

FARAM 121-211

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 121

[Docket No. 25148; Amdt. No. 121-211]

RIN 2120-AC33

## Anti-Drug Program for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; revision of periodic drug testing requirements.

**SUMMARY:** On November 14, 1988, the FAA issued a final rule requiring specified aviation employers and operators to submit and to implement anti-drug programs for personnel performing sensitive safety- and security-related functions. This final rule amending the periodic testing requirement of the anti-drug program is intended to provide increased flexibility for employers and operators who must implement periodic drug testing as part of an anti-drug program. This rulemaking action, necessary to facilitate implementation of the final rule issued on November 14, 1988, is expected to mitigate some of the economic and administrative burdens noted by employers and operators in implementing the periodic testing requirement of the anti-drug program.

**EFFECTIVE DATE:** This final rule is effective on February 2, 1990.

**FOR FURTHER INFORMATION CONTACT:** Ms. Heidi Mayer, Office of Aviation Medicine, Drug Abatement Branch (AAM-220), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-3410.

**SUPPLEMENTARY INFORMATION:**

## Availability of Final Rule

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA-230), 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must include the amendment number identified in this final rule. Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

## Background

The rulemaking process that led to promulgation of the final anti-drug regulation began in late 1986. On December 4, 1986, the FAA issued an advance notice of proposed rulemaking (ANPRM) (51 FR 44432; December 9, 1986). The ANPRM invited comment from interested persons on drug and alcohol abuse by personnel in the aviation industry. The ANPRM also solicited comment on the options that the FAA should consider to protect and to maintain aviation safety in light of any drug and alcohol use in the aviation industry.

On March 3, 1988, the FAA issued a notice of proposed rulemaking (NPRM) (53 FR 8368; March 14, 1988) that analyzed the comments submitted on the ANPRM and set forth proposed regulations for comment by interested persons. The FAA received over 900 comments in response to the ANPRM and the NPRM.

The FAA also held three public hearings across the country on the proposed regulations contained in the NPRM. Each hearing was recorded by a court reporter and the hearing transcript was placed in the public docket for the rulemaking.

The FAA issued the final anti-drug rule requiring certain aviation employers and operators to develop and to implement an anti-drug program for employees performing specified aviation activities on November 14, 1988 (53 FR 47024; November 21, 1988). After the final rule was issued, the FAA continued to review the implementation requirements contained in the final anti-drug rule and became aware that the timeframes for employers' submission of their anti-drug program plans for FAA approval were unrealistic. Consequently, the FAA amended the final rule to extend certain compliance dates and make other minor revisions (54 FR 15148; April 14, 1989). More recently, the FAA issued an amendment to the final rule on December 11, 1989, to delay the compliance date for drug testing of covered employees located outside the territory of the United States (54 FR 53282; December 27, 1989).

Recognizing its responsibility for providing guidance to the industry regarding program compliance, the FAA has undertaken a process of continuing review of the rule's implementation requirements. Representatives of aviation organizations and employers subject to the final rule recently expressed concern about periodic drug testing and some specific procedural requirements, and suggested that revision of the final rule is warranted.

While similar issues were addressed generally by commenters in the prior rulemaking action, the process of actually developing the anti-drug program has increased FAA and industry awareness of the impact of specific requirements of the program, prompting the submissions to the FAA that result in this amendment.

The section of the anti-drug rule causing industry concern is found in appendix I of part 121 and reads as follows:

(V)(B) *Periodic testing.* Each employee who performs a function listed in section III of this appendix for an employer, and who is required to undergo a medical examination under part 67 of this chapter, shall submit to a periodic test. The employee shall be tested for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs as a part of the first medical evaluation of the employee during the first calendar year of implementation of the employer's anti-drug program. An employer may discontinue periodic testing of its employees after the first calendar year of implementation of the employer's anti-drug program when the employer has implemented an unannounced testing program based on random selection of employees.

(53 FR 47058; November 21, 1988)

Periodic testing and related procedural requirements have been the subject of submissions to the FAA by Delta Air Lines, Inc. (Delta), the Regional Airline Association (RAA), the Air Transport Association of America (ATA), and the Allied Pilots Association (APA). Copies of these documents are available for review by interested persons in Docket No. 25148.

