



# LEGAL EASE

## AVIATION LAW MADE SIMPLE

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## Drug Testing: Are You Certain You Are in Compliance?

**I**s your business drug testing your employees? If your business has one or more customers who fit into one of the following categories, you are required to perform drug and alcohol testing on your employees who perform safety-sensitive functions:

- Part 121 air carriers
- Part 135 air operators
- Section 91.147 sightseeing operation

Most repair stations are aware of the drug and alcohol testing requirements in the regulations — or at least they think they are. Despite the pervasive knowledge about drug-testing standards, repair stations frequently find themselves out of compliance with the rules. In many cases, the errant repair station was actively trying to comply with the regulations but found itself violating the complicated regulations anyway.

Let's review some of the important drug and alcohol testing standards repair stations have been accused of violating, despite their best efforts to remain in compliance.

### Whose Program Should You Use?

Your business can opt to be part of your customer's testing program; however, if you have more than one covered customer, it might be more effective to simply have your own testing program.

If your business opts to conduct your own anti-drug program, you

will want to obtain an Anti-drug and Alcohol Misuse Prevention Program Operations Specification (A449) from your FAA principle maintenance inspector or principle avionics inspector. Non-compliance with this operations specification is a Part 145 violation (in addition to any Part 121 violations for which you might be charged).

### Which Personnel Are Covered?

Any person who performs maintenance and/or preventive maintenance duties for a covered client is required to be part of a drug- and alcohol-testing program. This is what the regulations and standards mean when they refer to safety-sensitive functions.

A number of other functions also are covered, such as flight crews and air traffic control, but for repair stations the key question usually is, "Does the employee perform maintenance or preventative maintenance?"

But what is maintenance and what is not? Generally, cleaning an aircraft is not maintenance; however, some functions related to cleaning, such as post-cleaning lubrication, are considered maintenance. Painting an aircraft might be considered preventative maintenance (it is "refinishing a decorative coating" under Part 43, Appendix A).

On the other hand, if you have an employee whose sole function is to build parts, this person might not be

a covered employee because manufacturing is not considered maintenance — although the consumption of the part through installation would be considered maintenance.

Non-certificated personnel who work on maintenance or preventative maintenance tasks under the supervision of a Part 65 certificate holder are considered safety-sensitive employees, even though they do not hold their own Part 65 certificates and they are not eligible to approve for return-to-service.

If your business is covered by the drug-testing rules and you obtain services by contract (subcontractor, contract labor, etc), you should make sure each contractor also is covered by an appropriate Department of Transportation drug-testing program — either your own or an acceptable program of their own.

Employees and contractors outside of the United States, performing all their work outside the U.S., currently are not required to comply with the regulations — although there has been talk within Congress of changing this standard.

### Should I Perform Pre-Employment Testing?

Your business needs to perform pre-employment testing on all potential employees who will perform safety-sensitive functions. You must receive a negative result before you can hire the employee.

The definition of “hire” addresses use of a person for a covered function; therefore, even if the person volunteers and intends to remain unpaid, the person still is subject to the drug and alcohol testing regulations.

The FAA has issued a legal opinion suggesting it is inappropriate to hire someone as a “trainee” before receiving a negative testing result. Part of the reason for this is because trainees often are specifically being trained in safety-sensitive functions; therefore, there is no substantive difference between the trainee’s function and the person’s functions as an employee.

What about transferring a non-covered employee to a safety-sensitive position? If you have an employee who was not covered under the DOT-testing program and you want to move this employee into a role in which he or she will perform safety-sensitive functions, you must have the employee tested and you must receive a negative test result before the person can be transferred to the new role.

You also need to check on the prospective safety-sensitive employee’s drug and alcohol testing record. You need to obtain a list of all DOT-regulated employers for whom the prospective employee has worked in the past two years, then obtain the prospective employee’s written consent to release drug-testing results information. A complete list of the information you need to request can be found at 49 CFR § 40.25. If the employee refuses to provide this consent, you cannot hire this person to perform a safety-sensitive function.

You should review this information before the person starts work, and you must obtain and review the information within 30 days from the date the employee first performed safety-sensitive functions. If the employee’s records show he or she violated a drug and alcohol regulation but has completed the return-to-duty requirements

of the regulations, you should obtain written proof of compliance before allowing the person to perform safety-sensitive functions.

### **When Should Employees Be Randomly Tested?**

Your business should have an internal procedure for discretely notifying employees of their selection for random testing. If you are working with a drug-testing consortium, the consortium might have recommendations about best practices for notification.

When you notify an employee he or she has been selected for random testing, the employee must proceed immediately to the collection site. The employee should not finish his or her current assignment or take any further steps (except steps immediately necessary to protect safety). Immediately after notification, the employee’s energies should be directed toward providing a testing specimen.

### **What Happens if an Employee Doesn’t Test?**

Sometimes in the real world, selected employees are unavailable for testing. An employee might be out sick, on vacation or otherwise impossible to reach for random testing. As an employer, you need to have a plan for what you will do if a selected employee is unavailable.

If the employee does not receive notice of the random selection because he or she is out for a scheduled day off, you should notify the employee of the need to report for a random test during his or her next shift within the same selection cycle.

If the employee is unavailable for an extended period, you should document the reason the employee is unavailable for testing and keep a copy of the written assessment in your files.

Your business must meet minimum standards for random testing, which currently is 25 percent of employees for

drug testing and 10 percent of employees for alcohol testing. Because the failure to perform a test can adversely affect your compliance with these standards, you might need to select an additional person in your next selection cycle to make up for a missed test.

Generally, there is no excuse for failure to report for testing once an employee has been notified of the random selection. The employee must report for random testing; otherwise, he or she will be considered as having refused testing. A refusal to test can be punished more severely than a positive drug or alcohol test.

### **Who Should Be Subject to Random Testing?**

Make certain your business is performing random testing across all of your safety-sensitive employees, meaning your drug- and alcohol-testing pool should include everyone who performs a safety-sensitive function.

In determining whether or not someone should be subject to random testing, look at the actual functions the person performs. A person’s title does not matter.

Only DOT safety-sensitive employees may be part of the DOT random pool or pools. Your business may choose to perform random testing on employees who are not safety-sensitive personnel; however, you should check state laws for restrictions on this practice.

If you choose to perform random testing on employees who are not safety-sensitive personnel, these employees must be in a different testing pool from your safety-sensitive employees.

A good way to ensure your business remains in compliance with these requirements is to examine the testing pool before each random selection and update the testing pool to include all safety-sensitive employees subject to DOT random testing, and to exclude

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those not subject to DOT random testing.

The drug and alcohol regulations are complicated and the standards are spread through many different sections of the regulations. It is important to work closely with your testing consortium or other testing service provider to make certain your business remains in compliance with these often complicated regulations. □

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