

DOT RECENTLY ISSUED NEW 49 CFR PART 40 GUIDANCE AND INTERPRETATIONS

The Department of Transportation's Office of Drug and Alcohol Policy and Compliance (ODAPC) recently issued new guidance and interpretations regarding 49 CFR Part 40. The topics covered in this release include;

1. Authorizations required to release drug and alcohol information
2. How to handle an insufficient specimen during an observed collection
3. Evaluating internet prescriptions
4. What constitutes a failure to cooperate with testing process?

1. Authorizations for release of DOT drug and alcohol testing information: The DOT states that neither employers nor service agents are required to obtain authorization to disclose drug and alcohol testing information where disclosing that information is required by 49 CFR Part 40 or other DOT Agency & U.S. Coast Guard (USCG) drug and alcohol testing regulations. This is true even if drug and alcohol testing information is viewed as protected under HIPAA.

Specific examples are that employers do not need written authorizations from employees to conduct DOT tests. MROS do not need authorization to release results to employers and SAPS do not need authorization to confer with employers. Consortia/Third Party Administrators need no written authorizations from employees to bill employers for service agent functions that they perform.”

2. Stand-down waiver for certain “shy bladder” situations: When a donor is sent for a directly observed specimen and is unable to provide a sufficient specimen, ODAPC indicates this can be considered similar to a laboratory reporting a positive, adulterated, or substituted test result to the MRO.

An employer could apply for a stand-down waiver that would permit the employee to be removed from safety-sensitive duties when he or she does not provide an adequate amount of urine during an observed collection. This request would need to meet all criteria outlined at 40.21 and should reference the fact that it is for standing down an employee who fails to provide an adequate amount of urine during an observed collection.

If the waiver is granted, then the company could remove an employee from safety-sensitive duties pending the MRO's final determination based on the “shy bladder” evaluation report—but only if they have stand-down waiver granted for this type of circumstance

3. Internet Prescriptions: An MRO can only accept an Internet prescription if there is a documented doctor-patient relationship; a physician prescribing medication over the internet

would not meet this criteria by reviewing a questionnaire. MROs are instructed to also consider the state of licensure of the practitioner and whether the employee initiated the request for the medication to the pharmacy.

4. Failing to cooperate with the testing process: A few examples of failing to cooperate with the testing process were listed in the initial regulations and this guidance expands the examples to now include:

- The employee refuses to empty his pockets when directed to do so by the collector.
- The employee behaves in a confrontational way that disrupts the testing process.
- The employee fails to wash his or her hands after being directed to do so by the collector.
- The employee admits to the collector that he or she adulterated or substituted the specimen; and
- The employee is found to have a device – such as a prosthetic appliance – the purpose of which is to interfere with providing an actual urine specimen.

When the issue is a problem with refusing to following instructions or if there is a confrontation, the collector should warn the employee of potential consequences of a failure to cooperate; and if practical, seek assistance from the DER or supervisor to ensure that the employee understands the ramifications.

When the employee admits to adulteration or substitution or when a specimen adulteration or substitution device is found, the collector should terminate the collection process, document the circumstances on the CCF, record on the CCF “Refusal to test”, distribute the CCF copies as required, and then notify the DER or collection site supervisor of the refusal to test occurrence. There is no need for the collector to warn the employee or to seek assistance from the employer prior to terminating the collection process.

The complete release and previous guidance and interpretations can be found on the ODAPC website at <http://www.dot.gov/ost/dapc>

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