Delta's submission requests a qualified exemption of the periodic testing requirement to permit periodic test specimen collection at a time other than when the part 67 medical examinations are conducted. Specifically, Delta seeks to collect periodic test specimens in conjunction with part 67 certificate holders' first 1990 recurrent training session, held in the first six months of the calendar year. Specimen collection when the periodic test group is gathered at a central location early in the first year of anti-drug program implementation would relieve Delta of the burden of individual specimen collections at medical examinations. In addition, such group collection would facilitate the specimen collection process because many physicians who conduct part 67 medical examinations are not familiar with DOT and FAA specimen collection, storage and transmission requirements.

Although the Delta submission is styled as a request for exemption, this

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issue potentially applies to all subject aviation entities. Accordingly, the FAA believes that a final rule amendment is in order.

The FAA concurs with the Delta request for flexibility in the time of periodic test specimen collection as long as FAA's primary objective is met: That individuals subject to part 67 medical examinations be subject to testing early in the implementation of an employer's anti-drug program. While the final rule requires periodic test specimen collection " \* \* \* as part of the first medical evaluation of the employee \* \* \*," FAA has previously provided program guidance clarifying that this collection need not be done either by the physician conducting the medical evaluation, or on the same day the medical examination is conducted. As stated in FAA guidance to the industry, " \* \* \* periodic collections must be within a couple of days either side of the periodic physical \* \* \*" ("Most Frequently Asked Questions About The Aviation Industry Anti-Drug Program," November 17, 1989.) Nevertheless, FAA recognizes that additional flexibility is warranted.

The RAA submission is offered on behalf of its drug-testing consortium and its members. The RAA petition for exemption from the anti-drug rule's periodic testing requirement seeks permission to substitute full implementation of random testing (at the 50 percent annualized rate) at the anti-drug program's outset in lieu of periodic testing. RAA first notes that the final rule permits entities with a December 18, 1989, anti-drug program commencement date to cease periodic testing after the first year, when their random testing programs are implemented at an annualized rate of at least 50 percent (after a first-year phase-in rate of at least 25 percent). Aware of this, RAA requests authorization for entities to delete entirely periodic testing if random testing is conducted at an annualized rate of 50 percent of all covered employees from the start of approved anti-drug programs. As with the Delta submission, the FAA is treating the RAA submission in the rulemaking context because of its general applicability.

While it is true that termination of periodic testing is allowed after the first year of anti-drug program implementation when random testing is at the 50 percent annualized rate, the requested substitution is not an equivalent one, as different objectives are achieved by the two tests. Periodic testing assures that 100 percent of part 67 medical certificate holders are tested

early in the implementation of employers' anti-drug programs. Although scheduled tests do permit all but the most heavily drug-dependent individuals to escape detection by temporary abstinence, there may be part 67 certificate holders who are so heavily drug dependent, or who misjudge the effective abstinence period, as to be identified through periodic testing.

In contrast, while random testing is an effective deterrent given the difficulty in evading drug use detection when subject to an unannounced random drug testing program, it serves a distinctly different purpose. Exclusive reliance on random testing presents the risk of continuing and undetected drug use among those who, while part of the random test population pool, have not yet been selected for testing. This is a consequence that the FAA has determined could have potential adverse impact on aviation safety in light of the unique responsibility for commercial air safety of part 67 certificate holders.

After careful consideration of the relative benefits of periodic testing and RAA's random testing alternative, the FAA is not persuaded that the proposal meets the periodic testing objective of assuring that all part 67 certificate holders are subject to drug testing early in the anti-drug program. Hence, the FAA denies RAA's request to include a random testing alternative to periodic testing. The agency, however, does believe that some of the troublesome program implementation issues prompting RAA's request may be mitigated by the final rule amendment contained in this action.

