantee who performed "safety-sensitive" functions;[253]

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[243] As a "recipient" defined in 49 C.F.R. § 655.4; Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations, 66 Fed. Reg. 41,996 (Aug. 9, 2001).

[244] Letter from FTA Chief Counsel Patrick Reilly to Puerto Rico Department of Transportation and Public Works Assistant Secretary Freya Feria (Nov. 9, 1999). http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/Interpretations/LegalInterpretations/1999/ffer99.asp.

[245] Letter from FTA Chief Counsel Patrick Reilly to San Francisco Bay Area Rapid Transit District Attorney Marco Gomez (Aug. 20, 1999). http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/Interpretations/Legal Interpretations/1999/mg99.asp.

[246] Letter from FTA Chief Counsel Patrick Reilly to San Francisco Deputy City Attorney Robin Reitzes (Feb. 5, 1999). http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/LegalInterpretations/1999/reitzes99.asp.

[247] Letter from FTA Chief Counsel Patrick Reilly to San Francisco Bay Area Rapid Transit District Attorney Marco Gomez (Aug. 20, 1999). http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/Interpretations/LegalInterpretations/1999/mg99.asp.

[248] 64 Fed. Reg. 425 (Jan. 5, 1999). 49 C.F.R. § 655.4. An exception exists if the recipient receives funding under 49 U.S.C. §§ 5307 or 5309, is in an area of less than 200,000 in population, and contracts out such services, or receives funding under 49 U.S.C. § 5311, and contracts out such service. 49 C.F.R. § 655.4. Under such circumstances, one is deemed not to be maintaining revenue service vehicle or equipment. *Id.*

[249] 49 C.F.R. § 655.4.

[250] Letter from FTA Chief Counsel Patrick Reilly to Oregon Tri-County Metropolitan Transportation Manager Harry Saporta (Aug. 23, 1999). http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/Interpretations/LegalInterpretations/1998/saporta98.asp.

[251] *Id.* Letter from FTA Chief Counsel Patrick Reilly to San Francisco Bay Area Rapid Transit District Associate General Counsel Andrea Ravas (Apr. 14, 2000), http://transit-safety.fta.dot.gov/DrugAndAlcohol/Regulations/Interpretations/LegalInterpretations/2000/ravas00.asp.

[252] Letter from FTA Chief Counsel Patrick Reilly to St. Joseph Transit Manager John Nardini (Feb. 8, 1999). "If the grantee always goes to the same contractor for overhaul/rebuilding work, and the contractor, based on its past relationship with the grantee, reasonably expects to perform the grantee's overhaul/rebuilding work, the rule applies, even absent a written contract." *Id*. http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/Interpretations/LegalInterpretations/1999/nardini99.asp.

[253] Letter from FTA Chief Counsel Patrick Reilly to Transport Workers Union Local 100 Director Thomas Cassano (Mar. 25, 1999). http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/Interpretations/LegalInterpretations/1999/cass99.asp.

• A private operator (e.g., paratransit broker) and its subcontractors who provide service under an agreement with an FTA recipient;[254] and

• Security guards, tow truck operators, and maintenance contractors who perform safety-sensitive functions, regardless of whether they are paid with federal funds.[255]

The following are *not* considered employees performing safety-sensitive functions:

• Maintenance contractors performing nonsafety critical component repairs (e.g., farebox maintenance, video electronics repair, destination sign repair);[256]

• Maintenance subcontractors;[257]

• An employee who does not otherwise perform a safety-sensitive function (e.g., car servicer or rail janitor) who incidentally controls the movement of a revenue service vehicle, or for whom a vehicle operator stops to let them pass, or who has potential exposure to a high-voltage third rail;[258]

• Local maintenance personnel who work for taxicab companies whose primary purpose is not public transit service, but who incidentally provide public transit service;[259] and

• Contractors that provide overhaul or rebuilding work on an ad hoc or one-time basis, without a long-term contract with the grantee.[260]

[254] Letter from FTA Chief Counsel Patrick Reilly to San Francisco Deputy City Attorney Robin Reitzes (Feb. 5, 1999). *See* http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/Interpretations/LegalInterpretations/1999/reitzes99.asp.

[255] *Id*.

[256] Letter from FTA Chief Counsel Patrick Reilly to Oregon Tri-County Metropolitan Transportation Manager Harry Saporta (Aug. 23, 1999). http://transit-safety.fta.dot.gov/DrugAndAlcohol/Regulations/Interpretations/LegalInterpretations/2000/ravas00.asp.

[257] *Id.* However, grantees may not subcontract out maintenance work merely to avoid complying with the rules. *Id*.

[258] Letter from FTA Chief Counsel Patrick Reilly to Chicago Transit Authority Manager Cary Morgen (Aug. 9, 1999). http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/Interpretations/LegalInterpretations/1999/cmor99.asp.

[259] Letter from FTA Chief Counsel Patrick Reilly to Oregon Tri-County Metropolitan Transportation Manager Harry Saporta (June 17, 1999). http://transit-safety.fta.dot.gov/DrugAndAlcohol/Regulations/Interpretations/LegalInterpretations/2000/ravas00.asp.

[260] Letter from FTA Chief Counsel Patrick Reilly to St. Joseph Transit Manager John Nardini (Feb. 8, 1999). Transit attorneys would be well advised to build a notebook on various topics with opinion letters. *See, e.g.,* http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/Interpretations/LegalInterpretations/1999/nardini99.asp.

4. Anti-Drug and Anti-Alcohol Certifications

The Drug-Free Workplace Act of 1988 (DFWA),[261] and its implementing regulations require that an applicant for FTA funding agree that it will provide a drug-free workplace.[262] In accordance with the DFWA, DOT requires that a grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace by:

1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;[263]

2. Establishing an ongoing drug-free awareness program to inform employees about (a) the dangers of drug abuse in the workplace, (b) any available drug counseling, rehabilitation, and employee assistance programs, (c) the penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

3. Requiring each employee to be engaged in the performance of the grant to be given a copy of a statement published in No. 1 above; and

4. Notifying employees that as a condition of employment under the grant, the employee will (a) abide by terms of the statement, and (b) notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than 5 days after such conviction.[264]

Upon receipt of notice of the criminal drug statute violation, the grantee is further required to "take appropriate personal action" against the employee, which may include (1) terminating the employee or (2) requiring the employee to participate in a drug abuse assistance or rehabilitation program.[265] The applicant's

[261] Drug-Free Workplace Act of 1988, as amended, 41 U.S.C. § 8102 *et seq*.

[262] "Drug-Free Workplace Requirements (Grants)," 49 C.F.R. pt. 29, subpt. F (1999) (archived), as modified by 41 U.S.C. § 8102 *et seq*..; Drug-Free Workplace Act of 1968, as amended, 41 U.S.C. § 8102 *et seq*. and OMB's subpart to its government-wide debarment and suspension rule. 49 C.F.R. § 29.600(a)(1) (archived). Requirements for the drug-free workplace certification for grantees other than individuals are found at 49 C.F.R. pt. 29, App. C. (archived). FTA notes that the provisions of the DFWA are separate from and in addition to the FTA Drug and Alcohol Testing program.

[263] Minutes or resolutions of policy boards can show the adoption of a drug-free workplace policy. A copy of the written policy, memoranda, notifications on bulletin boards, employee handbooks, and letters sent to employees are all potential sources of information showing a grantee has notified employees. Some employers have employees sign statements that they have received such notification. FTA Grants Management Workbook § 20 (2001).

[264] 49 C.F.R. pt. 29, App. C (archived).

[265] *Id*.

"agreement" is further required by the annual FTA Master Agreement, and for recurring grantees, as part of the Annual Certifications and Assurances submitted by the grantee when it files its first grant application within a fiscal year.

Grantees must certify that, as a condition of the grant, they "will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant."[266] If such a grantee is convicted of a criminal drug offense, he or she must report the conviction in writing within 10 days of the conviction to every grant officer.[267] DOT regulations provide that if it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the DFWA, the agency may take action authorized by the Act or utilize any other remedy available to the federal government.[268] Note that the DFWA requirement applies to all employees of the grantee, but does not extend to contractors or the grantee, while the FTA Drug and Alcohol Testing Policy applies only to "safety sensitive" employees and extends to contractors.[269]

An applicant for FTA funds must certify that it has established and implemented an anti-drug program and has conducted employee training.[270] If the applicant for FTA funding has employees regulated by the FRA, it must also certify that it has an anti-drug program and alcohol misuse program complying with FRA regulations.[271] An applicant for FTA funds also must certify that it has established and implemented an alcohol misuse prevention program.[272] States must also certify compliance on behalf of their transit fund subrecipients, as must MPOs.[273] Failure to establish a program of alcohol and controlled substances testing renders an applicant ineligible to receive further FTA grants.[274]

Drug and alcohol policies drafted by a local transit provider may be submitted to the FTA for a determination of adequacy. If a DOT regulation requires interpretation in a specific context, the FTA Administrator or Chief Counsel may provide a binding agency decision.[275]

5. Alcohol and Controlled Substances Testing Procedures

The Omnibus Testing Act required that DOT promulgate regulations requiring FTA-funded mass transportation providers "to conduct preemployment, reasonable suspicion, random, and post-accident testing of mass transportation employees responsible for safety-sensitive functions" for the use of a controlled substance or alcohol in violation of law.[276] The Act and its implementing regulations require that each covered employer[277] establish an anti-drug program,[278] and an anti-drug and -alcohol misuse policy statement.[279]

When a grantee receives notice of an employee's criminal conviction for a drug statute violation that occurred in the workplace, it has ten calendar days within which to report the conviction to the appropriate FTA regional office. Grantee must provide the individual's position title and the grants in which the individual was involved. Further, the grantee must take one of the following actions within 30 days of receiving notice of such a conviction: (1) take appropriate personnel action up to and including termination, consistent with the Rehabilitation Act of 1973, as amended; or (2) require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes.

FTA Grants Management Workbook § 20 (2001).

[266] 49 C.F.R. pt. 29, App. C, Alternate II Certif. § (a) .

[267] *Id*. at Alternate Certif. II § (b).

[268] *Id*. at 2.

[269] FTA Grants Management Workbook § 20 (2001). *See* http:/www.fta.dot.gov/grant_programs.

[270] 49 C.F.R. § 655.14(b) .

[271] "Control of Alcohol and Drug Use," 49 C.F.R. § 655.82. 49 C.F.R. § 655.3.

[272] "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations," 49 C.F.R. pt. 655.

[273] 49 C.F.R. § 655.73 (2001); 66 Fed. Reg. 41996 (Aug. 9, 2001).

[274] 49 U.S.C. § 5331(g). 49 C.F.R. § 655.82(c).

[275] Letter from FTA Chief Counsel Patrick Reilly to Arkansas State Highway and Transportation Department Administrator Jim Gilbert (Nov. 24, 1999). http://transit-safety.fta.dot.gov/drugandalcohol/Regulations/Interpretations/LegalInterpretations/1999/jgil99.asp.

[276] 49 U.S.C. § 5331(b)(1)(A).

[277] Employers that receive FTA assistance, and their contractors, are subject to these regulations. Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996 (Aug. 9, 2001).

[278] 49 C.F.R. § 655.12. *See* 49 U.S.C. § 5331; Prevention of Prohibited Drug Use in Transit Operations, 59 Fed. Reg 7572, 7589 (Feb. 15, 1994); Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996 (Aug. 9, 2001). The antidrug program must include: (1) a statement describing the employer's policy on prohibited drug use and alcohol misuse in the workplace, including the consequences associated with prohibited drug use or alcohol misuse; (2) an education and training program; (3) a testing program; and (4) procedures for referring an employee who has a positive drug test to a Substance Abuse Professional (SAP).

[279] The policy statement must be available to safety-sensitive employees and contain: (1) the identity of the person available to answer questions about it; (2) the categories of employees subject to it; (3) the circumstances under which an employee will be tested; (4) the procedures used for drug and alcohol testing; (5) the requirement that employees submit to testing; (6) a description of employee behavior that constitutes a refusal to test; (7) the consequences of a verified positive drug or alcohol test (of 0.04 or greater) or a refusal to submit to a test; (8) the consequences for an alcohol test of between 0.02 and 0.04; and (9) any additional requirements imposed by the employer not inconsistent with the FTA rules. 49 C.F.R. § 655.15(j), "May not impose requirements that are inconsistent with, contrary to, or frustrate the[se] provisions." Prior to 2001, employees had to be provided with written notice of the employer's antidrug policies and procedures. With the new rules, employers need only specify that their procedures will comply with 49 C.F.R. pt. 40, instead of providing a detailed elaboration of the testing procedures to be used. FEDERAL TRANSIT ADMIN., FTA DRUG AND ALCOHOL REGULATION UPDATES (Issue No. 19, Summer 2001).

