



Program Evaluation and Audit

FTA Drug and Alcohol Program

September 23, 2008

INTRODUCTION

Background

In response to the passage of the Omnibus Transportation Employee Testing Act of 1991, the Federal Transit Administration (FTA) published two regulations in 1994 prohibiting drug use and alcohol misuse by transit employees and requiring that transit agencies test for prohibited drug use and alcohol misuse. The regulations were updated and consolidated in 2001 into 49 CFR Part 655, *Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations* (Part 655). In addition, the Department of Transportation (DOT) issued 49 CFR Part 40, *Procedures for Transportation Workplace Drug and Alcohol Testing Programs* (Part 40) in 1989 and later revised them with an effective date of August 1, 2001. Part 655 is to be used in conjunction with Part 40 to create and implement a substance abuse policy. Each recipient of federal assistance, along with any contractor of a recipient or sub-recipient, is required to comply with these regulations to continue receiving federal assistance.

The Metropolitan Council (Council) receives financial assistance from FTA and subsequently contracts out some transportation services to various transit systems throughout the seven-county area through the Metropolitan Transportation Services Division (MTS). Under that scenario, MTS's contractors are required to implement programs designed to help prevent accidents, injuries, and fatalities resulting from the misuse of alcohol and use of prohibited drugs by employees who perform safety-sensitive functions. Safety-sensitive functions include operators of revenue service vehicles, CDL-holding operators of non-revenue service vehicles, vehicle controllers, revenue service vehicle mechanics, and firearm-carrying security personnel. To fulfill the requirements of Part 655, the Council is responsible for monitoring these contractors to ensure that they are in compliance with FTA and DOT regulations.

The last round of oversight activities was in late 2005 when MTS sent a Drug and Alcohol Program Monitoring Checklist for Compliance with FTA Requirements to all providers of contracted public transit services in the region. MTS staff reviewed the information for the agency's compliance with Part 655 and Part 40 and met with each provider to review deficiencies and perform a review of their random testing records to check compliance of collection site personnel. Although MTS staff sent a follow-up letter to formally notify the agencies of any deficiencies, no successive follow-up was conducted with any of the agencies to determine whether corrective actions were taken.

Under the current regulations, collection sites utilized by MTS's contractors are also required to comply with the procedures contained in Part 40, since they too are recipients of federal funds. All agreements and arrangements, written or unwritten, between and among MTS and service agents concerning the implementation of DOT drug and alcohol testing requirements are deemed, as a matter of law, to require compliance with drug and alcohol testing regulations. Compliance with these provisions is a material term of all such agreements.

Purpose

To ensure the compliance of the Council's contracted providers and collection sites, Program Evaluation and Audit (Audit) completed an audit of MTS's contractor's anti-drug and alcohol misuse programs to ensure they are up-to-date and compliant with DOT and FTA requirements. In addition, Audit reviewed Metro Transit's anti-drug and alcohol misuse program.

Assurances

This evaluation was conducted in conformance with the *Standards for the Professional Practice of Internal Auditing (Institute of Internal Auditors)* and *Governmental Audit Standards (U.S. General Accounting Office)*.

Scope

The evaluation included an assessment of each transit system's compliance with FTA regulations as well as the collection site's compliance with DOT regulations.

- The basic requirements of each employer's alcohol misuse and prohibited drug use program, including the elements required to be in each employer's testing program.
- Testing procedural requirements mandated by the Omnibus Transportation Employee Testing Act of 1991, and as required in Part 40.
- The list of consequences for covered employees who engage in alcohol misuse or prohibited drug use.
- Administrative matters, such as recordkeeping requirements (2008 testing records).

Methodology

The audit was broken down into 3 parts:

- A Substance Abuse Checklist
- Mock DOT drug and alcohol collections done at each contractor's collection site. A process checklist was used during the testing process to assess how well each collector was complying with Part 40 during an uneventful collection. In addition, each collector was asked a series of questions concerning an eventful collection.
- A transit system site visit to complete a records review of tests conducted since 2008 and education and training materials, as well as a review of the way in which these records are kept and who has access to them.

FINDINGS

MTS Contractors

1. *Various forms are used erroneously or superfluously throughout the testing process.*

Collection sites and transit systems ask and in some cases require employees to sign HIPAA, consent, release, authorization, and waiver forms. The regulations are clear as to where and how employees are required to give consent. Unless otherwise stipulated by Part 40, use or disclosure of testing information without consent or authorization from the employee is required by the Omnibus Transportation Employees Testing Act of 1991, Part 40, and DOT Agency regulations.

