

DOT DRUG & ALCOHOL TESTING POLICY – POLICY UPDATE 11/01/08

COMPANY

What DOT Covered Employees Need To Know About the

NEW DOT 49 CFR Part 40

Final Rule for Workplace Drug and Alcohol Testing Programs

Nov. 1, 2008

The U.S. Court of Appeal for the D.C. Circuit has temporarily delayed the November 1st Direct Observation (DO) requirement for DOT return-to-duty and follow-up tests. This is an “administrative stay” until the Court completes its review on the matter. [See Attachment]

Therefore, Direct Observation for return-to-duty and follow-up testing will continue to be an employer option, rather than mandatory.

A further policy revision will be provided when the Court makes a decision on the matter.

Effective August 25, 2008

The Department of Transportation (DOT) is amending certain provisions of its drug and alcohol testing procedures to change instructions to collectors, laboratories, medical review officers, and employers regarding adulterated, substituted, diluted, and invalid urine specimen results. These changes are intended to create consistency with specimen validity testing requirements (i.e., testing for adulterants and/or substitutions) established by the U.S. Department of Health and Human Services and to clarify and integrate some measures taken into the DOT’s Interim Final Rules. This Final Rule makes specimen validity testing and other drug testing provisions mandatory within the regulated transportation industries, and therefore the *COMPANY* must comply with these new regulations.

Key Points:

1. Laboratories are mandated to test all DOT specimens for specimen validity (i.e., adulterants and urine substitutes).
2. Observed collections will afford less privacy in order to guard against employee use of items designed specifically to beat the testing process:
 - a. Directly observed collections will continue to occur when the collector has specific reason to believe that an employee may be attempting, or have sufficient reason, to evade the testing process (i.e., out-of-temperature specimens, a specimen appears to have been tampered with,

evidence of vials or items used to carry clean urine, or when an employee's conduct clearly indicates an attempt to tamper with a specimen) or as directed by the MRO based upon the laboratory test result;

b. During the observed collection, items such as prosthetic devices designed to carry clean urine will be checked for by observers with both male and female donors, by asking the donor to raise and lower clothing, turn around, and then put the clothing back into place for the observed collection. The observer must be of the same gender; and

3. Certain negative dilute urine test results (when the creatinine concentration of the specimen was equal to or greater than 2mg/dL, but less than or equal to 5 mg/dL) also mandate different action by the DOT employer as follows:

a. At the direction of the MRO, the employee will be required to submit to an immediate recollection under direct observation (as detailed above). Failure of the employee to submit is classified by the DOT as a refusal to test;

b. For current employees required to submit to a return-to-duty test or follow-up test (both of which under DOT regulations must be a negative test result) a second directly observed collection resulting in a negative dilute urine test result will render the final result a “negative” test; and

c. An applicant with a second directly observed negative dilute urine test result will not be eligible for hire under the Company’s uniformly enforced policy. DOT rule do not prohibit hiring an applicant under such circumstance.

4. During the Medical Review Officer’s (MRO) review process, an employee’s admission of adulterating or substituting a specimen is now a refusal to test.

5. An employee with a previously diagnosed medical condition which has caused them in the past to provide an invalid urine test result when called for testing, may now be referred directly to the MRO who will conduct a “signs and symptoms” medical evaluation (or the MRO may direct a licensed physician acceptable to the MRO to perform such an evaluation in accordance with DOT Regulations) to determine if there is evidence the employee is an illicit drug user. If no such evidence is found, the MRO will determine the test result to be a “negative” test and provide a report to the Company. If the medical evaluation provides contrary evidence, the MRO will provide the Company a report that the test is cancelled and state the reason(s) the employer cannot hire or have the individual resume safety-sensitive work without a negative result.

6. The DOT has also expanded the definition of a “refusal to test” found at 49 CFR Part 40.191, which states a follows:

(a) As an employee, you have refused to take a drug test if you:

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being

directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by C/TPA (see §40.61(a));

(2) Fail to remain at the testing site until the testing process is complete; Provided that an employee who leaves the testing site before the testing process commences (see §40.63(c)) for a pre-employment test is not deemed to have refused to test;

(3) Fail to provide a urine specimen for any drug test required by this part or DOT agency regulations; Provided that an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences (see §40.63(c)) for a pre-employment test is not deemed to have refused to test;

(4) In the case of a directly observed or monitored collection in a drug test, fail to permit the observation or monitoring of your provision of a specimen (see §§40.67(l) and 40.69(g));

(5) Fail to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see §40.193(d) (2));

(6) Fail or decline to take an additional drug test the employer or collector has directed you to take (see, for instance, Sec.40.197 (b));

(7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under Sec. 40.193(d). In the case of a pre-employment drug test, the employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment. If there was no contingent offer of employment, the MRO will cancel the test; or

(8) Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when directed by the collector, behave in a confrontational way that disrupts the collection process, fail to wash hands after being directed to do so by the collector).

(9) For an observed collection, fail to follow the observer's instructions to raise your clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if you have any type of prosthetic or other device that could be used to interfere with the collection process.

(10) Possess or wear a prosthetic or other device that could be used to interfere with the collection process.

(11) Admit to the collector or MRO that you adulterated or substituted the specimen.

(b) As an employee, if the MRO reports that you have a verified adulterated or substituted test result, you have refused to take a drug test.

(c) As an employee, if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

7. These above DOT mandatory changes will become effective for all drug testing conducted on or after August 25, 2008, with the exception of the effective date for mandatory observed collections for return to duty and follow-up testing has been delayed by the DOT until November 1, 2008.

8. Additionally, in May 2008, the DOT issued an interim final rule authorizing employers of Commercial Motor Vehicles Drivers holding a CDL, and TPA of owner operators consortiums, to comply with state laws requiring notice of positive drug and alcohol test and refusals.