



Moving Public Transportation
Into the Future

USDOT Drug & Alcohol Regulation Update (49 CFR Part 40)-Oral Fluid Drug Testing & More!

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LA CROSSE, WI | WI/MN PUBLIC TRANSIT CONFERENCE



Part 40 Update

The What

- 49 CFR Part 40 is USDOT's D&A regulation covering testing procedures
- Part 40 has been updated

The Why

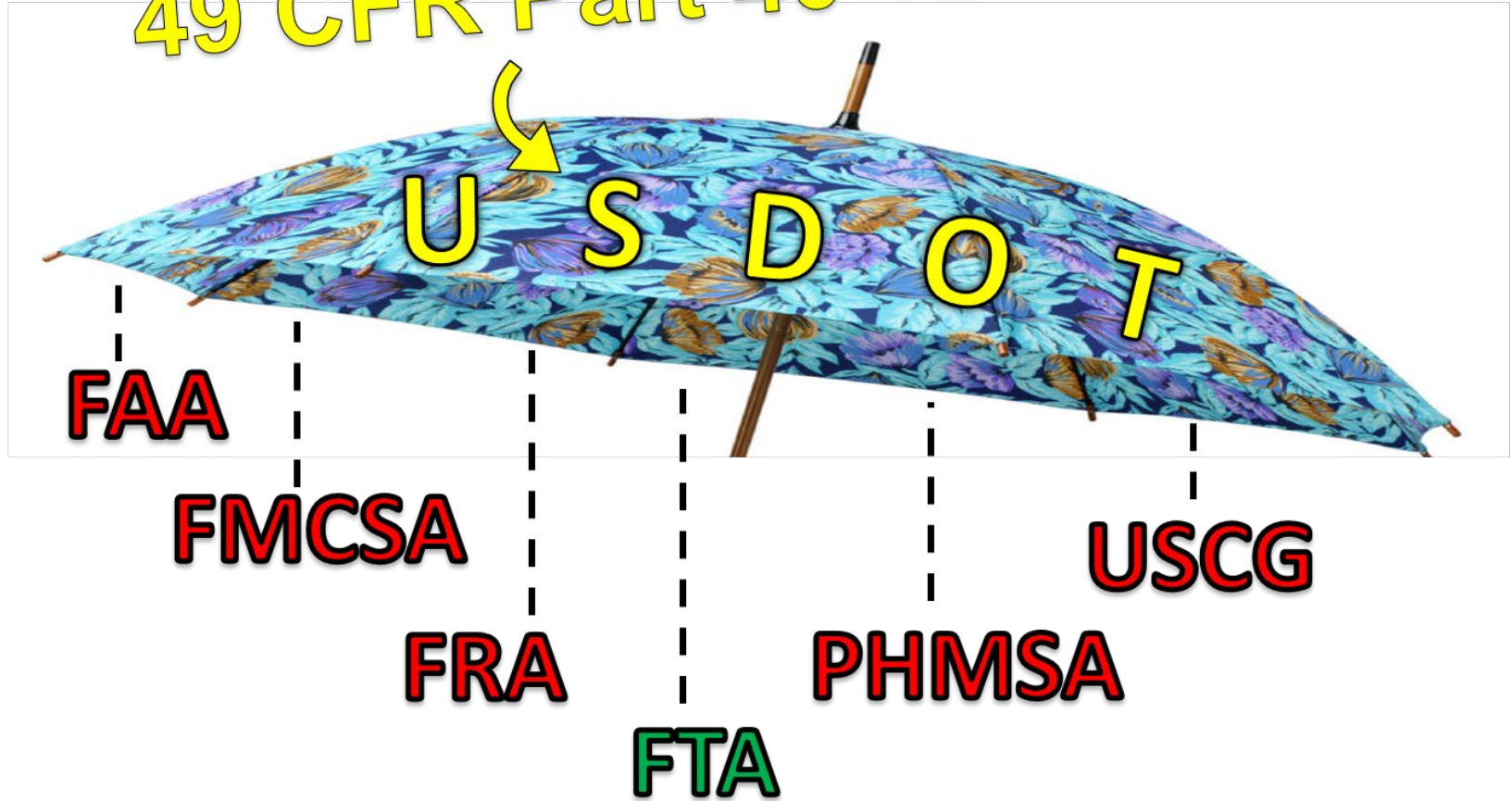
- DHHS published final rule for oral fluid testing in 2019
- OTETA requires DOT align with DHHS rules
- This final rule aligns Part 40 with DHHS 2019 Guidelines for oral fluid testing

The When

- Feb 2022 – USDOT issued NPRM
- May 02, 2023 – Final rule published in Federal Register
- **June 01, 2023 – Effective date for all changes**

Part 40 Update

49 CFR Part 40





Part 40 Update

The Who

- Applicable to entire DOT industry
- ANYONE and EVERYONE subject to Part 40
- Employers, Employees, Applicants, Collection Sites, etc.



Part 40 Update

The Headline ORAL FLUID TESTING

- Permitted as an alternative* to urine testing... not a replacement
- Oral Fluid Collection Process = Very Parallel to Urine Testing
 - Time to result won't be much different than urine testing
- Great potential for lowered burden on operations

Can We Start Conducting Oral Fluid Testing?

- No. Not Yet!
- DHHS must first approve 2 labs
- Why 2 labs?



