

from drug and alcohol testing is contrary to the spirit of the testing mandates of Congress in the Omnibus Employee Testing Act of 1991. However, the legislative history of the drug and alcohol testing requirement does not reflect a specific concern about drug and alcohol testing of volunteers. In fact, the tragic accidents that moved Congress to action involved professional transportation employees, not volunteers. See, for example, Conference Report to Accompany H.R. 2942, Department of Transportation and Related Agencies Appropriation Bill, Fiscal Year 1992, in *Congressional Record*, H7672, October 3, 1991.

FTA recognizes that the term "volunteer," as used in the revised definition of "covered employee," could be construed broadly to include any non-employee. FTA's intention in this final rule, however, is to exempt only non-employee volunteers who perform a service as a charitable act without the expectation of receiving a benefit, whether financial or as part of a program established to relieve an obligation. Other non-employees remain covered by the rule, i.e., those who provide charitable service in return for some benefit, for example, in the context of "workfare"-type programs that make public assistance or other benefits contingent on the donation of transportation services or community service programs that confer academic credit or provide an alternative to a criminal sentence. This issue was not raised in the NPRM or in the comments to the docket, but we would consider it in the future if appropriate.

II. Post-Accident Testing

FTA received 20 comments from large and small transit operators on FTA's proposal to eliminate the citation requirement in the non-fatal, post-accident testing provision applicable to non-rail transit vehicles. Currently, 49 CFR sections 653.45(a)(2)(i) and 654.33(a)(2)(i) require a post-accident drug and alcohol test after a non-fatal accident if, among other things, the operator of the mass transit vehicle involved in the accident receives a citation from a State or local law enforcement official. Five large and two small transit operators favored retaining the citation requirement. Eight large and five small transit operators commented that the citation requirement should be eliminated.

Comments

Commenters made the following arguments in favor of eliminating the citation requirement:

Police officers rarely issue citations in time for drug and alcohol testing to be useful. The majority of commenters indicated that law enforcement officials rarely issue citations in non-fatal accidents. When a citation is warranted, often too much time has passed for the testing to be useful. One commenter pointed out that unless an officer witnesses the accident, the officer will want to conduct an investigation before issuing a citation, which means that virtually no post-accident tests are conducted for non-fatal accidents.

Local guidelines sometimes already require testing without a citation. Two large commenters indicated that local guidelines provide for a stricter standard that already requires post-accident testing, even without a citation being issued.

Requiring a citation is inconsistent with the Omnibus Employee Testing Act of 1991. One commenter opined that the Omnibus Transportation Employee Testing Act of 1991 requires that FTA mandate testing, without the citation requirement, to insure that the transit industry is free from employees using illegal drugs and misusing alcohol while performing safety-sensitive functions.

FTA's definition of "accident" should change. Commenters suggested several changes to FTA's definition of "accident" for the purpose of determining when post-accident testing is necessary. It was not FTA's intention to solicit comments on this part of the rule, but rather the part of the rule that currently requires a citation to be issued before post-accident testing occurs.

Commenters made the following arguments in favor of retaining the citation requirement:

The citation requirement is easy to follow. One commenter noted that the citation requirement provides an easily understood benchmark and gives decision-making confidence to supervisors and managers. Another commenter pointed out that the current regulation operates well in that it requires the judgment of law enforcement officials, people who are trained in accident investigation, to assess whether the transit operator's actions contributed to the accident.

The proposed rule would require more testing, which will increase overall costs. One commenter estimated that the proposed rule would require the testing of approximately twenty more individuals a year, adding an additional \$3,000 to their estimated \$70,000 annual cost of conducting drug and alcohol testing. Another commenter pointed out that elimination of the citation requirement will result in

additional unfunded costs that are not in proportion to any expected benefit.

Discussion

FTA agrees with those commenters who favor removing the citation requirement. Because of the delay in issuing a citation in many accidents, the citation requirement renders post-accident alcohol and drug testing virtually ineffective.

Arguments that removing the citation requirement would increase the number of drug and alcohol tests given and increase the cost are not persuasive. The legislative history reveals that Congress intended that post-accident testing of safety-sensitive employees should be required

In the case of any accident in which occurs a loss of human life, or, as determined by the Secretary, other serious accident involving bodily injury or significant property damage. It is not the Committee's intent that drug and alcohol testing should be required every time there is an accident involving a mass transportation operation. Rather, post-accident testing should be limited to those instances in which there is a loss of human life or other accident of sufficient magnitude in terms of bodily injury or significant property damage for which testing for drugs and alcohol would be warranted. Report of the Senate Committee on Commerce, Science, and Transportation, on S. 676, Omnibus Transportation Employee Testing Act of 1991. 102d Congress, 1st Session, Report 102-54 (1991). (Emphasis added.)

Based upon the comments FTA received, the Agency does not believe that the issuance of a citation is the best measure for whether the accident is of sufficient magnitude to warrant drug and alcohol testing. The issuance of a citation depends on several factors, such as whether the law enforcement officer was physically present at the accident scene. These factors are often completely unrelated to the magnitude of the accident. Moreover, the timing of the issuance of a citation is not driven by the requirements of drug and alcohol testing. As a result, by the time a citation is issued, it is often too late to conduct drug and alcohol testing.

The result of requiring a citation as the trigger for a post-accident drug and alcohol test is that too many accidents have not been properly investigated for drug and alcohol-related causes. This amendment is better tailored to accomplish the Congressional intent that all significant, non-fatal accidents should trigger drug and alcohol testing of appropriate personnel.

III. Definition of Accident—Armed Security Personnel

FTA received only seven responses to our request for comment on whether the