The FTA published its initial rules on prohibited drug[280] and alcohol[281] abuse in 1994.[282] In August 2001, FTA promulgated a unified rule for drug and alcohol testing.[283] DOT's procedural rules closely track the *Mandatory Guidelines for Federal Workplace Drug Testing Programs* issued by the U.S. Department of Health and Human Services.[284] Though local transit providers enjoy substantial discretion in the administration of these rules, all alcohol and drug testing must comport with those procedures.[285]

The anti-drug and the alcohol misuse programs must make available the services of a Substance Abuse Professional [SAP].[286] An SAP must be knowledgeable and remain up-to-date on contemporary DOT Substance Abuse Professional Guidelines.[287] The rules require that any employee who has tested positively for drugs or alcohol, or who has refused to submit to such a test, be evaluated by an SAP, regardless of whether the employer elects to terminate the employee. The SAP is responsible for evaluation, referral, and treatment of employees identified through breath and urinalysis testing as positive for alcohol and/or a controlled substance, or who refuse to be so tested. The fundamental responsibility of the SAP is to provide a face-to-face assessment and clinical evaluation of an employee who tests positive for alcohol or drugs to determine whether he or she needs assistance resolving problems with alcohol and/or drug abuse. [288] If the SAP determines that the employee who has refused to submit to, or tested positive in, a drug or alcohol test is in need of assistance in resolving drug abuse problems, the SAP shall recommend a course of action to the employee that the employee must follow before returning to the safety-sensitive position.[289] The SAP shall determine whether the employee has properly followed the SAP's recommendations, and determine the frequency and duration of unannounced follow-up testing.[290] The employer has no obligation under the Act or the regulations to pay for treatment or rehabilitation of a current abuser of drugs or alcohol.[291]

• *Required Tests.* One source notes: "Federal Motor Carrier Safety Regulations require employers to have a policy on drug and alcohol abuse, and DOT rules require pre-employment, periodic, and random drug testing for all employees who are required to hold a commercial driver's license, are transit workers, or who are otherwise in safety sensitive positions."[292] Five types of employee tests are required: (1) pre-employment (including transfer of an employee to a safety-sensitive position); (2) reasonable suspicion; (3) post-accident; (4) random; and (5) return to duty/follow-up (periodic).[293] Drug testing is required in all five situations, while

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Its employees must be required to: (1) abide by the terms of the statement, and (2) notify the employer of any conviction for a violation of a criminal drug statute. Drug-Free Workplace Requirements (Grants), 49 C.F.R. pt. 29, subpt. F (1999), as modified by 41 U.S.C. § 702. This requirement extends to all employees working on any activity under the grant and not merely those whose positions have been wholly or partially federally funded. An employee who pleads *nolo contendere* must also report such conviction to the employer. Letter from FTA Chief Counsel Patrick Reilly to San Francisco Bay Area Rapid Transit District attorney Marco Gomez (Aug. 20, 1999). http://www.fta.dot.gov/library/legal/dral/99toc.htm.

An employer may choose to impose additional requirements not mandated by FTA, such as recurring training or employee rights provisions, though it should indicate that these are the employer's and not FTA's requirements. Neither the Testing Act nor the regulations require that the employer's assessment program pay for the cost of an employee's treatment or rehabilitation. 66 Fed. Reg. 41,996 (Aug. 9, 2001). The employer may also incorporate by reference 49 C.F.R. pt. 40 in its policy statements, or make it available for review by employees upon request. Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996 (Aug. 9, 2001).

[280] 49 C.F.R. pt. 653.

[281] 49 C.F.R. pt. 654.

[282] 49 C.F.R. pt. 655. Shortly thereafter, it published the *Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit,* (revised publication located at http://www.fta.dot.gov/documents/ImplementationGuidelines_Oct2009.pdf), which provides a comprehensive overview of the rules and a useful desk reference for any transit lawyer who deals with drug and alcohol testing program issues.

[283] 49 C.F.R. pt. 655.

[284] 49 C.F.R. pt. 40 (1999); Update of Drug and Alcohol Procedural Rules, 61 Fed. Reg. 18,713 (Apr. 29, 1996); Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 65 Fed. Reg. 79,462 (Dec. 19, 2000).

[285] 49 C.F.R. pt. 655. 65 Fed. Reg. 79,462 (Dec. 19, 2000); Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996 (Aug. 9, 2001).

[286] Originally, DOT defined a substance abuse professional (SAP) as a licensed or certified psychologist, social worker, or employee assistance professional, or an alcohol and drug abuse counselor certified by the National Association of Alcohol and Drug Abuse Counselors. It has since expanded the list of qualified SAPs. *See* Amendment to Definition of "Substance Abuse Professional," 61 Fed. Reg. 9969 (Mar. 12, 1996); 49 C.F.R. pt. 382. §§ 401, 655.52.

[287] 49 C.F.R. § 40.281(b).

[288] Amendment to Definition of "Substance Abuse Professional," 61 Fed. Reg. 9969, 9970 (Mar. 12, 1996).

[289] Such assistance may include full or partial in-patient treatment, out-patient treatment, educational programs, and aftercare. *Id*. at 9970 (Mar. 12, 1996).

[290] 49 C.F.R. pt. 40.

[291] Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996, 41,998 (Aug. 9, 2001).

[292] Deborah L. Markowitz, *A Practical Guide to Hiring and Firing Public Employees*, THE URBAN LAWYER 293, vol. 29, no. 2 (1997).

[293] Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996, 42,000–42001 (Aug. 9, 2001).

alcohol testing is required in all five except for pre-employment.[294]

• *Pre-Employment Testing*. Before 2001, an employer was required to administer a drug test and receive a negative result before hiring a potential employee.[295] Today, an employer may hire an employee before administering such a test, but may not allow the employee to perform a safety-sensitive function unless the applicant takes a drug test with a verified negative result.[296] Prior to the first time an employee performs a safety-sensitive function, the employer must ensure that the employee is tested and has a negative result for marijuana, cocaine, opiates, amphetamines, or PCP, and alcohol.[297] For alcohol, pre-employment testing is discretionary.[298] If the employer chooses to administer an alcohol test, the individual must have an alcohol concentration level below 0.02 before he or she is allowed to perform a safety-sensitive function.[299] Where an employee has been away from work for more than 90 consecutive calendar days,[300] he or she must successfully pass a drug test before returning to a safety-sensitive function.[301]

• *Reasonable Suspicion Testing*. An employer shall conduct testing when it has a reasonable suspicion that the employee has used a prohibited drug, or is under the influence of alcohol. Reasonable suspicion shall be based on "specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors" of the employee, and made by a company official who has been trained in detecting the symptoms of drug abuse and alcohol misuse.[302] Follow-up testing is required where the employee has tested positive for drug use.

• *Post-Accident Testing*. The Testing Act provides that post-accident testing must occur whenever a human life is lost in a mass transportation accident,[303] and that post-accident testing also may be required by DOT whenever bodily injury, significant property damage, or other serious accident occurs involving mass transportation.[304] Under DOT regulations, as soon as practicable following an accident involving the loss of human life, the employer must test each surviving employee operating the mass transit vehicle at the time of the accident, and any other covered employee who could have contributed to the accident.[305] As soon as practicable following an accident not involving the loss of human life, the employer must test each employee operating the mass transit vehicle at the time of the accident, unless the employer determines that the covered employee's performance can be completely discounted as a contributing factor.[306] The regulations require that employers document the decision to test or not to test.[307] Where the employer is unable to perform a post-accident test within the required timeframe, it may use the testing results of post-accident law enforcement agencies when the personnel have independent authority for the tests and the employer is able to obtain the results consonant with local law.[308] Moreover, in the case of a fatality, the transit operator need not perform a post-accident test

[294] The rule requires that the DOT procedures in 49 C.F.R. pt. 40 (1999) be applied to safety-sensitive transit employees. 49 C.F.R. § 655.46. Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996 (Aug. 9, 2001).

[295] Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996 (Aug. 9, 2001).

[296] 49 C.F.R. § 655.41.

[297] 49 C.F.R. § 382.301, 382.305, 382.307, 655.42, 655.43 . An individual who will perform a safety-sensitive function for two separate companies need submit to only one preemployment test, provided that the results are sent to both companies.

[298] If an employer chooses to conduct a pre-employment alcohol test, it must follow the testing procedures in 49 C.F.R. pt. 40.

[299] 49 C.F.R. § 655.42(e). An employee may not be allowed to perform safety-sensitive functions if his alcohol level is 0.04 or greater. 49 C.F.R. § 655.31(b). If the employee tests between 0.02 and 0.04, he or she may not perform a safety-sensitive function until the employee's alcohol concentration drops below 0.02, and 8 hours have elapsed since administration of the test. 49 C.F.R. § 655.35 . An employee's direct supervisor shall not serve as the breath alcohol technician for the performance of an alcohol test. 49 C.F.R. § 655.53. Neither shall the direct supervisor serve as the collection site person for the employee's drug test. *Id*. No alcohol may be consumed within 4 hours of performing a safety-sensitive function. 49 C.F.R. § 655.33.

[300] A test may not be administered for a leave of less than 90 days. FEDERAL TRANSIT ADMIN., *supra* note 208, at 3.

[301] 49 C.F.R. § 655.41(d) (2001); Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996 (Aug. 9, 2001).

[302] 49 C.F.R. § 655.43(a)(b) . Company officials other than supervisors may make a reasonable suspicion determination provided they have been trained in detecting the signs and symptoms of drug abuse and alcohol misuse. FEDERAL TRANSIT ADMIN., *supra* note 208, at 4. For alcohol, the employer may direct reasonable suspicion testing only while the employee is performing safety-sensitive functions, or just prior to or after such performance. 49 C.F.R. § 655.43(c).

[303] 49 U.S.C. § 5331(b)(2)(A).

[304] 49 U.S.C. § 5331(b)(2)(B).

[305] 49 C.F.R. § 655.42(a)(ii).

[306] 49 C.F.R. § 655(a)(2). Such tests have been upheld as Constitutional. Tanks v. Greater Cleveland Regional Transit Auth., 930 F.2d 475 (6th Cir. 1991); Bennett v. Mass. Bay Transp. Auth., 1998 Mass. Super Lexis 164 (Mass. Superior Ct. 1998). The Constitutional dimensions of drug testing are discussed in greater detail below.

[307] 49 C.F.R. § 655.44(d). FEDERAL TRANSIT ADMIN., *supra* note 208, at 5.

[308] 49 C.F.R. § 655.44(f) (2001); Prevention of Prohibited Drug Use in Transit Operations: Prevention of Alcohol Misuse in Transit Operations, 63 Fed. Reg. 67,612 (Dec. 8, 1998); Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996, 42001 (Aug. 9, 2001).

where one has been performed under the testing regulations of the FMCSA.[309]

• *Random Testing*. The principal purpose of testing employees randomly is deterrence.[310] The Testing Act provides that DOT "may prescribe regulations for conducting periodic recurring testing of mass transportation employees responsible for safety-sensitive functions" for the misuse of alcohol or a controlled substance in violation of law or government regulation.[311] The regulations require that the selection of such employees for random drug and alcohol testing shall be made by a scientifically valid method so as to ensure each employee has an equal chance of being tested each time tests are conducted.[312] Employees must be selected for tests in a nondiscriminatory and impartial method, so that no employee is harassed by being treated differently from another in similar circumstances.[313] The dates for conducting the random testing should be spread reasonably throughout the year,[314] though they should be performed at least quarterly.[315] Random testing for alcohol misuse is restricted to safety-sensitive performance, while random drug testing may be performed at any time throughout the workday.[316] The minimum annual percentage rate for random drug testing is 50 percent of covered employees, and 10 percent for alcohol testing.[317] When these regulations were first promulgated, the requirements were 50 percent and 25 percent for drug and alcohol testing, respectively.[318] In the event the national positive test rate again exceeds the permitted level, the minimum random testing rate returns to the original higher level required by the regulations.[319]

The random drug testing rate has been lowered to 25 percent.[320] However, FMCSA and USCG retained the 50 percent rate.[321]

• *Return-to-Duty Testing*. Once an employee has failed or refused to take a drug or alcohol test, an SAP must evaluate the employee, prescribe a treatment regimen, and determine whether the employee has fulfilled the SAP's recommendations. Before such an employee is allowed to return to a safety-sensitive job, he or she must have passed the return to duty drug test, and if the SAP so determines, an alcohol test.[322]

• *Follow-up Testing*. Whenever the SAP determines it appropriate,[323] the employee may be subjected to unannounced follow-up drug and/or alcohol testing.[324] Follow-up testing for drug abuse or alcohol misuse shall consist of at least six tests within the first 12 months of the employee's return to duty.[325] The SAP, and not the employer, determines whether the employee requires up to 60 months of follow-up testing.[326] The SAP determines both the length of follow-up testing and the number of follow-up tests.