Employees are given a testing notification form and sent to the collection site, oftentimes unescorted. No contact is made by the Designated Employer Representative (DER) to alert the collection site that an employee is on their way in for a test. Collection sites frequently operate on a walk-in basis, so there is no way of knowing if the employee is late, early, or on-time for a test. An employee could spend an undisclosed amount of time proceeding to the collection site, which gives them an opportunity to try to evade or outwit the testing process. Following up on an employee's arrival time is critical to ensuring the integrity of the testing process.

2. *Collectors often fill out the Chain of Custody and Alcohol Testing Forms incorrectly. Common errors include:*

Chain of Custody Form (CCF) Exhibit 1

- Not entering the specific name of the delivery service used to transport the specimen (A)
- Not indicating which laboratory the specimen will be delivered to (B)
- Leaving the type of test and/or reason for testing blank (C)
- Dating and/or signing the specimen bottle seals while they are still attached to the CCF, which breaks the evidentiary chain of custody. You can tell when this has been done because the ink will leave a shadow on the form. (D)

Alcohol Testing Form (ATF) Exhibit 2

- Writing in the test number and/or results when using an Evidential Breath Testing device (EBT), which should only be done if the device does not print (A)
- Checking "No" under "15 Minute Waiting Period," which should only be done after waiting 15 minutes during an alcohol confirmation test (B)
- The Breath Alcohol Technician (BAT) signs Step 3 before administering the test, which breaks the evidentiary chain of custody (C)

*Use the corresponding letters next to each error to locate it on the forms.

3. *Shy bladder procedures are not followed properly.*

Collectors are to administer shy bladder procedures when an employee is unable to give a sufficient volume sample. The employee is given three hours to produce an adequate specimen. During this time, they are encouraged to drink up to 40 ounces of fluid spread reasonably throughout the three hours. The Department of Health and Human Services set the limit at 40 ounces to minimize the possibility of a diluted specimen. Employees are to be monitored at all times by collection site personnel and the amount of fluids they drink is to be documented on the remarks line of the CCF along with the time that has elapsed. Although the collectors are aware of the amount of fluids employees are supposed to drink according to the regulations, they did not know the capacity of the cups given to the employees, nor did they make any effort to measure the amount of water employees were putting into the cups or count the number of refills they were obtaining. As a result, the amount of fluid being consumed was neither monitored nor controlled as the regulations would require.

4. *Transit systems have inaccurate information listed in their policies and/or the education and training materials that are used to inform safety-sensitive employees of the FTA and DOT drug abuse and alcohol misuse programs.*

The testing procedures listed in the systems' policies and education and training materials were missing steps or had incorrectly interpreted regulations. Policies must include specific information concerning the behavior and conduct prohibited by Part 655. Audit found 62% of the transit systems to be deficient on this part, as well. Each policy should also list either all of the specific behaviors that constitute a refusal to test or it should list none and simply reference Part 655. The policies Audit analyzed did not reflect this requirement. The definition of a Substance Abuse Professional needs to be revised in all of the policies in accordance with a recent update to the regulations. These provisions should be clearly stipulated so the employee knows their rights and what is expected of them with regard to all provisions of the drug and alcohol testing process.

Transit systems often have one comprehensive Drug and Alcohol Policy for their employees. While this is perfectly acceptable, the authority under which the provisions listed within must be explicitly stated. For instance, there must be a clear distinction between testing that falls under FTA authority and testing that falls under the Drug-Free Workplace Act or the company's independent authority. The policies Audit examined did not clearly specify authority. Transit systems are not required to have their own policy on Prescription/Over-the-Counter medicine, but they are highly encouraged to include one in their company-wide drug and alcohol policy.

5. *Neither the transit systems nor MTS are conducting any service agent or vendor oversight.*

FTA explicitly states that, as the employer, you are responsible for all actions of your officials, representatives, and agents in carrying out the requirements of the DOT agency regulations. If a recipient fails to establish and implement a program as required by this

part they may not be eligible for Federal financial assistance or their eligibility may be suspended. While MTS has conducted previous audits on their contractors, no follow-up has been completed nor has there been evidentiary proof of corrections submitted from the contractors. According to the Substance Abuse Checklist, the transit systems have also failed to conduct any monitoring or oversight of their sub-recipients.

