

RECONSIDERATION OF REFUSAL TO TEST-SUBSTITUTED SPECIMEN RESULTS FOR DOT DRUG TESTS REPORTED PRIOR TO MAY 28, 2003

On September 11, 2007, the US DOT, Office of Drug and Alcohol Policy and Compliance (ODAPCP) issued a notice to employers and employees covered by DOT drug and alcohol testing regulations regarding drug test results reported as Refusal to Test-Substituted Specimen prior to May 28, 2003. The notice makes provisions for individuals whose urine specimens were reported as substituted with a creatinine value of 2-5 mg/dL to submit documentation to the DOT for reconsideration of their Refusal to Test-Substituted Specimen determination.

In May 2003, the DOT modified the criteria for determining that a donor submitted a substituted specimen for drug testing. The modification was in the creatinine value used to determine that a specimen was substituted. Prior to 2003, the creatinine value used to determine substitution was less than 5 mg/dL; a rule change in May 2003 changed the creatinine value used to determine substitution to less than 2 mg/dL.

The DOT is now offering the opportunity for individuals who had a refusal to test-substituted specimen determination made prior to May 28, 2003 to seek reconsideration of their test result if the following are true:

The Substituted Specimen determination was reported prior to May 28, 2003

The specimen had a creatinine concentration in the 2-5 mg/dL range and a specific gravity of ≤ 1.001 or ≥ 1.020 ; and

The individual provides credible medical documentation that he/she naturally produces urine specimens with creatinine concentrations and specific gravity in the above ranges.

Individuals who meet the above criteria and want to have their test result reconsidered, must submit documentation to the DOT ODAPC for review. The DOT notice is time-limited and qualifying individuals must submit their documentation for reconsideration to ODAPCP prior to March 11, 2008.

What is the impact of this notice for Employers? If you receive a request from another employer or authorized entity to report a test result that was determined a Refusal to Test-Substituted Specimen with creatinine 2-5 mg/dL reported to you prior to May 2003, you should make the donor aware (if possible) that he/she can seek reconsideration of the test result from the ODAPCP. Remember that requests you receive for prior DOT test results are normally limited to 2 or 3 years prior to the date of the signed release - thus, you should not routinely be releasing DOT test results for tests conducted prior to May 2003. There is no obligation under this DOT notice for you to conduct a review of all Refusal to Test-Substituted Specimen test results that were reported to you by your MRO prior to May, 2003.

If you, as an employer, receive an inquiry from an employee or former employee concerning a Refusal to Test-Substituted Specimen determination made prior to May, 2003 you should provide him/her with a copy of the attached DOT Notice.

**FOR MORE INFORMATION OR ADDITIONAL CLARIFICATION, PLEASE CONTACT DR. DONNA SMITH,
FIRSTLAB'S REGULATORY AFFAIRS OFFICER, AT DSMITH@FIRSTLAB.COM OR 727-383-0283.**

**NOTICE TO EMPLOYERS AND EMPLOYEES COVERED
BY DOT DRUG AND ALCOHOL TESTING REGULATIONS**

**REGARDING EMPLOYMENT RECORDS OF
EMPLOYEES REPORTED AS A “REFUSAL TO TEST” DUE TO THE VERIFICATION OF A
SUBSTITUTED URINE SPECIMEN**

We recommend that employers review past drug testing employment records, where records indicate an employee refused to test before May 28, 2003.

For substituted specimens that were reported as refusals to test prior to May 28, 2003, employers should be aware of the following:

Before May 28, 2003: Specimens with creatinine concentrations equal to or greater than 2, but less than or equal to 5 mg/dL [hereafter, “2-5 mg/dL range”] and a specific gravity of less than or equal to 1.001 or greater than or equal to 1.020 were considered to be substituted urine samples and therefore reported by the MRO as refusals to test.

May 28, 2003: An interim final rule change required that any test results meeting these criteria must be considered dilute specimens warranting recollections under direct observation. They would no longer be considered refusals to test. The preamble for this interim final rule stated that if the employer was notified of a substituted test result prior to May 28, 2003, the employer should continue to consider the result a refusal to test.