As noted above, the Testing Act required that DOT establish the minimum list of the controlled substances for which transit employees may be tested,[327] and DOT requires that employers test employees performing safety-sensitive functions for marijuana, cocaine, opiates, amphetamines, and PCP.[328] If an employee tests positively for one of these controlled substances or alcohol,[329] or otherwise violates the rule, he or she must be removed from his or her safety-sensitive position. The

[309] FEDERAL TRANSIT ADMIN., *supra* note 208, at 5. The post-accident testing regulations of the Federal Motor Carrier Safety Administration may be found at 49 C.F.R. § 382.303.

[310] Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996 (Aug. 9, 2001).

[311] 49 U.S.C. § 5331(b)(1)(B); 49 C.F.R. § 655.45(e).

[312] Examples proffered in the regulations include "a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made." 49 C.F.R. § 655.45(e).

[313] 49 U.S.C. § 5331(d)(8).

[314] 49 C.F.R. § 655.45(g).

[315] Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 66 Fed. Reg. 41,959, 41,996, 42,001 (Aug. 9, 2001).

[316] *Id.* at. 41,996, 41,998 (Aug. 9, 2001).

[317] 49 C.F.R. § 653.47. These numbers are adjusted annually depending upon the number of "positives" for use of prohibited drugs or misuse of alcohol during the preceding year. *See* Prevention of Prohibited Drug Use in Transit Operations: Prevention of Alcohol Misuse in Transit Operations, 66 Fed. Reg. 13,997 (Mar. 8, 2001).

[318] 49 C.F.R. § 655.45(c)(d).

[319] In 1999, the FTA lowered the random alcohol testing rate to 10 percent. Because the random alcohol violation rate was lower than .5 percent for 2 consecutive years (0.19 percent for 1997 and 0.22 percent for 1998), the random alcohol testing rate remained at 10 percent for 2000. Prevention of Prohibited Use in Transit Operations: Prevention of Alcohol Misuse in Transit Operations, 64 Fed. Reg. 66,230 (Nov. 24, 1999).

[320] *See* Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations, 72 Fed. Reg. 1057 (Jan. 9, 2007).

[321] *See* the ODAPC current testing rates for all modes: http://www.dot.gov/odapc/rates.html.

[322] 49 C.F.R. §§ 199.105, 199.225, 199.243, 382.121, 655.46, 655.61; 49 C.F.R. pt. 40, subpt. O. Marine employees are subject to U.S. Coast Guard testing procedures performed by a Medical Review Officer.

[323] The SAP shall determine the frequency and duration of follow-up testing. 49 C.F.R. pt. 40, subpt. O.

[324] 49 C.F.R. § 382.309, 49 C.F.R. pt. 40, subpt. O.

[325] 49 C.F.R. pt. 40, subpt. O.

[326] A union agreement that attempts to circumscribe such SAP discretion is inconsistent with these rules.

[327] 49 U.S.C. § 5331(d)(2)(B).

[328] 49 C.F.R. pt. 40 § 655.41.

[329] 49 C.F.R. § 199.133. An employee may not be removed from a safety-sensitive function before final verification of the negative test result. FEDERAL TRANSIT ADMIN., *supra* note 208, at 11.

regulations require that the employer treat a refusal by a covered employee to submit to a test as a negative test result, and such employees may not perform safety-sensitive functions.[330] If the employee tests positively or refuses the test, the employee must also be informed about available education or rehabilitation programs.[331]

The employer may dismiss the employee, though it has an obligation to provide him with a list of the resources available in evaluating and resolving problems associated with the misuse of alcohol.[332] The employer may also adopt a second chance policy, whereby an employee who has violated the drug and alcohol regulations may be allowed to return to a safety-sensitive position after completing rehabilitation.[333] An employee who tests positive for drug use or refuses to submit to a test shall be advised of the resources available to him or her, including a list of SAPs and counseling and treatment programs.[334] The employer is not obligated to either create or pay for treatment programs for employees. The employer's obligation is limited to informing the employee of counseling and treatment programs available to the employee.

As is discussed in greater detail in Section 10—Civil Rights, one who is "currently engaging in the illegal use of drugs" is not a qualified individual with a disability within the meaning of the Americans with Disabilities Act.[335] For example, in *Redding v. Chicago Transit Authority*,[336] a transit bus driver alleged she was unlawfully dismissed because she tested positively for cocaine pursuant to a mandatory drug test. After the employee first tested positive, the Chicago Transit Authority twice provided the employee with comprehensive drug treatment. The employee then refused to provide a mandatory urine specimen. When she eventually did, it tested positive for narcotics, and the employee was dismissed. Noting that operating a bus is a safety-sensitive duty, and that the regulations require that one who tests positive for an illegal drug must cease performing a safety-sensitive function, the court held that the driver "was not qualified under the ADA to perform her duties as a bus driver after she tested positive for cocaine."[337]

The Omnibus Testing Act required DOT to establish standards for laboratories,[338] testing procedures for controlled substances testing, and laboratory procedures, including use of the best available technology, to ensure reliability and accuracy of controlled substances testing.[339] Such testing must "be confirmed by a scientifically recognized method of testing capable of providing quantitative information about alcohol or a controlled substance."[340] Specimens must be "retained in a secure manner to prevent the possibility of tampering…."[341] DOT must establish procedures and standards for periodic review and criteria for certification of laboratories performing controlled substances testing.[342] DOT adopted such regulations at 49 C.F.R. Part 40.

Congress also required DOT to develop requirements that promote individual privacy in the collection of specimens.[343] Test results and medical information collected shall remain confidential, except that they may be used for imposing appropriate sanctions upon employees who have violated legal requirements.[344] The DOT may require temporary disqualification or permanent dismissal of any employee found to have used or been impaired by alcohol when on duty, or to have used a controlled substance not medically and lawfully prescribed, whether or not on duty.[345] Congress also required DOT to establish requirements for rehabilitation programs and treatment for employees found to have violated these provisions.[346]

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[330] 49 C.F.R. §§ 655.49(a), 655.61(a)(3) (2001); 49 C.F.R. § 40.191 (2001) (describes what constitutes a refusal to take a drug test); 49 C.F.R. § 40.261 (describes what constitutes a refusal to take an alcohol test).

[331] 49 C.F.R. § 199.133 . The employer has the discretion to administer a second test immediately; however, the employer must treat all applicants the same. 49 C.F.R. § 40.197.

[332] Letter from FTA Chief Counsel Patrick Reilly to Kari Blackburn (July 12, 1999).

[333] Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations, 66 Fed. Reg. 41,996 (Aug. 9, 2001).

[334] 49 C.F.R. §§ 655.12, 655.62 .

[335] 42 U.S.C. § 12114(a). One source notes

> The U.S. Department of Health and Human Services (DHHS) is reconsidering whether substance abuse ought to be deemed a disability under the Americans with Disabilities Act (ADA). Under current ADA regulations, use of recreational drugs and alcohol do not qualify as covered disabilities. Protection is provided, however, to those who have successfully completed a drug rehabilitation program or who are currently enrolled in such a program. Furthermore, employers may utilize drug testing to ensure that employees who have completed or are enrolled in rehabilitation programs remain drug free. This differs dramatically from the ADA's rules regarding covered disabilities: employers are forbidden to require medical tests for applicants or current employees. ADA policies also allow employers to prohibit the use of drugs and alcohol in the workplace and to hold employees abusing drugs or alcohol to the same job performance criteria as other employees.

M. Carmela Epright & Robert M. Sade, *Conundrums and Controversies in Mental Health and Illness*, 38 J.L. MED. & ETHICS 722 (2010).

[336] 2000 U.S. Dist. Lexis 14557 (S.D. Ill. 2000).

[337] *Id*. at 8.

[338] FTA testing may only be performed by Department of Health and Human Services-certified laboratories. A list of such laboratories is published during the first week of every month in the Federal Register under the Substance Abuse and Mental Health Services Administration heading. FEDERAL TRANSIT ADMIN., *supra* note 208, at 9.

[339] 49 U.S.C. § 5331(d)(2)(A).

[340] 49 U.S.C. § 5331(d)(4).

[341] 49 U.S.C. § 5331(d)(5).

[342] 49 U.S.C. § 5331(d)(2)(C).

[343] 49 U.S.C. § 5331(d)(1).

[344] 49 U.S.C. § 5331(d)(7). 49 C.F.R. §§ 219.211, 552.13, 655.44 (2004)

[345] 49 U.S.C. § 5331(c).

[346] 49 U.S.C. § 5331(e).

Though the regulations impose extensive record-keeping requirements,[347] restrictions have been placed on outside access to facilities and records.[348] DOT regulations provide that an employer may disclose drug and alcohol testing information to the state oversight agency or grantee required to certify compliance of these procedures.[349] The employer may not release information to a law enforcement agency solely upon the request of such agency.[350] Upon written request of the employee, a covered employee is entitled to obtain copies of records concerning his or her use of drugs and alcohol, or have such records made available to a subsequent employer, or to any other person. USDOT and state agencies overseeing rail fixed guideway systems may have access to facilities and records. As part of an accident investigation, the NTSB may have access. In a workers' compensation, unemployment compensation, or other proceeding relating to a benefit sought by the covered employee, the decision maker may have access.[351] Moreover, in a criminal or civil action resulting from an employee's performance of a safety-sensitive function, where a court believes that information is relevant to the case and issues a court order requiring the employer to produce the information, the employer may release the information to the court.[352]

[347] 49 C.F.R. §§ 655.71, 655.72.

[348] 49 C.F.R. § 655.73 .

[349] 49 C.F.R. § 655.73(i)); Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations, 66 Fed. Reg. 41,996 (Aug. 9, 2001).

[350] Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations, 66 Fed. Reg. 41,996, 41,998 (Aug. 9, 2001).

[351] 49 C.F.R. § 655.73(g) (2001).

[352] 49 C.F.R. § 40.323(a)(2). FEDERAL TRANSIT ADMIN., *supra* note 208, at 3.

The laws and regulations restricting the disclosure of information about the treatment of alcohol and other drug (AOD) use disorders contain safeguards that are significantly more protective of patient confidentiality than ordinary state health privacy provisions, as well as those provided by the federal Health Insurance Portability and Accountability Act of 1966 (HIPAA). Unless one of the exceptions applies, the general rule is that a federally-assisted AOD treatment program may not disclose information regarding the identification, diagnosis, prognosis, or treatment of a person who has sought or received substance abuse treatment. Richard C. Boldt, *Confidentiality of Alcohol and Other Drug Abuse Treatment Information for Emergency Department and Trauma Center Patients*, 20 HEALTH MATRIX: JOURNAL OF LAW–MEDICINE 387 (2010). 42 U.S.C. § 290dd-2; 42 C.F.R. §§ 2.1-.67. Waiver of these requirements can be provided by patient consent and through other circumstances. §§ 2.31-.53. The following exceptions exist:

> (A) To medical personnel to the extent necessary to meet a bona fide medical emergency.
>
> (B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.
>
> (C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

42 U.S.C. § 290dd-2. *See* Laura Rothstein & Ruth Colker, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and The Individual*, 69 U. PITT. L. REV. 531 (2008).