6. Collection sites do not follow the proper procedures for an uneventful collection.

Employees are not allowed to wait for a representative to arrive before they begin testing. The substances for which the employee may be tested can dissipate rapidly, which is why testing should begin immediately upon their arrival at the collection site. Personnel at the collection sites are unaware of the types of acceptable identification from employees. FTA is very specific as to the acceptable means of identifying employees.

Part 40 requires collectors to advise employees that failure to comply with any steps during the collection process constitutes a refusal to test. Audit did not observe this practice during the mock DOT drug and alcohol collections.

To ensure the continued integrity of the facility, urine collectors are required to recheck them after each donation. This collection sites are not completing this step, which could compromise the results of the test.

BATs are required to read the test number from the EBT before the employee gives their donation. They are also supposed to show the employee the test results. Audit did not observe collectors doing either of these.

7. Collection sites do not follow proper procedures for eventful collections.

Part 40 gives a detailed account of how to proceed when you encounter a problem during a collection. Collectors must take and pass mock, eventful collections before becoming certified. During an interview following each mock collection completed by Audit, the collectors often did not know the correct protocol for the following situations:

- Specimen seals should be in tact on the specimen tubes; collectors cited incorrect procedures in the event of a ripped or torn specimen seal.
- When the calibration of an EBT is outside the acceptable tolerance level, every result of 0.02 or above since the last valid calibration check should be cancelled. BATs responded that previous tests would not be cancelled.
- During a confirmation test, BATs are not informing the employee that the 15 minute waiting period is to prevent an accumulation of mouth alcohol from leading to an artificially high reading.
- Alcohol confirmation test results must be printed out or the test is invalid. BATs said they would write in the results on the ATF if the EBT would not print.
- The air blank on the EBT should be 0.00. If it is greater than 0.00, BATs should retest them. Sites often only have one EBT and BATs responded that they would

send the employee to a new testing site if the EBT would not calibrate after the first try.

- If the employee will not sign Step 2 of the ATF this is considered a refusal to test. BATs told Audit that they would continue with the collection and document the event on the remarks line.

In addition, collectors don't know the difference between correctable flaws, which are mistakes that only cause the test to be cancelled if they are not corrected, and fatal flaws, which always cause the test to be cancelled.

8. Recordkeeping by Transit System administrators does not effectively meet the standards required by FTA.

When submitting inquiries to previous employers concerning an employee's positive test results, the employer must demonstrate a good faith effort in obtaining this information. Presently, transit systems generally have insufficient procedures in place to conduct follow-up on these requests.

Audit found that numerous employee anti-drug and alcohol misuse files were missing Chain of Custody Forms. In addition, these files frequently contain personnel files, which should be kept separately.

The employee files must contain documentation for post-accident reports. However, at present, they do not contain sufficient evidence for the manager/supervisor determination about the accident, and oftentimes uses invalid testing criteria. See Exhibit 3 for a further explanation.

Metro Transit

- 1. The policy and procedures are substantively compliant with FTA regulations.*

RECOMMENDATIONS

Program Evaluation and Audit recommendations are categorized according to the level of risk they pose for the Metropolitan Council. The categories are:

- **Essential** – Steps must be taken to avoid the emergence of critical risks to the Council or to add great value to the Council and its programs. Essential recommendations are tracked through the Audit database and status is reported twice annually to the Council’s Audit Committee (and the Regional Administrator),
- **Significant** – Adds value to programs or initiatives of the Council, but is not necessary to avoid major control risks or other critical risk exposures. Significant recommendations are also tracked with status reports to the Audit Committee (and Regional Administrator).
- **Considerations** – The recommendation would be beneficial, but may be subject to being set aside in favor of higher priority activities for the Council, or it may require collaboration with another program area or division. Considerations are not tracked. Their implementation is solely at the hands of the management.

The recommendations in this report cover two areas: follow-up for the review conducted by Program Evaluation and Audit, and ongoing oversight and review of drug and alcohol program compliance of contracted providers and their selection collection sites.

Follow-Up Recommendations

1. **(Essential) MTS should conduct an initial and thorough follow-up with each individual transit system to ensure that they are in compliance with regulations.**

Compliance with drug and alcohol regulation is a major safety issue for transit providers and their customers. Enforcement of those regulations in contracts is among the highest priorities for the Council. Therefore, based on the reviews conducted by Audit, MTS should oversee that corrective actions are promptly enacted by its contracted transit providers.