Why the rule changed: The U.S. Department of Transportation (DOT) became aware that a small number of people could naturally produce specimens with creatinine within this 2-5 mg/dL range.

What this means: That in a rare number of cases, individuals determined to have substituted urine specimens, and which were ultimately reported as a refusal to test, might not have substituted their urine samples. The purpose of this notice is to provide employers with accurate information for interpreting employment records regarding substituted / refusal test results prior to May 28, 2003. DOT would like to see employers make informed decisions.

Warning: This information applies only to a small number of tests, and most refusals to test determinations prior to May 28, 2003 will remain applicable.

Many responsible employers look back farther than the DOT rules require in evaluating whether to hire someone. While regulations require employers to review two or three or even five years of past drug and alcohol testing records (the length of time depends on type of your transportation industry) when an employee applies for or transfers into a safety sensitive position, DOT believes it is important for employers to take this notice into consideration when reviewing those records.

What’s the remedy: The DOT will reconsider an employee’s drug test result if each of the following conditions are met:

1. The substitution / refusal to test determination was reported before May 28, 2003;
2. The test had a creatinine concentration in the 2-5 mg/dL range and a specific gravity of less than or equal to 1.001 or greater than or equal to 1.020; and
3. There exists credible medical documentation that the individual naturally produces urine specimens with creatinine concentrations and specific gravity in these ranges.

NOTE: One example of what the DOT could consider credible medical documentation could be a controlled medical examination during which the individual produces the same result during a collection under direct observation.

Another could include any subsequent required DOT drug test in which the individual demonstrated the ability to produce another urine specimen with creatinine concentration in the 2-5 mg/dL range and a specific gravity of less than or equal to 1.001 or greater than or equal to 1.020.

What can employees do: If you meet the above criteria, you should send documentation to DOT thoroughly addressing the above three points. Send your request to:

U.S. Department of Transportation
Office of the Secretary
Office of Drug and Alcohol Policy and Compliance
ATTN: Mark Snider [ODAPC]
1200 New Jersey Avenue, SE
Washington, DC 20590

What can employers do: If you discover through a background check or other means that a current employee or an applicant or employee who is being hired or is transferring into a safety-sensitive function was reported as refusing due to having a substituted drug test result before May 28, 2003, you may choose one or more of the following:

If you are a current or previous employer:

1. You may inform employees that the DOT can reconsider their substitution / refusal results if they meet the three conditions outlined above.
2. When you receive a 40.25 inquiry on a previous employee and have written documentation that the DOT reconsidered the employee's original refusal result, you should not report the refusal result on this test to the requesting employer.

If you are a gaining employer:

1. You may permit the employee to perform safety-sensitive functions if he or she has successfully completed the DOT return-to-duty process.
2. You may inform the employee that he or she may submit documentation (see above) regarding his or her substituted test result to the DOT for reconsideration. You may permit the employee to perform safety-sensitive functions upon receipt of DOT documentation that the employee has been shown to naturally produce creatinine concentrations in the 2-5 mg/dL range and a specific gravity of less than or equal to 1.001 or greater than or equal to 1.020.
3. If after reconsideration ODAPC provides written documentation stating that the original results should not be considered substituted, you should attach that written documentation to the original substituted drug test result, as proof that the test should not be considered as substituted.

NOTE: Under DOT regulations, all decisions to hire or fire an employee are left to the employer, but these options are provided because DOT would like employers to make the most informed decisions possible. DOT does NOT require that employers hire or fire any specific individual.

Our review will be on a case-by-case basis. Following our review, the DOT and the DOT Agencies will take appropriate action to notify employees of our determinations.

NOTE: This Informational Notice is time limited, and submissions must be sent to the DOT no later than six months from the date of publication of this notice in the Federal Register. For more information, contact Mark Snider by phone at 202.366.3784 or by Email at mark.snider@dot.gov; or visit our website at: www.dot.gov/ost/dapc.