Several states have legalized medical marijuana. The Department of Justice (DOJ) issued guidelines for federal prosecutors in states that have enacted laws authorizing the use of "medical marijuana."[353] DOT insists that the DOJ guidelines have no bearing on its regulated drug testing program: "We will not change our regulated drug testing program based upon these guidelines to Federal prosecutors." The DOT's Drug and Alcohol Testing Regulation—49 C.F.R. Part 40, at 40.151(e)—does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result. An MRO may not verify a drug test as negative based upon information that a physician recommended that the employee use "medical marijuana."[354]

Specifically, DOT's Drug and Alcohol Testing Regulation[355] does not authorize "medical marijuana" use under a state law to be a valid medical explanation for a transportation employee's positive drug test result. It provides that an MRO must not "verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the "medical marijuana" laws that some states have adopted.)"[356]

6. FTA Drug and Alcohol Audits

In 1997, the FTA also announced a drug and alcohol audit program both to determine compliance with federal law and to provide assistance in evaluating drug and alcohol testing procedures and offering corrective recommendations. Systems that are selected for audit are ordinarily notified by letter 6 weeks prior to the arrival of the audit team so as to give ample opportunity for assembling requested information and making logistical arrangements.[357] The audit consists of two parts: a desk audit and an on-site review.[358]

[353] *See* press release and link at http://www.justice.gov/opa/pr/2009/October/09-ag-1119.html (last visited July 2014).

[354] 49 C.F.R. § 40.151. DOT Office Of Drug And Alcohol Policy and Compliance Notice, http://www.dot.gov/odapc.

[355] 49 C.F.R. § 40.151(e).

[356] 49 C.F.R. § 40.151.

[357] Letter from Gordon Linton re FTA Drug and Alcohol Audit Program (July 2, 1997), http://www.fta.dot.gov/legal/

7. Constitutionality of Drug and Alcohol Testing

The Fourth Amendment of the U.S. Constitution protects the people against "unreasonable search and seizure." Except for a relatively small number of exceptions,[359] searches without consent or a valid search warrant are unreasonable. Warrantless drug testing of employees without probable cause or reasonable suspicion of drug use constitutes a search potentially violating the Fourth Amendment. As one court noted, "it is by now well settled that government drug testing of employees constitutes a search or seizure for purposes of the Fourth Amendment."[360] Collection and testing of urine[361] or blood pursuant to a government directive intrudes upon "an excretory function traditionally shielded by great privacy."[362] It involves the highly private function of urination, considered by some to be offensive to personal dignity.[363] The testing of urine for drugs by an arm of the state and municipal governments constitutes a search and, therefore, "must meet the reasonableness requirement of the Fourth Amendment."[364] In evaluating Fourth Amendment claims, courts balance the intrusiveness of the test against the government's interest satisfied by testing.[365]

In *Skinner v. Railway Labor Executives' Ass'n*,[366] the U.S. Supreme Court examined the constitutionality of FRA regulations requiring blood and urine tests of railroad employees involved in certain train accidents, and of employees who violate certain safety rules. In upholding the tests as constitutional, the Court noted that railroad employees' reasonable expectations of privacy were diminished by their participation in an industry pervasively regulated for safety, and the persons tested "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."[367] The Supreme Court weighed the government-as-employer[368] interest in stopping misuse of drugs by employees in safety-sensitive positions against the intrusion upon personal privacy affected by the requirement of administering a urinalysis test.[369] It found the governmental interest in safety compelling, noting that "employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others."[370] *Skinner* is cited in the *Federal Register* notice in which the DOT regulations were promulgated as legal authority for the drug and alcohol testing program.[371] Other cases have extended these principles to employees performing safety-sensitive functions in other transportation modes.[372] The government interest in protecting the safety of large groups of people traveling by mass transit has been held sufficient to override the personal interest of transit employees against warrantless searches.[373]

In the absence of individualized suspicion, the reasonableness of such a search depends on balancing the "special need" of the government against the extent of the intrusiveness of the testing procedure.[374] Reason-

guidance/dear-colleague/1977.

[358] Drug and alcohol audit questions are available online at http://www.dot.gov/odapc.

[359] Among the exceptions to the Fourth Amendment warrant requirement is the "administrative search exception," which upholds drug testing without individualized suspicion in highly regulated industries. Policeman's Benevolent Ass'n v. Township of Washington, 850 F.2d 133, 135 (3d Cir. 1988).

[360] Transport Workers' Union of Phila. v. Southeastern Pa. Transp. Auth., 863 F.2d 1110, 1115 (3d Cir. 1998).

[361] Urine specimen guidelines are published at http://www.dot.gov/odapc/urine-specimen-collection-guidelines.

[362] Vernonia School Dist. v. Acton, 515 U.S. 646, 658, 115 S. Ct. 2386, 2393, 132 L. Ed. 2d 564, 577 (1995).

[363] Transport Workers' Union of Phila. v. Southeastern Pa. Transp. Auth., 863 F.2d 1110, 1119 (3d Cir. 1998).

[364] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665, 109 S. Ct. 1384, 1390, 103 L. Ed. 2d 685, 702 (1989); *see* Burka v. N.Y. City Transit Auth., 739 F. Supp. 814, 819 (S.D.N.Y. 1990). *See* Dorancy-Williams, *supra* note 222.

[365] Gonzalez v. Metro. Transp. Auth., 174 F.3d 1016, 1020 (9th Cir. 1999).

[366] 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). *See* Dorancy-Williams, *supra* note 222.

[367] *Skinner*, 489 U.S. at 628.

[368] *See* Waters v. Churchill, 511 U.S. 661, 671, 114 S. Ct. 1878, 1886, 128 L. Ed. 2d 686, 697 (1994) ("We have never explicitly answered this question, though we have always assumed that its premise is correct—that the government as employer indeed has far broader powers than does the government as sovereign."). "The government, as employer, has legitimate interests that may contravene the constitutional rights of its employees. For example, the government has a legally recognized interest in 'promot[ing] efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.'" Amy W. Estrada, *Saving Face from Facebook: Arriving at a Compromise Between Schools' Concerns With Teacher Social Networking And Teachers' First Amendment Rights*, 32 T. JEFFERSON L. REV. 283 (2010).

[369] *Skinner*, 489 U.S. at 614. *See also* Drake v. Delta Airlines, Inc., 923 F. Supp. 387, 396–97 (E.D. N.Y. 1996), *aff'd in relevant part*, Drake v. Delta Airlines, Inc., 147 F.3d 169, 170–71 (2d Cir. 1998). Beharry v. MTA, 1999 U.S. Dist. Lexis 3157 (E.D. N.Y. 1999).

[370] *Skinner*, 489 U.S. at 628.

[371] DOT, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 73 Fed. Reg. 62910 (Oct. 22, 2008); 49 C.F.R. pt. 40.

[372] International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292 (9th Cir. 1991), upholds the constitutionality of drug testing for bus and commercial truck drivers. What was critical in Teamsters was that the persons tested could be impaired "behind the wheel." Teamsters, 932 F.2d at 1304. Railway Labor Executives' Assoc. v. Skinner, 934 F.2d 1096 (9th Cir. 1991), upheld the random testing of railroad workers, even without a crash or safety violation.

[373] Transport Workers' Union of Phila. v. Southeastern Pa. Transp. Auth., 863 F.2d 1110, 1121 (3d Cir. 1988).

[374] Chandler v. Miller, 520 U.S. 305, 318, 117 S. Ct. 1295, 1303, 137 L. Ed. 2d 513, 525 (1997). *See* Dorancy-Williams, *supra* note 222.

ableness is judged by balancing the search's intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. The factors to be considered are: the nature of the privacy interest upon which the search intrudes, the character of the intrusion, the immediacy of the government concern, and the efficacy of the search for meeting it.[375]

For example, in *Beharry v. New York City Transit Authority*,[376] a case in which a signal maintainer's helper refused to provide a urine sample for drug screening, a federal district court held, "the Authority's request that Beharry provide a small urine sample within a two-hour period caused a minimal interference with Beharry's privacy rights, which must be outweighed by the Authority's concerns with protecting the safety of its employees and customers."[377] Similarly, in *Holloman v. Greater Cleveland Regional Transit Authority*,[378] a case in which a bus driver tested positive for marijuana on the day he was involved in a rear-end collision, the Sixth Circuit held that the transit authority had a compelling governmental interest in "protecting the safety of its passengers and the general public by ensuring that its drivers do not operate buses while under the influence of alcohol or drugs," and that this interest outweighed the employee's diminished expectations of privacy.[379] In another transit case, the Seventh Circuit has held, "the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxicating or drug abuse."[380]

Regarding the nature and immediacy of the government concern, in a case involving bus drivers, the transit authority "presented extensive evidence of a severe drug abuse problem among its operating employees."[381] In *Transport Workers' Union of Philadelphia v. Southeastern Pennsylvania Transportation Authority*,[382] the Third Circuit upheld random testing of safety-sensitive transit employees where the transit authority adduced evidence of a significant drug problem. In a 2-year period, operators of vehicles at fault who tested positive for drugs or alcohol were involved in six major accidents involving 89 injuries; the operator at fault in another accident refused to submit to a test. Twelve percent of "new hires" tested positive. The court concluded, "In light of the evidence connecting impairment with drug use, it was appropriate for SEPTA to design its program in an effort to detect drug users. It was not required to limit its detection efforts to those employees whose then-current impairment could be detected…."[383] The court reiterated the Supreme Court's admonition that even when a search is designed with important public safety considerations in mind, there must still be sufficient safeguards to ensure against abuse of official discretion in deciding when and how the search is implemented.[384] The Third Circuit found SEPTA's random drug testing program reasonable, finding that "the plan contains sufficient safeguards, in the form of confidentiality, chain of custody, verification, and random selection procedures, to protect against abuse of discretion by implementing officials."[385]

However, in *Gonzalez v. Metropolitan Transit Authority*,[386] it was unclear whether the employees would pose a substantial immediate threat to public safety if impaired by drugs or alcohol, whether the procedure for testing them would be reasonably effective for finding out if they are impaired, or whether the tests as performed were an undue invasion of their privacy. The court therefore held the testing unconstitutional. Similarly, in *Bolden v. Southeastern Pennsylvania Transportation Authority*,[387] the Third Circuit upheld a $285,000 jury award in a 42 U.S.C. § 1983 action against SEPTA, concluding that compulsory, suspicionless back-to-work testing of a maintenance custodian who tested positive for marijuana use constituted a violation of the employee's Constitutional rights. The court noted that the employee was not a safety-sensitive employee likely to create any great risk of causing harm to others, and did not have diminished privacy expectations due to the pervasive government regulation. Hence, a transit agency's "test everyone" drug testing program can get the agency in trouble, because the agency loses the safe harbor of the regulations as to employees who perform safety-sensitive functions.

Nonetheless, in a Section 1983 claim alleging violation of the Fourth Amendment brought by 18 bus or rail employees involved in on-the-job incidents who had failed their blood and urine tests, the D.C. Circuit held that WMATA was immune from suit because the local jurisdictions had in the charter establishing the multistate authority both conferred on it sovereign immunity and delegated to it 11th Amendment insulation from

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[375] Vernonia School Dist. v. Acton, 515 U.S. 646, 653, 115 S. Ct. 2386, 2391, 132 L. Ed. 2d 564, 575 (1995).

[376] 1999 U.S. Dist. Lexis 3157 (E.D. N.Y. 1999).

[377] *Id*. at 30.

[378] 1991 U.S. App. Lexis 6904 (6th Cir. 1991).

[379] *Id*. at 4.

[380] Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976).

[381] Transport Workers' Union v. Southeastern Pa. Transp. Auth., 884 F.2d 709, 711 (3d Cir. 1988). The U.S. Supreme Court granted certiorari, and vacated and remanded for reconsideration the earlier case. On remand, the Third Circuit held that SEPTA's random testing program was Constitutionally justified and that a dispute over random drug testing was a minor dispute subject to arbitration under the Railway Labor Act.

[382] 863 F.2d 1110 (3d Cir. 1988).

[383] *Id.* at 1120.

[384] *See* Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

[385] Transport Workers Union, 863 F.2d at 1121 (3d Cir. 1988).

[386] 174 F.3d 1016, 1020 (9th Cir. 1999).