Contracted transit providers should be given a specific list of all deficiencies identified, and be required to provide evidentiary proof of their corrections within 30-45 days. If they do not satisfactorily develop and implement a process to correct the problems within the established timeframe, then their contract should be suspended. Continued non-compliance should result in the termination of any contract with the Council.

Management Response: *MTS concurs with the recommendation and will work with audit staff to ensure that contracted transit providers have a complete list of deficiencies*

identified through the audit. Contractors will be required to develop and implement a process for correction and compliance by November 14, 2008.

2. (Essential) MTS should ensure that collection sites are brought into compliance with all applicable regulations within 30 days.

Collection sites, selected and contracted by the transit providers, are critical to drug and alcohol programs since they provide the crucial information as to whether or not an individual is in violation of the policy. However, the majority of sites tested had significant violations of DOT regulations. Similar to the contracted transit providers, each site should be provided with a detailed list of its deficiencies, but given only 30 days to correct the deficiencies and provide documentation of steps taken to ensure future compliance with regulations.

Follow-up could be conducted by either MTS or the contracted provider who selected the collection site, but documentation of the corrective action should be provided to and reviewed by MTS to ensure that all requirements were met to satisfy DOT regulations.

***Management Response:** MTS concurs with the recommendation. In October 2008, MTS will host a mock collection training session to ensure that contracted transit providers know how to conduct a mock collection and are equipped to oversee their collection sites. In November 2008, MTS staff will assist contracted transit providers with a follow up mock collection to ensure that Department of Transportation (DOT) requirements are met at each of their collection sites.*

Ongoing Compliance Recommendations

3. (Essential) MTS should conduct an audit on 1/3rd of its contracted transit providers annually to ensure their continued compliance with drug and alcohol policy requirements.

Because MTS holds so many contracts, it has been a strain on resources to attempt to conduct an audit/review of their systems on an annual basis. As a result, the reviews have not occurred on a regular basis in more than 3 years. To create a more manageable cycle of reviews, Audit recommends that each year, MTS audits 1/3rd of their contractors. The process would include: submitting the Substance Abuse Checklist to each provider and completing a site visit to review the records and recordkeeping practices. An interview with the Designated Employer Representative may also be necessary in some cases, depending on the answers to the checklist questions and what MTS finds at the site visit.

This schedule would ensure that, at a minimum, each contractor was thoroughly reviewed for their compliance with drug and alcohol policy requirements once every three years.

Management Response: *MTS concurs with the recommendation and will develop a monitoring plan to review and follow-up with at least 1/3 of the contracted transit providers annually.*

4. (Essential) Collection sites should be tested annually for compliance with DOT regulations.

Every collection site used by a transit provider should be subject to at least a mock collection type review of their drug and alcohol testing protocols. Given the rate of errors found in this year's review, next year's review should also include administering the questionnaires regarding difficult testing situations again. In future years if reviews are error free, reviews could be less frequent or shorter, but for the next 2-3 years, they should likely be done as this year's was. The reviews could be done either by MTS or by the contractors who selected the collection site, but MTS is ultimately responsible for compliance, so MTS should ensure that the reviews are completed, documented and available for audit, should they be needed.

Management Response: *MTS concurs with the recommendation and will work to incorporate the changes recommended in the audit and will ensure that collection site reviews are completed, documented and readily available for review.*

- 10788 Roselle St, San Diego, CA 92121
- 69 First Ave., Raritan, NJ 08869
- 1904 Alexander Dr., Research Triangle Park, NC 27709
- 1229 Madison, Ste. 500, Seattle, WA 98104 (DrugProof)
- 1120 Main Street, Southaven, MS 38671
- 7202 North Gessner, Houston, TX 77040

FEDERAL DRUG TESTING CUSTODY AND CONTROL FORM

Exhibit 1
2008-A12

SPECIMEN ID NO. **0851814924**

LAB ACCESSION NO.

STEP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

A. Employer Name, Address and I.D. No. _____ B. MRO Name, Address, Phone and Fax No. _____

C. Donor SSN or Employee I.D. No. 999 99 9999

D. Reason for Test: Pre-employment Random Reasonable Suspicion/Cause Post Accident
 Return to Duty Follow-up Other (specify) _____

E. Drug Tests to be Performed: THC, COC, PCP, OPI, AMP THC & COC Only Other (specify) _____

F. Collection Site Address: _____

Collector Phone No. _____
Collector Fax No. _____

STEP 2: COMPLETED BY COLLECTOR

Read specimen temperature within 4 minutes. Is temperature between 90° and 100°F? Yes No, Enter Remark _____

Specimen Collection: Split Single None Provided (Enter Remark) _____ Observed (Enter Remark) _____

REMARKS: _____

STEP 3: Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor initials seal(s). Donor completes STEP 5 on Copy 2 (MRO Copy)

STEP 4: CHAIN OF CUSTODY - INITIATED BY COLLECTOR AND COMPLETED BY LABORATORY

I certify that the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed, and released to the Delivery Service noted in accordance with applicable Federal requirements.

