

(iii) No employer shall take any action under this subpart against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an employer with authority independent of this subpart from taking any action otherwise consistent with law.

(e) *Return-to-duty alcohol testing.* Each employer shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited in §§ 120.19 or 120.37 the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02. The test cannot occur until after the SAP has determined that the employee has successfully complied with the prescribed education and/or treatment.

(f) *Follow-up alcohol testing.* (1) Each employer shall ensure that the employee who engages in conduct prohibited by §§ 120.19 or 120.37, is subject to unannounced follow-up alcohol testing as directed by a SAP.

(2) The number and frequency of such testing shall be determined by the employer's SAP, but must consist of at least six tests in the first 12 months following the employee's return to duty.

(3) The employer must direct the employee to undergo testing for drugs in accordance with subpart E of this part, in addition to alcohol, if the SAP determines that drug testing is necessary for the particular employee. Any such drug testing shall be conducted in accordance with the provisions of 49 CFR part 40.

(4) Follow-up testing shall not exceed 60 months after the date the individual begins to perform, or returns to the performance of, a safety-sensitive function. The SAP may terminate the requirement for follow-up testing at any time after the first six tests have been conducted, if the SAP determines that such testing is no longer necessary.

(5) A covered employee shall be tested for alcohol under this section only while the employee is performing safety-sensitive functions, just before the employee is to perform safety-sensitive

functions, or just after the employee has ceased performing such functions.

(g) *Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04.* Each employer shall retest a covered employee to ensure compliance with the provisions of § 120.221(f) if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04.

#### **§ 120.219 Handling of test results, record retention, and confidentiality.**

(a) *Retention of records.* (1) *General requirement.* In addition to the records required to be maintained under 49 CFR part 40, employers must maintain records required by this subpart in a secure location with controlled access.

(2) *Period of retention.*

(i) *Five years.*

(A) Copies of any annual reports submitted to the FAA under this subpart for a minimum of 5 years.

(B) Records of notifications to the Federal Air Surgeon of refusals to submit to testing and violations of the alcohol misuse prohibitions in this chapter by covered employees who hold medical certificates issued under part 67 of this chapter.

(C) Documents presented by a covered employee to dispute the result of an alcohol test administered under this subpart.

(D) Records related to other violations of §§ 120.19 or 120.37.

(ii) *Two years.* Records related to the testing process and training required under this subpart.

(A) Documents related to the random selection process.

(B) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(C) Documents generated in connection with decisions on post-accident tests.

(D) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.