[387] 953 F.2d 807, 823-4 (3d Cir. 1991).

suit in federal courts.[388] Section 1983 claims are discussed in greater detail in Section 10—Civil Rights. Interstate compacts and sovereign immunity were discussed in Section 1.[389]

Beyond the Fourth Amendment issues raised here, in at least one instance a First Amendment issue was raised. The Metro-Dade Transit Agency was confronted with an employee who, during an observed drug test, refused to remove a cap bearing a religious inscription due to a sincerely-held religious belief. FTA regulations require that prior to a drug or alcohol test being administered, the employee must remove unnecessary outer garments so that he or she would not be able to conceal items used to obstruct the test.[390] To accommodate the employee's religious belief, the transit agency determined the employee would be allowed to keep his hat on provided he agreed to allow an observed specimen collection. The FTA concluded this was an appropriate balance between accommodating the employee's First Amendment rights and the transit agency's responsibilities with complying with federal regulations.[391]

The DOT Office of Drug and Alcohol Policy and Compliance has since promulgated Direct Observation Procedures. They authorize directly observed collections when:

• The employee attempts to tamper with his or her specimen at the collection site.
• The specimen temperature is outside the acceptable range.
• The specimen shows signs of tampering, such as an unusual color, odor, or characteristic.
• The collector finds an item in the employee's pockets or wallet that appears to have been brought into the site to contaminate a specimen, or the collector notes conduct suggesting tampering.
• The Medical Review Officer (MRO) orders the direct observation because:
• The employee has no legitimate medical reason for certain atypical laboratory results.
• The employee's positive or refusal [adulterated/substituted] test result had to be cancelled because the split specimen test could not be performed (for example, the split was not collected).
• The test is a Follow-Up test or a Return-to-Duty test.[392]

8. Preemption

The Supremacy Clause of the U.S. Constitution "invalidates any state law that contradicts or interferes with an Act of Congress."[393] The strongest case for federal preemption exists when Congress has expressly declared its intent.[394] The Omnibus Testing Act provides that "a State or local government may not prescribe, issue, or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this section."[395] However, a state criminal law imposing sanctions "for reckless conduct leading to loss of life, injury, or damage to property" is not preempted.[396] The regulations provide that they preempt state law to the extent that (1) compliance with both the state or local requirement and the DOT drug and alcohol regulations is not possible, or (2) compliance with the state or local requirement is an obsta-

[388] Sanders v. Wash. Metro. Area Transit Auth., 819 F.2d 1151 (D.C. Cir. 1987).

[389] Some entities are created by an Interlocal Cooperation Agreement. Two (the Bi-State Development Authority and the Washington Metropolitan Transportation Authority) are the result of Interstate Compacts approved by Congress.

[390] 49 C.F.R. § 40.25(f)(4) .

[391] Letter from Patrick Reilly to Metro-Dade Transit Agency Chief Ronald Jones (Dec. 7, 1999). http://transit-safety.fta.dot.gov/DrugAndAlcohol/Regulations/Interpretations/LegalInterpretations/1999/rtj99.asp.

[392] These policies continue as follows:

2. The observer must be the same gender as the employee.

3. If the collector is not the observer, the collector must instruct the observer about the procedures for checking the employee for prosthetic or other devices designed to carry "clean" urine and urine substitutes and for watching the employee urinate into the collection container.

• The observer requests the employee to raise his or her shirt, blouse or dress/skirt, as appropriate, above the waist, just above the navel; and lower clothing and underpants to mid-thigh and show the observer, by turning around, that the employee does not have such a device.

• If the Employee Has a Device: The observer immediately notifies the collector; the collector stops the collection; and the collector thoroughly documents the circumstances surrounding the event in the remarks section of CCF. The collector notifies the DER. This is a refusal to test.

• If the Employee Does Not Have a Device: The employee is permitted to return clothing to its proper position for the observed collection. The observer must watch the urine go from the employee's body into the collection container. The observer must watch as the employee takes the specimen to the collector. The collector then completes the collection process.

4. Failure of the employee to permit any part of the direct observation procedure is a refusal to test.

See http://www.dot.gov/odapc/reminder-notice-direct-observation-dot-return-to-duty; 49 C.F.R. pt. 40.

[393] Hayfield N. R. Co. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 627, 104 S. Ct. 2610, 2614, 81 L. Ed. 2d 527, 533 (1984).

[394] *See, e.g.*, Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31, 116 S. Ct. 1103, 1108, 134 L. Ed. 2d 237, 244 (1996); Greenwood Trust Co. v. Commonwealth of Mass., 971 F.2d 818, 822 (1st Cir. 1992).

[395] 49 U.S.C. § 5331(f)(1).

[396] *Id*. "Preemption," an example of a state law not in conflict with the federal requirements is Florida Statutes, Section 440.101. This Florida Drug & Alcohol Statute grants employers who adopt the law both a discount for Workers' Compensation premiums and bars employee recovery in accidents where the employee tests positive post-accident. (The case law seems to imply a causation requirement.) The law also gives authority for testing additional substances identified in the state law, but not the federal requirements. The blending of the two by allowing federal law to preempt and state law to supplement, however, is no easy task. One must be equally as concerned, when adopting the state law, not to violate the collective bargaining agreement(s), which apply.

cle to the accomplishment and execution of the DOT drug and alcohol regulations.[397] The regulations also provide that they are not to be construed to preempt any state criminal law "that imposes sanctions for reckless conduct leading to actual loss of life, injury, or damage to property."[398]

Federal courts have held that where Congress has mandated random drug and alcohol screens for employees who perform safety-sensitive functions, contrary state law cannot stand as an obstacle to the testing protocol.[399] Noting that federal drug and alcohol testing regulations were imposed by Congress under the taxing and spending clause of the U.S. Constitution, the First Circuit Court of Appeals in *O'Brien v. Massachusetts Bay Transportation Authority*,[400] held that when the federal government conditions the receipt of federal money on complying with certain requirements, and the state accepts the money, the Supremacy Clause requires the local law (in this case, the Massachusetts Declaration of Rights, which prohibited unreasonable searches and seizures) to yield. The court concluded:

> Massachusetts authorities have elected to draw on federal coffers to finance a bevy of mass transit projects. Having accepted those funds, they must abide by the conditions that Congress attached to them, one of which mandates random drug and alcohol screens for employees who…perform safety-sensitive functions. Because applicable law includes an express preemption provision, contrary state law cannot stand as an obstacle to the testing protocol.[401]

The Federal Omnibus Transportation Employee Testing Act provides that a "State or local government may not prescribe or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this section."[402] The regulations provide that when compliance with both state laws and the federal regulations is not possible, or when the state laws are an "obstacle to the accomplishment and execution of any requirement" in the regulations, the state law is preempted.[403] One court observed, "The language in the statute, combined with the federal regulations and commentary, explicitly preempt state law to the extent that it conflicts or obstructs the enforcement of DOT regulations." [404]

D. MOTOR VEHICLE DRIVER QUALIFICATIONS

1. Federal Statutes

In order to promote the safe operation of commercial motor vehicles (CMVs), to minimize dangers to the health of CMV operators and other employees, and to ensure increased compliance with traffic laws and CMV safety and health regulations,[405] DOT has been given wide-ranging jurisdiction to address highway safety.[406] CMVs and their driver qualifications and certifications are regulated by the DOT's FMCSA.[407]

The Motor Carrier Safety Act of 1984[408] defined a CMV as "any self-propelled vehicle in interstate commerce to transport passengers or property" if the vehicle transports more than 16 passengers (including the driver),[409] has a gross weight of 10,001 or more pounds, or transports hazardous materials requiring the vehicle to be placarded.[410] The Motor Vehicle Safety Act of 1986[411] required state implementation of a single,[412]

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[397] 49 C.F.R. §§ 653.9(a), 654.9(a).

[398] 49 C.F.R. §§ 653.9(b), 654.9(b).

[399] O'Brien v. Mass. Bay Transp. Auth., 162 F.3d 40 (1st Cir. 1998).

[400] *Id.*

[401] *Id.* at 45.

[402] 49 U.S.C. § 31306(g).

[403] 49 C.F.R. § 382.109. The federal regulations explain the purpose of preemption:

> The purpose of preemption is to avoid the confusion and expense of inconsistent requirements for employers or testing entities that operate in several States and to prevent interference with the functioning of the Federal program by extraneous, burdensome requirements that may defeat its purpose and benefits by making effective implementation difficult or impossible (e.g., by requiring that employers pay for any rehabilitation or requiring confirmation tests beyond those required by DOT). Because of the nationwide application of the Federal program and the interstate nature of the operations covered, even minor requirements in the aggregate may become unduly burdensome. For this reason, we intend to scrutinize closely State and local requirements under this preemption authority.

See Limitation on Alcohol Use by Transportation Workers, 59 Fed. Reg. 7302, 7317 (Feb. 15, 1994).

[404] Belde v. Ferguson Enters., 2005 U.S. Dist. LEXIS 18770 (D. Minn. 2005).

[405] 49 U.S.C. § 31131(a).

[406] DOT has jurisdiction to conduct and make contracts for inspections and investigations; compile statistics; make reports; issue subpoenas; require production of documents and property; take depositions; hold hearings; prescribe record keeping and reporting; conduct and make contracts for studies, development, testing evaluation, and training; and perform such other acts it deems appropriate. 49 U.S.C. § 31133(a).

[407] The Motor Vehicle Safety Act of 1986, Pub. L. No. 99-570, 100 Stat 3207, 3209 (1986). General driver qualifications are set forth in 49 C.F.R. § 391.11. *See* Fed. Reg. 33,254 (June 18, 1998). *See also* GEORGE L. REED, FEDERAL AND STATE LICENSING AND OTHER SAFETY REQUIREMENTS FOR COMMERCIAL MOTOR VEHICLE OPERATORS AND EQUIPMENT (Transit Cooperative Research Program, Legal Research Digest No. 18, Transportation Research Board, 2001).

[408] Pub. L. No. 98-554, 98 Stat. 2832 (1984).

[409] CMVs that transport between 9 and 15 passengers (including the driver) for compensation must file a motor carrier identification report, mark their vehicles with a DOT identification number, and maintain an accident register. 49 C.F.R. pt. 390. Federal Motor Carrier Safety Regulations; Definition of Commercial Motor Vehicle (CMV); Requirements for Operators of Small Passenger-Carrying CMVs**,** 66 Fed. Reg. 2756 (Jan. 11, 2001).

[410] 49 C.F.R. § 390.5.

[411] Pub. L. No. 99-570, 100 Stat. 3207 (1986).

[412] No longer may a driver hold a license from more than one state. 49 U.S.C. § 31302 (2003).

classified commercial driver's license (CDL) program.[413] The ICC Termination Act of 1995[414] defined a CMV as a vehicle that is

> designed or used to transport passengers for compensation, but excluded vehicles providing taxicab service and having a capacity of not more than 6 passengers and not operated on a regular route or between specified places, [or] is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation.

TEA-21[415] further amended the CMV definition to make it clear that the 10,001 pounds requirement referred to either "gross vehicle weight" (GVW) or the "gross vehicle weight rating" (GVWR).

If a motor carrier's operations include interstate transportation, it must comply with the applicable federal safety regulations and Operating Authority rules, in addition to state and local requirements. The carrier must notify the state in which it plans to register its vehicle(s) of its intention to operate in interstate commerce to ensure that the vehicle is properly registered for purposes of the International Registration Plan (IRP) and the International Fuel Tax Agreement (IFTA). The registering state ordinarily will assist by collecting the appropriate fees and distributing a portion of those fees to the other states in which the carrier operates.

If the carrier operate exclusively in intrastate commerce, it must comply with applicable State and local regulations, as well as certain Federal regulations, including:

- The commercial driver's license (CDL) requirement (for drivers operating commercial motor vehicles as defined in 49 C.F.R. 383.5);
- Controlled substances and alcohol testing for persons required to possess a CDL; and
- Minimum financial responsibility for the intrastate transportation of certain quantities of hazardous materials and substances.

2. Commercial Motor Vehicles

A CMV is defined as a self-propelled or towed vehicle used in interstate commerce to transport passengers or property if the vehicle: (a) has a GVW or GVWR of 10,001 pounds or more,[416] whichever is greater; (b) is designed or used to transport more than eight passengers (including the driver) for compensation: (c) is designed or used to transport more than 15 passengers (including the driver) and is not used to transport passengers for compensation; or (d) is used to transport hazardous material in such quantity as to require placarding.[417] Moreover, the Motor Carrier Safety Improvement Act of 1999[418] added commercial vans known as "camionetas" and commercial vans operating in interstate commerce outside of commercial zones that have been determined to pose serious safety risks.