Part 40 Update

Employer Chooses Specimen Type

- No one else other than employer gets to choose specimen type for tests
- Employers should have “standing orders” with service agents

All Oral Fluid Collections Are Considered “Directly Observed” Collections

- Oral fluid collectors are not required to be same gender as donor
- When collection started as a urine specimen and D.O. required:
 - If collection site doesn’t have same-gender observer, collector may switch to oral fluid collection **only if employer has standing order in place allowing such protocol**, otherwise, must contact DER.



Part 40 Update

All Oral Fluid Collections Are Considered “Directly Observed” Collections (Continued)

- Oral fluid collection is **REQUIRED** for donors who are transgender or non-binary **who must undergo a directly observed collection**
- For drug tests that are NOT required to be conducted under direct observation:
 - They can still be done via a urine collection, even for donors who are transgender or non-binary
 - However, may not be a best-practice, especially if your collection site is not set up to conduct oral-fluid collections



Part 40 Update

Stand Down Policies

- Employers have LONG been prohibited from having stand-down policies w/o waiver from FTA
- Nothing has changed with addition of oral fluid testing
- **Employers are now explicitly prohibited from ordering a 2nd test using an alternative specimen based on a negative result of another test**



Part 40 Update: What Else Changed?

Employee ID Numbers

- Expanded allowability of different types of ID numbers
- State issued ID card numbers
- State issued DL numbers!!!!!!!!!!!!!!!!!!!!!!
- Any other state/federally issued ID numbers

SAP Evaluations

- Remote evaluations allowed permanently
- Technology & security must be sufficient
- Must be done in accordance with SAP's qualifying credential
- SAP addresses must be physical location, no PO Boxes



Part 40 Update: What Else Changed?

MRO Updates

- MROs permitted to reverse cancelled test results when due to paperwork errors (40.203 and 40.205)
- MRO assistants permitted to verify Rx w/ Pharmacy
- “Safety-concern” justifications **MUST NOT** be included on CCFs
- MROs don’t need retraining for oral fluid testing
- Medical evaluations for Shy Bladder/Dry Mouth



Part 40 Update: What Else Changed?

Changes to Definitions

- Many definitions had to be revised/added due to addition of oral fluid testing

DOT Agency Regulation Amendments

- Final Rule of Part 40 also amends DOT Agency D&A regulations
- Part 655 (FTA), Part 382 (FMCSA), Part 120 (FAA), 14 CFR Part 219 (FRA)*
 - FRA post-accident toxicological testing not impacted



Part 40 Update: Compliance Considerations

Service Agent Credentials

- MROs DO NOT need new training
- Oral fluid collectors WILL need new training

Employer D&A Policies

- Some level of policy change will be required in most cases
- Many D&A policies will need updated
 - References to “urine” testing must be updated to “urine and/or oral fluid”
 - Part 40 citations may need updated*
- Updated policy guidance / templates soon (working with FTA closely)
- Consider a “policy addendum” to serve as stop-gap if needed

Part 40 Sub-Section Resignations



Sub-Sections Redesignated

REDESIGNATIONS OF SECTIONS IN PART 40	
Old Section	New Section
40.35	40.36
40.41	40.42
40.45	40.40
40.47	40.41
40.49	40.44
40.51	40.45
40.73	40.79
40.85	40.82
40.87	40.85
40.89	40.86
40.91	40.87
40.93	40.88
40.95	40.89
40.96	40.90
40.99	40.84
Appendix B	Appendix D
Appendix C	Appendix E
Appendix D	Appendix F
Appendix E	Appendix G
Appendix F	Appendix H
Appendix G	Appendix I
Appendix H	Appendix J



Part 40 Update

What Does This Mean For Employers?

- Decide which specimen type(s) will be utilized by your agency for drug testing
- Decide specimen type for scenarios requiring “subsequent collections”, i.e., shy bladder, dry mouth, temp. out of range & other D.O. collections, etc.
- Establish “standing orders” with collection site(s)
 - Should cover all scenarios - Regular collections and problem collections



Part 40 Update

What Does This Mean For Employers? (cont.)

- Collectors will need to obtain training on oral fluid collections and employers should retain documentation of training
- Vital for DERs/DAPMs to be available to collectors at all times during collection process
- Policy impacts



Part 40 Update

What Does This Mean For Employers? (cont.)

- Can you train staff to be oral fluid collectors?

Pros	Cons
Ease of scheduling	Conflicts of interest
Gets EEs back to duty faster	Lack of interest/comfort from staff to be collectors
Quality control	Invasion of privacy
Ease of access	Lack of professional experience
Less wait time	EE turnover in collector position
Less predictable testing patterns	Staff burden / retention concerns
May be only option for remote areas	Insurance & other employment implications
	Union challenges



Part 40 Update

What Does This Mean For Employees?

- May be subject to either urine collection or oral fluid collection in future
- Some collections may start as one specimen type and have to switch to another
- Make it clear to employees that the decision on specimen type is the **employer's decision only**
- SAP evaluations may be conducted remotely
- [ODAPC "summary of changes"](#)



USDOT-ODAPC Resources

◆ Summary of Changes

- https://www.transportation.gov/odapc/Notice_Summary_May_2023

◆ CCF Notice

- https://www.transportation.gov/odapc/Notice_CCF_May_2023

◆ Policies Notice

- https://www.transportation.gov/odapc/Notice_Policies_May_2023

◆ Published Final Rule

- <https://www.transportation.gov/odapc/frpubs>



Questions