

DIRECT OBSERVATION COLLECTION PROCEDURES FOR DOT DRUG TESTS

EFFECTIVE AUGUST 31, 2009, ALL RETURN TO DUTY AND FOLLOW-UP TESTS CONDUCTED UNDER DOT REGULATIONS MUST BE DIRECTLY OBSERVED URINE SPECIMEN COLLECTIONS. In a July 30 Final Rule Notice, the DOT reinstated the requirement for direct observation for all return to duty and follow-up drug tests. This provision was stayed by the US Court of Appeals for the DC Circuit effective Nov 1, 2008, but that stay was lifted on July 1, 2009. The July 30 final rule notice restores paragraph **§40.67 (b) As an employer, you must direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.**

On May 15, 2009, the US Court of Appeals for the DC Circuit unanimously upheld DOT's direct observation drug testing rules applicable to return to duty, safety-sensitive transportation industry employees who have failed or refused to take a prior drug test. The Court determined that direct observation drug testing for return to duty and follow-up testing was not arbitrary and capricious because the DOT had chosen a reasonable way to of responding to the compelling government interest in transportation safety. The Court's decisions also held that the rules did not violate the Fourth Amendment constitutional prohibition on unreasonable searches and seizures, taking into account, among other factors, the diminished expectation for privacy of employees who have failed or refused a prior drug test. The Court concluded "[g]iven the combination of the vital importance of transportation safety, the employees' participation in a pervasively regulated industry, their prior violations of the drug regulations, and the ease of obtaining cheating devices capable of defeating standard testing procedures, we find the challenged regulations facially valid under the Fourth Amendment."

The DOT's previously revised direct observation specimen collection procedures which include a requirement for specimen donors to partially disrobe so that the observer can visually inspect for specimen adulteration and substitution devices or paraphernalia are mandated for all direct observation collections, including return-to duty and follow-up tests. Direct Observation collections are mandated in the following circumstances:

- (1) The MRO reported a cancelled test due to an invalid specimen for which there is no medical explanation
- (2) The MRO cancelled a positive, adulterated, or substituted test because the test of the split specimen could not be performed
- (3) The MRO reported negative-dilute result with a creatinine concentration greater than or equal to 2 mg/dL but less than or equal to 5 mg/dL
- (4) The collector observed materials brought to the collection site or the employee's conduct clearly indicates an attempt to tamper with a specimen
- (5) The temperature on the original specimen was out of range
- (6) A specimen presented to the collector appeared to have been tampered with
- (7) The drug test is a return-to-duty test or a follow-up test. (EFFECTIVE AUGUST 31, 2009)

Remember that DOT return to duty and follow-up tests are only authorized for safety-sensitive employees who have previously tested positive, have had a refusal to test, or other violation of the DOT drug and alcohol regulations and are returning to safety-sensitive duties after completion of the Substance Abuse Professional (SAP) directed treatment or rehabilitation. Testing of employees who

are returning to duty after being out of work on medical, personal or other leave or furlough status is not a DOT Return to Duty test.

Collective bargaining agreements or state laws that prohibit or restrict direct observation urine specimen collections are pre-empted by the DOT regulations for tests conducted under DOT authority. The requirement for direct observation collections on return to duty and follow-up tests applies for any such tests conducted August 31, 2009 and thereafter, regardless of when the employee completed the DOT return to duty process as specified in Subpart O of Part 40.

**FOR QUESTIONS OR ADDITIONAL INFORMATION PLEASE CONTACT YOUR ACCOUNT MANAGER
AT 800-732-3784**