3. National Driver Register Program

DOT must maintain an informational system that serves as a clearinghouse and depository of information about the licensing, identification, and disqualification of CMV operators.[419] Under the DOT's National Driver Register program, states are to notify DOT of any individual who is denied a motor vehicle operator's license; or had it revoked, suspended, or canceled for cause; or who is convicted under state motor vehicle laws for operating a motor vehicle under the influence of alcohol or a controlled substance, for being involved in a fatal traffic accident, reckless driving or racing on the highways, for failing to give aid or information when involved in an accident resulting in death or personal injury, or for engaging in perjury or knowingly making a false affidavit or statement to officials regarding activities governed by law involving the operation of a motor vehicle.[420]

4. Driver Requirements, Suspension, and Disqualification

No individual may operate a CMV without a valid CDL.[421] An individual may hold only one CDL. The "single CDL" requirement was adopted in response to several serious accidents in which it was discovered that commercial drivers held licenses from multiple states, and continued to operate a commercial vehicle using a second or third license after the driver's initial license had been suspended, revoked, terminated, or canceled. Commercial driver's licenses are issued by states[422] under minimum uniform standard regulations promulgated by DOT requiring written and driver tests ensuring, among other things, that the operator has a working knowledge of applicable DOT safety regulations,[423] and has adequate physical qualifications for

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[413] It required that DOT establish and maintain a "National Driver Register to assist chief driver licensing officials of participating States in exchanging information about the motor vehicle driver records of individuals." 49 U.S.C. § 30302. Before this legislation was passed, persons licensed to drive automobiles could drive tractor-trailers.

[414] Pub. L. No. 104-88, 109 Stat. 803 (1995).

[415] Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998).

[416] There are three classes of CMVs: Class A (any combination of vehicles with gross weight of 26,001 or more pounds, provided the vehicle(s) towed exceed 10,000 pounds); Class B (vehicles with gross weight of 26,001 or more pounds, provided the vehicle towed is less than 10,000 pounds in weight); and Class C (any vehicle other than a Class A or B vehicle that is either designed to transport 16 or more passengers, including the driver, or is placarded for hazardous materials. It is the Class C vehicle that is relevant for transit operators.

[417] 49 U.S.C. § 31132.

[418] Pub. L. No. 106-159, 113 Stat. 1748 .

[419] 49 U.S.C. §§ 31106, 31309(a).

[420] 49 U.S.C. § 30304(a).

[421] 49 U.S.C. § 31302.

[422] 49 U.S.C. § 31301(3).

[423] 49 U.S.C. §§ 31305(a), 31308. 49 C.F.R. § 383.71.

the position.[424] A driver of passengers must secure a P (passenger) endorsement on his or her CDL, which requires passing a specific knowledge and skills test. The general knowledge test is comprised of at least 30 questions, and the applicant must answer 80 percent of them correctly.[425] The applicant must also pass a skills test in a vehicle of the type he or she is expected to operate.[426]

CMV drivers are also required to notify their employer of violations of state or local motor vehicle laws; driver's license suspension, revocation, or cancellation; and any previous employment as a CMV operator.[427] The employer may not knowingly allow its employee to operate a CMV while he or she has a driver's license suspended, revoked, or cancelled; has lost the right to operate a CMV in a state, or has been disqualified from operating a CMV; or has more than one driver's license.[428]

Individuals must be disqualified for 1 year from operating a CMV for using a CMV in the commission of a felony, or a first offense of driving a CMV under the influence of alcohol or a controlled substance or leaving the scene of an accident.[429] They may be disqualified for life if they have more than one violation of driving a CMV under the influence of alcohol or controlled substances or leaving the scene of an accident, or using a CMV in the commission of more than a single felony.[430] CMV drivers convicted under federal, state, or local law of violating railroad-highway grade crossing standards may be disqualified by the FMCSA from operating a CMV.[431] DOT regulations also limit hours of service.[432] Certain "whistleblower" protections have been extended to employees who file a complaint regarding violations of CMV safety regulations or refuse to operate a vehicle because of such violations or a reasonable apprehension of personal injury.[433] DOT must also conduct timely investigations of nonfrivolous written complaints alleging substantial safety violations.[434] Violations of the CDL regulations by drivers may subject them to civil fines of up to $2,500 and criminal penalties of up to $5,000 and/or up to 90 days in prison; employers who knowingly allow a driver to operate a CMV without a valid CDL may be subject to a fine of up to $10,000.[435]

The ADA Amendments Act of 2008 (ADAAA) focuses on discrimination rather than the individual's disability. The ADAAA retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that the statutory terms should be interpreted.[436]

DOT regulations prohibit an insulin-dependent diabetic from driving a CMV weighing 10,001 pounds or more or designed to carry 15 or more passengers.[437] They also require that drivers undergo periodic physical examinations. In *Myers v. Hose,*[438] the Fourth Circuit U.S. Court of Appeals addressed the collision of these

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[424] 49 C.F.R. pts. 383, 391.

[425] Commercial Driver Testing and Licensing Standards, 53 Fed. Reg. 27,628, 27,654 (July 21, 1988), 49 C.F.R. § 383.111, App. to subpt. G.

[426] 49 C.F.R. § 383.113.

[427] 49 U.S.C. § 31303.

[428] 49 U.S.C. § 31304.

[429] 49 U.S.C. § 31310(b). One is deemed driving under the influence of alcohol when one has a blood alcohol concentration level at or above .04 percent. 49 U.S.C. § 31310(a). DOT must also suspend a CMV operator for at least 60 days for committing two serious traffic violations involving a CMV within a 3-year period. 49 U.S.C. § 31310(e).

[430] 49 U.S.C. § 31310(c)(d). DOT must also suspend a CMV operator for at least 60 days for committing two serious traffic violations involving a CMV within a 3-year period. 49 U.S.C. § 31310(e). Drivers must notify the state and their employer of any state or local motor vehicle traffic control law violation. 49 C.F.R. §§ 383.31, 391.27. States in which a traffic violation occurs must notify the CMV-issuing state thereof. 49 C.F.R. § 384.209. Traffic convictions when driving noncommercial vehicles are also relevant to CMV certification. 49 C.F.R. § 383.77.

[431] 49 U.S.C. § 31310(j). 49 C.F.R. pts. 383, 384. Commercial Driver Disqualification Provision, 64 Fed. Reg. 48,104 (Sept. 2, 1999). Other disqualification criteria are set forth in 49 C.F.R. 391.15.

[432] 49 U.S.C. § 31502(b). 49 C.F.R. pts. 350, 390, 394, 395, and 398.

[433] 49 U.S.C. § 31105.

[434] 49 U.S.C. § 31143.

[435] 49 C.F.R. § 38353.

[436] In particular, the Act:

• Directs EEOC to revise the portion of its regulations that defines the term "substantially limits";

• Expands the definition of "major life activities" by including two nonexhaustive lists:

1. The first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);

2. The second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, respiratory, neurological, brain, circulatory, endocrine, and reproductive functions");

• States that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;

• Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;

• Provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is transitory and minor;

• Provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation; and

• Emphasizes that the definition of "disability" should be interpreted broadly.

[437] 49 C.F.R. §§ 391.41(b)(3), 391.43, 391.64.

[438] 50 F.3d 278 (4th Cir. 1995).

physical requirements and the Americans with Disabilities Act (ADA). Joseph Myers had a distinguished record as a bus driver (of a vehicle carrying more than 16 passengers) for the County of Frederick, Maryland, but upon his DOT-mandated physical, was diagnosed with heart failure, hypertension, and uncontrollable diabetes. Myers requested time to bring his diabetes under control. But the County asked him to resign or retire. He chose the latter option, then brought suit under the ADA.[439] The court in *Myers* observed that in determining whether the ADA has been violated, it must be demonstrated that the plaintiff is able to perform the essential duties of the job in question, and if not, whether he could do it with reasonable accommodation.[440] The court noted that, "The basic function of a bus driver is to operate his motor vehicle in a timely, responsible fashion. It is essential that a driver perform these duties in a way that does not threaten the safety of his passengers or other motorists."[441] Because of his diabetes, heart condition, and hypertension, the court concluded that his driving "would profoundly compromise the safety of his passengers, pedestrians, and other motorists" and therefore he was unable to perform the essential duties of the job.[442] The Fourth Circuit also held that "reasonable accommodation does not require the County to wait indefinitely for Myers' medical condition to be corrected, especially in light of the uncertainty of cure."[443]

Similarly, a driver who has a "heart condition" and thereby is ineligible for DOT certification is not a "qualified individual" within the meaning of the ADA during the period when he did not possess DOT certification. The employer is legally required to refuse the driver's request to return to driving a CMV until he presented the proper certification.[444] Nor is it incumbent upon the employer to provide a disabled employee with another job when he or she is unable to meet the demands of the present position.[445] Several other cases have held that dismissal of a bus driver who is prohibited by DOT regulations from physically performing such activities is not a violation of the ADA.[446]

5. State CMV Regulation

As noted previously, the definition of a CMV is a vehicle operating in interstate commerce. Most transit operators provide intrastate service. Nonetheless, the federal program requires the coordination and cooperation of the states. As noted previously, the states issue CDLs.[447] States are also relied upon to inform DOT of the infractions of CMV operators so that its clearinghouse function can operate effectively.[448] Moreover, public transit providers typically have state or municipal statutory authority to promulgate safety regulations.[449] States are encouraged to develop and implement programs to improve CMV safety and enforce CMV regulations.[450] DOT may delegate the responsibility of investigating and enforcing its CMV regulations to a state.[451] The statute makes clear that states are obliged to adopt and implement a program for testing and ensuring the fitness of CMV operators consistent with DOT's minimum standards and may issue a CDL only to individuals who pass a written and driving test for the operation of a CMV. State should also have in effect and enforce blood alcohol concentration prohibitions at least

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[439] Since the ADA is discussed at length in Section 10—Civil Rights, its requirements will not be repeated here.

[440] *Myers*, 50 F.3d at 281.

[441] *Id.* at 282 (citing Strathie v. Dep't of Transp., 716 F.2d 227, 231–32 (3d Cir. 1983).

[442] *Id.* at 282.

[443] *Id.* at 283. *See also* Davidson v. Atlantic City Police Dep't, 1999 U.S. Dist. Lexis 13,553 (D. N.J. 1999).

[444] Bay v. Cassens Transp. Co., 212 F.3d 969, 974 (7th Cir. 2000).

[445] Bates v. Long Island R.R. Co., 997 F.2d 1028, 1035–36 (2d Cir. 1993). The EEOC has taken the position that an employer may have an obligation to provide an employee with an available light duty job as a reasonable accommodation to a disability. *EEOC, Enforcement Guidance and Workers' Compensation at the ADA*, Questions 27-29 (Sept. 3, 1996). However, the employer need not create a light-duty job to accommodate a disabled employee. Hoskins v. Oakland County Sheriff's Dep't, 227 F.3d 719, 729 (6th Cir. 2000); Gile v. United Airlines, 95 F.3d 492, 499 (7th Cir. 1996); White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995). Nor is there an obligation to reassign a disabled employee to a job where there is a more qualified nondisabled candidate for the position. EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000).

[446] *See, e.g.,* Dougherty v. El Paso, 56 F.3d 695, 698 (5th Cir. 1995); Chandler v. City of Dallas, 2 F.3d 1385, 1394 (5th Cir. 1993); Christopher v. Laidlaw Transit, 899 F. Supp. 1224, 1227 (S.D.N.Y. 1995).

[447] 49 U.S.C. § 31301(3).

[448] 49 U.S.C. § 30304(a).

[449] For example, Sections 6 and 31 of the Illinois Metropolitan Transit Authority Act are the source of the CTA's power to determine its own safety regulations. Section 6 provides that the CTA: "shall have power to acquire, construct, own, operate and maintain for public service a transportation system in the metropolitan area of Cook County and outside thereof to the extent herein provided and all the powers necessary or convenient to accomplish the purposes of this Act, including, without limiting the generality of the foregoing, the specific powers enumerated herein." 70 ILL. COMP. STAT. 3605/6. Section 31 provides that the Chicago Transit Board:

> shall have power to pass all ordinances and make all rules and regulations proper or necessary to regulate the use, operation and maintenance of its property and facilities, and to carry into effect the powers granted to the Authority, with such fines or penalties as may be deemed proper. No fine or penalty shall exceed $300.00, and no imprisonment shall exceed six (6) months for one offense. All fines and penalties shall be imposed by ordinances, which shall be published in a newspaper of general circulation published in the metropolitan area. No such ordinance shall take effect until ten days after its publication.

70 ILL. COMP. STAT. 3605/31. Bulger v. Chicago Transit Auth., 345 Ill. App. 3d 103, 801 N.E.2d 1127 (2003).

[450] 49 U.S.C. § 31103(a).