Signature of Collector: [Signature] Time of Collection: 14:46 AM
(Print) Collector's Name (First, MI, Last): _____ Date (Mo/Day/Yr.): 6/17/08

SPECIMEN BOTTLE(S) RELEASED TO: A
Name of Delivery Service Transferring Specimen to Lab: LANSON

RECEIVED AT LAB: Primary Specimen Bottle Seal Intact Yes No, Enter Remark Below

Signature of Accessioner: _____ Date (Mo/Day/Yr.): 6/17/08

SPECIMEN BOTTLE(S) RELEASED TO: _____

STEP 5: COMPLETED BY DONOR

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct.

Signature of Donor: [Signature] (Print) Donor's Name (First, MI, Last): Tina R. Smith Date (Mo/Day/Yr.): 6/17/08

Daytime Phone No. 413 555 4824 Evening Phone No. 413 555 9999 Date of Birth 2/14/78
Mo. Day Yr.

Should the results of the laboratory tests for the specimen identified by this form be confirmed positive, the Medical Review Officer will contact you to ask about prescriptions and over-the-counter medications you may have taken. Therefore, you may want to make a list of those medications for your own records. THIS LIST IS NOT NECESSARY. If you choose to make a list, do so either on a separate piece of paper or on the back of your copy (COPY 5). -DO NOT PROVIDE THIS INFORMATION ON THE BACK OF ANY OTHER COPY OF THE FORM. TAKE COPY 5 WITH YOU.

STEP 6: COMPLETED BY MEDICAL REVIEW OFFICER - PRIMARY SPECIMEN

In accordance with applicable Federal requirements, my determination/verification is:

NEGATIVE POSITIVE TEST CANCELLED REFUSAL TO TEST BECAUSE:
 DILUTE ADULTERATED SUBSTITUTED

REMARKS: _____

Signature of Medical Review Officer: _____ (Print) Medical Review Officer's Name (First, MI, Last): _____ Date (Mo/Day/Yr.): _____

STEP 7: COMPLETED BY MEDICAL REVIEW OFFICER - SPLIT SPECIMEN

In accordance with applicable Federal requirements, my determination/verification for the split specimen (if tested) is:

RECONFIRMED FAILED TO RECONFIRM - REASON _____

Signature of Medical Review Officer: _____ (Print) Medical Review Officer's Name (First, MI, Last): _____ Date (Mo/Day/Yr.): _____

U.S. Department of Transportation (DOT) Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street _____
City, ST ZIP _____

DER Name and Telephone No. _____
DER Name _____ DER Phone Number _____

D: Reason for Test: Random Reasonable Susp Post-Accident Return to Duty Follow-up Pre-employment

Affix
Or
Print
Screening Results
Here

Affix
With
Tamper Evident Tap.

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee _____ Date _____/_____/_____
Month Day Year

Affix
Or
Print
Confirmation Results
Here

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded. **B**

TECHNICIAN: BAT SIT DEVICE: SALIVA BREATH* 15-Minute Wait: Yes No

SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.

REMARKS: _____

Alcohol Technician's Company _____ Company Street Address _____

(PRINT) Alcohol Technician's Name (First, M.I., Last) _____ Company City, State, Zip _____ Phone Number _____

Signature of Alcohol Technician _____ Date _____/_____/_____
Month Day Year

Affix
With
Tamper Evident
Tape

Affix
Or
Print
Additional Results
Here

Affix
With
Tamper Evident
Tape

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee _____ Date _____/_____/_____
Month Day Year