The ATA "Petition For Amendment or Exemption" seeks complete elimination of the periodic testing provision from the final rule. Arguing that the periodic testing requirement is unwarranted, ATA notes the acknowledged ease with which detection through scheduled, announced drug tests may be avoided and the low deterrence value of such scheduled tests compared with random tests. Additionally, ATA argues that part 67 certificate holders, being well educated and highly motivated, are unlikely to use drug, but if drugs are used, temporary abstinence is likely given the career risk. ATA further points to peer and supervisor observation and identification of part 67 certificate holders exhibiting behavioral and physical indications of drug dependence or heavy drug use.

It must be noted, however, that ATA raised similar arguments in comments submitted by the association during the comment period for the final rule.

Responding to those comments when issuing the final rule, the FAA was not persuaded that periodic testing should be eliminated entirely:

The FAA agrees with commenters that announced periodic testing can be circumvented by an employee's abstinence from drug use. However, periodic testing does enable an employer to identify those employees who are so heavily dependent on drugs that they are unable to abstain from drug use for even a short period of time prior to a periodic test.

(53 FR 47033; November 21, 1988)

The FAA continues to believe that periodic testing has an important role in an overall anti-drug program and that simply eliminating entirely the requirement for periodic testing during the first year is unwarranted. Part 67 certificate holders have direct and considerable responsibility for safe commercial air travel; and drug testing this group during the first year of anti-drug program implementation has safety benefits that justify the requirement.

The APA submission urges " \* \* \* deleting the requirement for medical certificate holders to undergo a periodic drug test in conjunction with the airman's scheduled FAA physical." The concerns expressed by APA involve the Aviation Medical Examiners' lack of familiarity with DOT and FAA specimen collection and chain-of-custody procedures, the potential costs that might be incurred by individuals who select their own Aviation Medical Examiner to conduct the physical exam and the attendant specimen collection for periodic testing, and the sanctions that might be imposed if an employee forgets to provide a periodic test specimen at the part 67 medical evaluation.

As previously noted in the discussion of Delta's submission, the FAA has issued guidance that substantively resolved APA's concerns. Nevertheless, the concerns raised by APA are further addressed by the FAA action taken in this final rule to increase the flexibility allowed in meeting periodic testing program requirements.

#### Discussion of the Amendment

Amended by this final rule is the periodic testing requirement found in appendix I to part 121. The amendment changes the periodic testing program to increase employer flexibility in meeting certain program implementation requirements.

The amendment addresses the final rule's periodic test requirement by permitting specimen collection at a time other than the part 67 medical examination.

Recognizing that many other methods of periodic test specimen collection would meet FAA's concerns, the agency is amending its final rule to permit employers to implement an alternative method for periodic test specimen collection if it meets with FAA approval. An example of an acceptable specimen collection alternative is that proposed by Delta: Collection of periodic test specimens when part 67 certificate holders are gathered at a central location for their first recurrent training session during 1990. The FAA is taking this action to mitigate some of the burdens imposed on employers by the final rule's restrictive time of collection requirement.

Those employers desiring to implement an alternative method for periodic test specimen collection into their approved anti-drug program must submit plan amendments to the FAA for review and approval.

#### **Reason for No Notice and Immediate Adoption**

The FAA does not believe that issuing an NPRM would result in the receipt of significant and useful comments. Therefore, the FAA has determined that notice and public comment procedures are unnecessary and contrary to the public interest.

Moreover, this amendment to the final anti-drug rule is needed immediately to mitigate certain administrative burdens imposed by the final rule. Because of the December 18, 1989, program implementation date for most anti-drug programs, this amendment must be implemented as soon as possible to permit the industry to benefit from the increased flexibility now allowed for meeting certain program requirements. Consequently, the FAA has determined that good cause exists to make this final rule effective in less than 30 days.

#### **Economic Assessment**

In accordance with the requirements of Executive Order 12291, the FAA reviewed the costs and the benefits of the final anti-drug rule issued on November 14, 1988. At that time, the FAA prepared a comprehensive Regulatory Impact Analysis of the final anti-drug rule. The FAA included that analysis in the public docket. The FAA also summarized and analyzed the comments submitted by interested persons on the economic issues in the final rulemaking document published in the Federal Register on November 21, 1988.