[451] 49 U.S.C. § 31133(c).

as stringent as those adopted by DOT.[452] DOT has promulgated regulations addressing state-administered CDL procedures[453] and driver physical qualifications requirements.[454]

A state that enacts a law or regulation affecting CMV safety must submit a copy to DOT immediately after its enactment or issuance.[455] If the DOT Secretary determines it is not as stringent as that prescribed by DOT, the state regulation may not be enforced.[456] Some states have enacted laws explicitly adopting Federal Motor Carrier Safety Regulations.[457]

E. BUS EQUIPMENT AND TESTING REQUIREMENTS

Congress has mandated that DOT promulgate regulations ensuring that CMVs are maintained, equipped, loaded, and operated safely.[458] Regulations have been promulgated addressing the safety features of buses, including such areas as antilock brake systems,[459] glazing and window construction,[460] seat belt assemblies and anchorages,[461] occupant crash protection,[462] school bus operations,[463] and bus testing.[464] CMVs must pass a state or federal inspection of all safety equipment mandated by regulation.[465] States may enforce a program for inspection of CMVs as or more stringent than that adopted by DOT.[466] Bus testing is the only requirement coming from 49 U.S.C. Chapter 53.[467] The rest are all FMCSA requirements.

In each application for the purchase or lease of buses, a recipient of FTA funds must certify that any new bus model, or any bus model with a major change in configuration or components, to be acquired or leased with FTA funds will be tested at the approved bus testing facility.[468] Gas-powered trolley buses are fully capable of being tested. Dual-mode electric buses using overhead power can be tested in their fueled mode. The buses must meet all applicable Federal Motor Vehicle Safety Standards.[469] Buses are tested for maintainability; reliability; safety; performance; structural integrity, including structural strength and distortion; structural durability; and fuel economy.[470] Testing for braking and emissions was added by ISTEA. The safety test consists of a handling and stability test, assessing the vehicle's ability to avoid obstacles and change double lanes at increasing speeds up to 45 mi per hour or until the vehicle can no longer be operated over the course, whichever is lower.[471] Both the preaward and postdelivery audits must include a manufacturer's Federal Motor Vehicle Safety certification.[472] The preaward and postdelivery audits are Buy America requirements that apply to any bus order, not just a new bus or bus model that is subject to new bus testing. FTA does not require Buy America audits for used bus sales, since the original purchaser probably conducted them during the initial acquisition. Bus testing, preaward and postdelivery

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[452] 49 U.S.C. § 31311.

[453] 49 C.F.R. pt. 383.

[454] 49 C.F.R. pt. 391.

[455] 49 U.S.C. § 31141(b).

[456] 49 U.S.C. § 31141(c)(3). Moreover, a state may not enforce a CMV law or safety regulation that the DOT Secretary decides may not be enforced. 49 U.S.C. § 31141(a). The state may, however, petition for a waiver, which the Secretary may grant if it is "consistent with the public interest and the safe operation of commercial motor vehicles." 49 U.S.C. § 31141(d).

[457] For example, Illinois has explicitly adopted 49 C.F.R. pts. 385, 390, 391, 392, 393, 395, and 396, and ordered its Department of Transportation to adopt regulations "identical in substance to the Federal Motor Carrier Safety Regulations…." 625 ILL. COMP. STAT. 5/18b-105(e). *See also* N.J. STAT. ANN. § 48:4-2.1e *et seq*.

[458] 49 U.S.C. § 31136(a)(1). *See* ROLLAND KING, SYNTHESIS OF TRANSIT PRACTICE: BUS OCCUPANT SAFETY (Transit Cooperative Research Program, Synthesis 18, National Academies, 1996), for a survey of the practical means by which passenger safety may be enhanced.

[459] 49 C.F.R. § 393.55.

[460] 49 C.F.R. §§ 393.61, 393.63.

[461] 49 C.F.R. § 393.93. Congress has mandated that such regulations "ensure that brakes and brake systems of commercial motor vehicles are maintained properly and inspected by appropriate employees. At minimum the regulations shall establish minimum training requirements and qualifications for employees responsible for maintaining and inspecting the brakes and brake systems." 49 U.S.C. § 31137(b).

[462] 49 C.F.R. § 571.208.

[463] 49 C.F.R. § 605.3.

[464] 49 C.F.R. § 665.11.

[465] 49 U.S.C. § 31142(a).

[466] 49 U.S.C. § 31142(c)(1)(A). A state may be prohibited from enforcing its inspection program if, after notice and hearing, DOT determines the state is not enforcing its program in a way that achieves the objectives of federal law. 49 U.S.C. § 31142(c)(2).

[467] In 2009, FTA amended its bus testing regulation to incorporate brake performance and emissions tests into FTA's bus testing program to comply with statutory changes. Bus Testing; Phase-In of Brake Performance and Emissions Testing, and Program Updates, 74 Fed. Reg. 51,083 (Oct. 5, 2009).

[468] Federal Transit Act of 1964, 88 Pub. L. No. 365, 78 Stat. 302;, Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 § 317; 49 C.F.R. §§ 665.1, 665.5, 665.7 (1999); 49 U.S.C. 5318.

[469] 49 C.F.R. pt. 571 (1999); 49 C.F.R. § 665.11(a)(2). *See also* 49 C.F.R. § 396.11.

[470] Under the "Bus Testing," regulations at 49 C.F.R. § 665.7 (1999), the model of the bus financed by FTA must have been tested at a bus testing facility approved by FTA.

[471] 49 C.F.R. pt. 665, App. A.

[472] A pre-award audit includes a Buy America certification, a purchaser's requirements certification, and where appropriate, a manufacturer's Federal Motor Vehicle Safety certification. 49 C.F.R. § 663.23 (1999); 56 Fed. Reg. 48395 (Sept. 24, 1991). A post-delivery audit includes a post-delivery Buy America certification, a post-delivery purchaser's requirements certification, and a manufacturer's Federal Motor Vehicle Safety Standard self-certification. 49 C.F.R. § 663.33. See Section 5—Procurement, above, for a discussion of these audit requirements.

audits, and Buy America requirements are discussed in Section 5—Procurement.

F. FINANCIAL RESPONSIBILITY AND FITNESS REQUIREMENTS

Congress has mandated minimum financial responsibility and liability and property damage insurance requirements for interstate passenger carriers. Those using motor vehicles with a seating capacity of at least 16 passengers shall have insurance, a guarantee or a surety bond in the amount of not less than $5 million, while the requirement is $1.5 million for those having a seating capacity of not more than 15 passengers.[473] These requirements do not apply to motor vehicles: (1) transporting only school children and teachers to and from school; (2) operating a taxicab service having a seating capacity of not more than six passengers and not operated on a regular route between specified points; (3) carrying not more than 15 individuals in a single, daily round trip to and from work; or *importantly,* (4) providing transit service funded in whole or part under a grant under 49 U.S.C. §§ 5307, 5310, or 5311 (urbanized area formula, elderly person and disability, or nonurbanized area formula programs, respectively), including transportation of elderly or disabled passengers—except that where the transit service area extends beyond the boundaries of a single state, the minimum financial responsibility shall be the highest level required of any state.[474]

The DOT's FMCSA must determine whether a CMV operator is fit to safely operate such vehicles, and periodically update that determination.[475] Fitness is a longstanding regulatory requirement of common carriers that survived deregulation.[476] This criterion assesses whether the carrier is fit, willing, and able to provide the proposed service and satisfy the applicable rules and regulations. Typically, it involves an assessment of the carrier's compliance disposition, financial fitness, managerial ability, and ability to perform the services safely.[477] If a passenger operator is deemed not fit, it must cease operations 46 days after such determination until it is subsequently deemed fit.[478] However, these requirements do not apply to transit systems operating entirely within a single state. But the state may delegate to the local transit provider or its department of transportation the authority to impose these or similar requirements on intrastate motor or rail operators.

G. CONSTRUCTION SAFETY REGULATION

Safety at the worksite is regulated by the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor.[479] New federally-funded buildings and additions to existing buildings built with federal assistance must be designed and constructed in accordance with the seismic design and construction requirements and certified through the Annual Certification and Assurance process.[480] Before accepting delivery of any building financed with FTA assistance, an FTA-funding recipient must obtain a certificate of compliance with the seismic design and construction requirements of 49 C.F.R. Part 41.[481] Federal law also bans the use of lead-based paint in construction or rehabilitation of residence structures.[482]

Responding to findings showing that a considerable part of the American population lived in areas with moderate to major earthquake risks and that existing safeguards were inadequate,[483] Congress in 1977 implemented legislation calculated to improve safety in federal buildings and buildings constructed using federal funds.[484] Following the devastating Loma Prieta earthquake of October 1989, President Bush issued Executive Order 12699 to reinforce the federal govern-

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[473] 49 U.S.C. § 31138(b), (c). Knowing violations of this provision are subject to a civil penalty of not more than $10,000 for each violation. 49 U.S.C. § 31138(d)(1).

[474] 49 U.S.C. § 31138(e).

[475] 49 U.S.C. § 31144(a).

[476] *See* PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 111–17 (Quorum 1986).

[477] For an examination of the fitness requirements in another modal context, *see* PAUL DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 256–60 (Coast Aire 1997).

[478] 49 U.S.C. § 31144(c)(2). A passenger operator may have a review of an adverse fitness determination within 30 days of a finding of a lack of fitness. 49 U.S.C. § 31144(d).

[479] U.S. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590, 29 U.S.C. §§ 657, 667. U.S. Occupational Safety and Health Administration, DOL, regulations on safety standards, 29 C.F.R. pts. 1900–1910. Section 107 of the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 327–333. U.S. Occupational Safety and Health Administration/DOL regulations, "Safety and Health Regulations for Construction," 29 C.F.R. pt. 1926. U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction," 29 C.F.R. pt. 5; and U.S. DOL regulations, "Safety and Health Regulations for Construction," 29 C.F.R. pt. 1926. For activities not involving construction, *see* Section 102 of the Contract Work Hours and Safety Standards Act, Pub. L. No. 107-217, 116 Stat. 1062 (2002), as amended, 40 U.S.C. §§ 327–332, and U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction," 29 C.F.R. pt. 5 .

[480] 49 C.F.R. pt. 41, Executive Order No. 12699, "Seismic Safety of Federal and Federally-Assisted or Regulated New Building Construction," 42 U.S.C. § 7704 note, pursuant to the Earthquake Hazards Reduction Act of 1977, Pub. L. No. 95-124, 91 Stat. 1098, as amended, 42 U.S.C. §§ 7701 *et seq*., 49 C.F.R. § 41.117.

[481] "Seismic Safety," 49 C.F.R. § 41.117(d).

[482] Section 401(b) of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4801, 4831(b).

[483] 42 U.S.C. § 7701(1) and (2).

[484] Earthquake Hazards Reduction Act of 1977, Pub. L. No. 95-124, § 2, 91 Stat. 1098 (1977) (codified as amended at 42 U.S.C. §§ 7701 *et seq.*).

ment's commitment to improved seismic safety.[485] These two enactments led to the formulation of the DOT's seismic safety regulations.[486]

Calculated to be "mission-appropriate and cost-effective,"[487] the regulations apply to any new DOT-owned or -leased buildings, and all new construction (including additions and renovations) made with DOT funds or otherwise within the scope of the DOT's regulatory powers.[488] The FTA (and other DOT operating agencies, such as the FHWA) is to be responsible for the design and construction of its own buildings in accordance with seismic design and construction standards adopted by DOT.[489] A certificate verifying compliance with the standards must be presented to the FTA prior to acceptance of the completed building.[490] Where the FTA enters into a new lease for a building,[491] it must obtain a certificate from the building's owner reflecting the same information as would be required in the construction of a new building.[492] A leased building with plans and specifications erected after January 5, 1990, must comply with the same seismic standards as a new structure.[493]

Where the FTA assists in the financing of construction of new buildings or additions to existing buildings, whether through grants, direct loans, mortgage insurance, or loan guarantees, it must ensure that the construction work complies with the seismic standards adopted by DOT.[494] The grantee must provide the operating administration with certification containing the same information as is required for the FTA's own structures.[495] This same principle applies to any buildings or additions that are "DOT regulated."[496] Neither the seismic regulations themselves nor the Federal Register entry for them give any guidance as to what specifically constitutes a "DOT regulated" building as distinct from a building constructed using federal funds provided by DOT and/or FTA. Erring on the side of caution, recipients of federal funds should probably consider all buildings constructed for them to be "DOT regulated."[497]

The Occupational Safety and Health Act of 1970 (OSHA or the Act), 29 U.S.C. §§ 651–678, includes an exemption stating that for purposes of the Act "'employer'"…does not include…any…political subdivision of a State." 29 U.S.C. § 652(5). In this case, the transit provider was deemed to be controlled by and responsible to public employees and therefore eligible for this exemption, despite the Department of Labor's conclusions to the contrary.[498]

H. SECURITY

Security differs from safety in that safety is protection from accidental danger, whereas security is protection from intentional threats. The transit environment poses particular security problems. As one source notes:

> It is open to anyone who pays for entrance and often to those who choose not to pay. It contains a variety of settings and targets configured in predictable patterns. Many of the targets are stationary and unguarded. Potential victims are often crowded together in intimidating conditions or in conditions that make it hard for them to guard their property and for others to see what is happening. On the street, offenders may not know what people will do next, but on public transport the choices for behavior are more limited and, therefore, more predictable. [499]
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> Offenders preying on the system, and on staff and passengers, will continue to take advantage of the many criminal opportunities presented by the transit environment. By its very nature this is difficult to secure. It is open to all members of the public, criminal or not. At off-peak times, trains, stations and bus stops tend to lack supervision from staff and tend to be lonely and intimidating. During rush hours, they may be so crowded that

[485] Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction, Executive Order No. 12699 § 1, 55 Fed. Reg. 835 (1990).