OMB No. 2105-0529

COPY 1 - ORIGINAL - FORWARD TO THE EMPLOYER

A

C

Exhibit 3: Post-Accident Testing Decision Tree

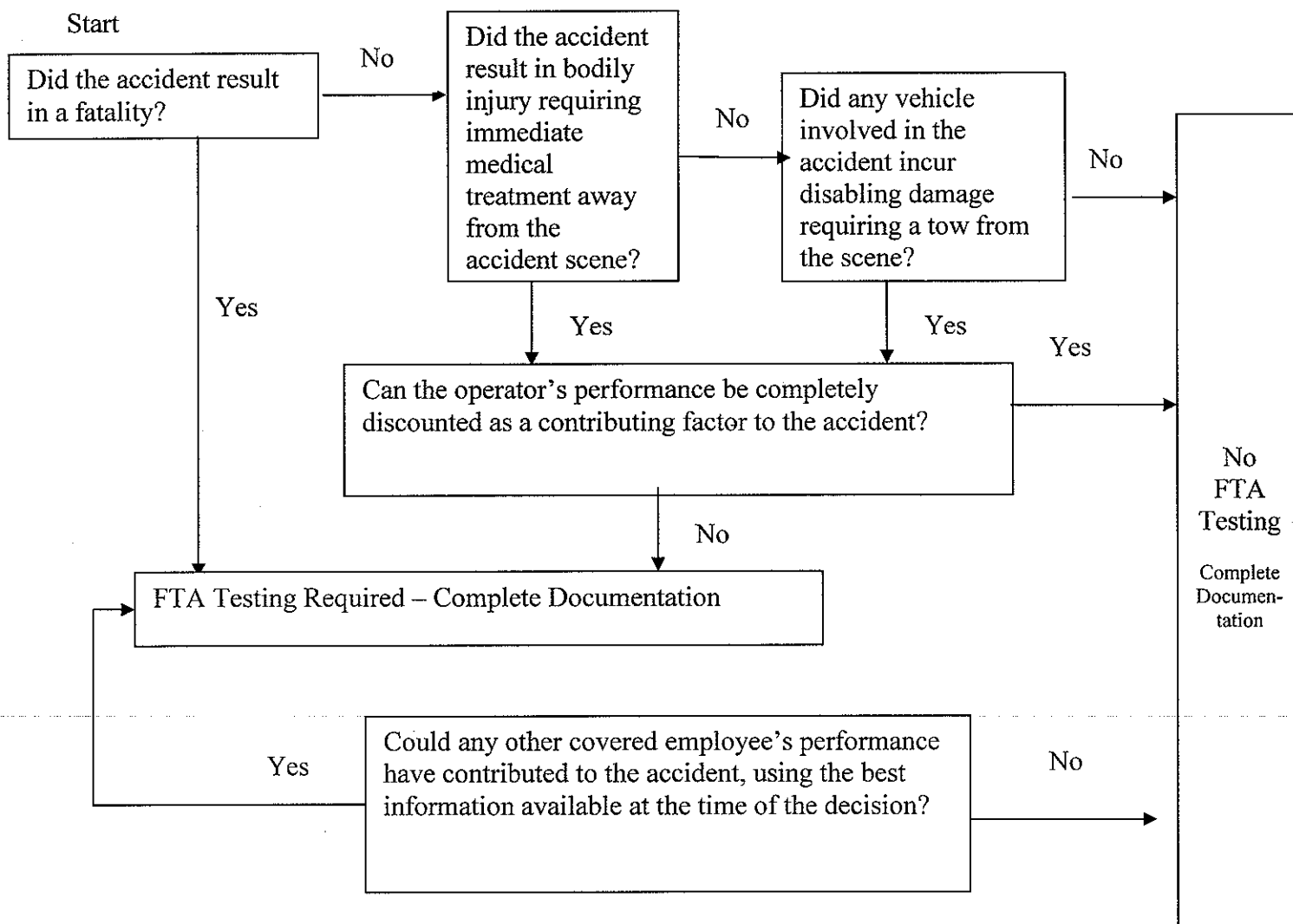


Exhibit 3 represents the testing criteria for accidents/incidents associated with the operation of a mass transit vehicle. The supervisor at the scene of the event should know the testing criteria and make a good faith effort decision to test or not test based on the information available at the time. The supervisor may consult with others, but ultimately, the supervisor is the person who has to make the determination.

Some transit companies have incorporated the testing criteria as they apply to other transit authorities, such as the Federal Motor Carrier Safety Administration, which requires testing if the employee received a moving violation as a result of the accident/incident. Other transit systems simply did not have sufficient documentation to determine if post-accident testing was required or not.

In any situation, the entire event must be documented and a record must be kept on file with other FTA/DOT files so employers can fully account for their program upon audits. In addition, employers will have the necessary records in the event that they have to produce documentation for court cases and arbitration hearings.