This final rule modifies existing requirements to provide for greater flexibility in employers' periodic drug testing programs. This rulemaking action

does not change the fundamental regulatory structure promulgated in the final anti-drug rule. Instead, it merely provides a narrowly defined compliance option for regulated entities. The FAA anticipates that there would be no additional costs associated with the provision allowing optional methods of compliance in the amendment of this final rule.

It is possible that modest cost savings may result as a consequence of this rulemaking action for those employers and operators who can perform tests more efficiently under the latitude provided. Because this specimen collection option may or may not be widely utilized, however, and because in any event the FAA believes that potential savings are minimal, the FAA has determined that revision of the comprehensive Regulatory Impact Analysis for the final anti-drug rule is not necessary and preparation of a separate economic analysis for this final rule is not warranted.

#### **Regulatory Flexibility Determination**

The Regulatory Flexibility Act of 1980 requires a Federal agency to review any final rule to assess its impact on small entities. The amendment contained in this final rule provides a specimen collection option to the final rule periodic drug testing requirements, allowing employers greater flexibility in a limited aspect of program implementation. In consideration of the nature of this amendment, the FAA has determined that this final rule will not have a significant economic impact, positive or negative, on a substantial number of small entities.

#### **International Trade Impact Statement**

This final rule contains an amendment that provides options to the periodic drug testing requirements of the final anti-drug rule, allowing employers greater flexibility in a limited aspect of program implementation. Thus, the FAA has determined that this final rule will not have an impact on trade opportunities for U.S. firms doing business overseas or on foreign firms doing business in the United States.

#### **Paperwork Reduction Act Approval**

The recordkeeping and reporting requirements of the final anti-drug rule, issued on November 14, 1988, previously were submitted to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1980. OMB approved those requirements on March 23, 1989 (OMB approval under control number 2120-0535.) Because this final rule does not amend the recordkeeping

and reporting requirements, it is not necessary to amend the prior approval received from OMB.

#### **Federalism Implications**

The final rule adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the FAA has determined that this final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

#### **Conclusion**

This final rule provides employers with flexibility in meeting periodic drug testing implementation, which was addressed in the prior rulemaking actions that led to promulgation of the final anti-drug rule. This rulemaking action is necessary to facilitate implementation of the final rule issued on November 14, 1988. Intended to alleviate some burdens imposed by the final anti-drug rule, this rulemaking action will increase employers' flexibility in implementation of the final rule's periodic testing requirement.

Pursuant to the terms of the Regulatory Flexibility Act of 1980, the FAA certifies that the final rule will not have a significant economic impact, positive or negative, on a substantial number of small entities. In addition, the final rule will not result in an annual effect on the economy of \$100 million or more and will not result in a significant increase in consumer prices; thus, the final rule is not a major rule pursuant to the criteria of Executive Order 12291. However, because the rule involves issues of substantial interest to the public, the FAA has determined that the final rule is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

#### **List of Subjects in 14 CFR Part 121**

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

#### **The Amendment**

Accordingly, the Federal Aviation Administration amends part 121 of the Federal Aviation Regulations (14 CFR Part 121) as follows:

**PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT**

1. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421-1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983).

**Appendix I [Amended]**

2. By revising paragraph (B) of section V of appendix I to part 121 to read as follows:

\* \* \* \* \*

B. *Periodic testing.* Each employee who performs a function listed in section III of this appendix for an employer and who is required to undergo a medical examination under part 67 of this chapter shall submit to a periodic drug test. The employee shall be tested for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs during the first calendar year of implementation of the employer's anti-drug program. The test shall be conducted in conjunction with the first medical evaluation of the employee or in accordance with an alternative method for collecting

periodic test specimens detailed in an employer's approved anti-drug program. An employer may discontinue periodic testing of its employees after the first calendar year of implementation of the employer's anti-drug program when the employer has implemented an unannounced testing program based on random selection of employees.

\* \* \* \* \*

Issued in Washington, DC, on January 29, 1990.

James B. Busey,  
*Administrator.*

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