[486] Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction 58 Fed. Reg. 32,867 (June 14, 1993). 49 C.F.R. pt. 41.

[487] *Id*. at 32,871. 49 C.F.R. § 41.100(a).

[488] 49 C.F.R. § 41.117(d).

[489] 49 C.F.R. § 41.110(a). The DOT recommends the use of model codes based on the National Earthquake Hazards Reduction Program (NEHRP) Recommended Provisions, particularly the 1991 International Conference of Building Officials Uniform Building Code, the 1992 Supplement to the Building Officials and Code Administrators International (BOCA, International) National Building Code, and the 1992 Amendments to the Southern Building Code Congress (SBCC) Standard Building Code. 49 C.F.R. § 41.120.

[490] 49 C.F.R. § 41.110(c). The certificate may include the engineer and architect's authenticated verifications of seismic design codes, standards, and practices used in the design and construction of the building, construction observation reports, local or state building department plan review documents, or any other documents deemed appropriate by the administration-owner. *Id*.

[491] According to the *Federal Register* entry for this regulation, a building should be considered to be "federally leased" when the DOT and/or its operating administrations occupy at least 15 percent of the building's total square area. Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction 58 Fed. Reg. 32,867, 32,870 (1993).

[492] 49 C.F.R. § 41.115(c).

[493] 49 C.F.R. § 41.115(b).

[494] 49 C.F.R. § 41.117(a).

[495] 49 C.F.R. § 41.117(d).

[496] 49 C.F.R. § 41.119(a) and (d).

[497] 49 C.F.R. § 41.119 is labled "DOT Regulated Buildings." These include "DOT owned buildings," *id*. § 41.110, buildings "leased for DOT occupancy, *id*. § 41.115, and buildings built with DOT financial assistance, *id*. § 41.117.

[498] 29 C.F.R. § 1975.5(b)(2). Startran v. Occupational Safety and Health Rev. Comm., 608 F.3d 312 (5th Cir. 2010).

[499] Martha Smith & Ronald Clarke, *Crime and Public Transport,* 27 CRIME & JUST. 169, 171.

> passengers have difficulty in protecting their persons or their property. These conditions are often exacerbated by lack of funding, poor administration, bad design, and inadequate policing.[500]

As described in Section 11—Carrier Liability, transit providers have been held liable where one foreseeably assaults,[501] hits,[502] shoots,[503] rapes,[504] or pickpockets a passenger.[505] Though passengers injured on buses may not recover damages where the driver is unaware of the assault,[506] typically, these cases hold that a common carrier is bound to exercise extraordinary care to protect its passengers where it knows or should know that a third person threatens injury, or might be anticipated to injure, the passenger.[507]

Therefore, security must be an integral part of transit system planning, design, construction, and operation. Vigorous maintenance and policing, as well as situational measures tailored to specific crime problems, also offer potential relief. The classic example of designing out crime is WMATA, whose subway system was designed with spacious platforms, open escalators and passageways, use of manned closed circuit television, and the absence of vendors.[508] Walls of the D.C. Metro subway stations are set back from the passenger waiting platforms, out of reach of potential graffiti artists. WMATA buses are equipped with silent alarms and two-way communications systems to notify the dispatcher of a problem (who in turn notifies transit and local police), and flashing alarm lights to signal police officers in the vicinity of a problem. Drivers are instructed when to use them.[509] The New York subway system has also seen a decrease in crime, perhaps corresponding with its policy of more vigorous police enforcement of minor offenses (including fare evasion).[510]

The FTA requires transit systems to develop and implement a Transit System Security Plan.[511] Security is also an element of the state safety oversight rule, discussed above.[512] The overall goal is to maximize the level of security and reliability to all passengers, employees, and any other individuals coming into contact with the transit system, including its vehicles, equipment, and facilities, while minimizing threats to human safety and vandalism.[513]

Unless it has determined that it is not necessary, a recipient of FTA funds must expend at least 1 percent of the amount of the federal assistance it receives for each fiscal year[514] for transit security projects, including increased lighting in or adjacent to a transit system, increased camera surveillance of an area in or adjacent to that system, emergency telephone line or lines to contact law enforcement or security personnel in an area in or adjacent to that system, and any other project intended to increase the security and safety of an existing or planned transit system.[515] Capital grant funds are also available for crime prevention and security.[516] Many transit systems are using the 1 percent security funds to install video cameras on transit vehicles.

The tragic events of September 11, 2001 (in which the New York World Trade Center and the Pentagon were attacked by aircraft flown by suicide hijackers), led Congress to pass the Air Transportation Safety and System Stabilization Act.[517] The legislation established a new Transportation Security Administration (TSA) originally within the DOT, but since folded into the Department of Homeland Security. Though the initial focus of the legislation was aviation, and certainly this has been the immediate concern of the TSA, one may anticipate that the new agency may eventually promulgate regulations addressing transit as well.

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[500] *Id*. at 219.

[501] McCoy v. Chicago Transit Auth., 69 Ill. 2d 280, 371 N.E.2d 625 (1977); Kenny v. SEPTA, 581 F.2d 351 (3d Cir. 1978).

[502] Carswell v. SEPTA, 259 Pa. Super. 167 393 A.2d 770 (1978).

[503] Martin v. Chicago Transit Auth., 128 Ill. App. 3d 837, 471 N.E.2d 544 (1984).

[504] Weiner v. Metro. Transp. Auth., 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (N.Y. 1982).

[505] Eagan v. Chicago Transit Auth., 240 Ill. App. 3d 784, 608 N.E.2d 292 (1992).

[506] Milone v. Wash. Metro. Area Transit Auth., 91 F.3d 229 (D.C. Cir. 1996) (bus rider who had been punched in the back of the head by an unruly passenger; jury verdict for WMATA affirmed; evidence insufficient to establish knowledge by bus driver of dangerous condition on bus as would create duty to protect rider). *But see* Wash. Metro. Area Transit Auth. v. O'Neill, 633 A.2d 834 (D.C. App. 1993) (transit authority held negligent where its driver refused to assist passengers from assault and battery).

[507] McPherson v. Tamiami Trail Tours, 383 F.2d 527, 531 (5th Cir. 1967) [unprovoked attack by a Caucasian passenger on an African-American passenger].

[508] Smith & Clarke, *supra* note 499, at 169, 208. *See* An Internal Audit Report by the Office of Auditor Ge., Mar. 2, 2006 (WMATA), http://www.wmata.com/about_metro/docs/AUDT5.pdf. The platforms have since become dangerously overcrowded.

[509] Under WMATA rules, the silent alarm is to be used where a passenger is exposed to assault, threat of bodily harm, or robbery, or is suffering acute illness or serious injury. Milone v. Wash. Metro. Area Transit Auth., 91 F.3d 229, 231 (D.C. Cir. 1996). Wash. Metro. Area Transit Auth. v. O'Neill, 633 A.2d 834 (D.C. App. 1993).

[510] Smith & Clarke, *supra* note 499, at 169, 210.

[511] *See FTA Transit System Security Planning Guide* (Jan. 1994).

[512] 49 C.F.R. 659.21, *et seq*.

[513] *See generally* PAUL DEMPSEY, AIRPORT PLANNING & DEVELOPMENT: A GLOBAL SURVEY 343–49 (McGraw Hill 1999).

[514] Such sums must be apportioned in accordance with 49 U.S.C. § 5336.

[515] 49 U.S.C. § 5307(d)(1)(J).

[516] 49 U.S.C. § 5321.

[517] 107 Pub. L. No. 42, 115 Stat. 230 (Sept. 22, 2001).

I. STATE AND LOCAL SAFETY REGULATION

As noted above, FTA has mandated that states establish State Rail Safety Oversight programs to govern New Starts and other rail systems. States have also taken over administration of portions of CMV authority. For example, some states have given their state DOTs broad authority to promulgate rules addressing equipment and operational safety standards.[518] County and city governments issue ordinances specifying speed limits or HOV lanes for use by buses. Some states have passed laws requiring that other drivers yield the right-of-way to a transit bus entering traffic.[519] Other states address equipment on an item-by-item basis, promulgating laws regulating, for example, lighting,[520] brakes,[521] safety glass,[522] and emission inspections.[523]

To ensure safety, many have passed laws governing passenger conduct on public passenger vehicles. [524] For example, the District of Columbia prohibits smoking; consumption of food or drink; spitting; carrying flammable or combustible liquids, live animals, explosives, acids, or any other inherently dangerous item aboard street railway or bus lines; or "knowingly to cause the doors of any rail transit car to open by activating a safety device designed to allow emergency evacuation of passengers." [525] The City of Memphis forbids playing radios or other devices on the transit vehicle, on grounds that noise could keep the operator from hearing horns, or distract the operator or passengers from warnings.[526]

A few states have established transportation safety boards. For example, Virginia established a 12-member Board of Transportation Safety to advise the Commissioner of Motor Vehicles, state DOT, and governor on "the elements of a comprehensive safety program for all transportation modes operating in Virginia."[527] Other states (such as California, Florida, Massachusetts, New York, and Pennsylvania) authorize various aspects of transit operation to be regulated by their state regulatory agencies.[528] For example, the Pennsylvania Department of Transportation (PennDOT) inaugurated the PennDOT Rail Transit Safety Review Program to provide comprehensive safety analysis and regulation of fixed guideway systems (i.e., rapid transit, light rail, busway, and inclined planes), including those of SEPTA, the Port Authority of Allegheny County in Pittsburgh, and the Cambria County Transit Authority in Johnstown. It does not include commuter rail services regulated by FRA. The California PUC promulgates safety rules and regulations over LRT equipment and operations (but not heavy rail transit) and monitors compliance with those provisions.[529]

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[518] *See, e.g.,* FLA. STAT. § 341.061(2): "The department shall adopt by rule minimum equipment and operational safety standards for all…bus transit systems…." It also requires that each bus transit system develop a transit safety program plan, and certify to the department that its plan is consistent with the safety standards, and that all transit buses be inspected not less than annually. *Id*.

[519] *See, e.g.,* OR. REV. STAT. § 811.167 (Oregon).

[520] *See, e.g.,* N.C. GEN. STAT. § 20-129.

[521] *See, e.g.,* 625 ILL. COMP. STAT. 5/12-301 (Illinois).

[522] *See, e.g.,* MASS. ANN. LAWS ch. 90, § 9A (2001).

[523] *See, e.g.,* N.J. STAT. § 39:8-60.

[524] For example, the District of Columbia requires that passengers shall not stand "in front of the white line marked on the forward end of the floor of any bus or otherwise conduct himself in such a manner as to obstruct the vision of the operator." D.C. CODE § 35-251 (2000).

[525] *Id.*

[526] Memphis City Code § 2-336.

[527] VA. CODE ANN. § 46.2-224.

[528] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 13.

[529] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at C-1–3.Dorancy California rail safety regulation was upheld as not preempted by federal law in Union Pacific R.R. v. Cal. PUC, 109 F. Supp. 2 1186 (N.D. Cal. 2000).