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New drug-testing regulations issued by the U.S. Department of Transportation will require observed urine collections for workers who have failed or cheated a drug test in the past.

Transportation Workers In All Industries Face Tougher Drug Testing Procedures: Observed Collections Designed to Thwart Abuses

By Nancy N. Delogu and Donald W. Benson

More than eight million regulated commercial drivers and other workers involved in transportation and the pipeline industry will face more stringent drug testing collection procedures when new federal transportation regulations go into effect August 25, 2008. The new rules, which are included in and modify 49 C.F.R. Part 40, address "specimen validity" and seek to deal with what appear to be widespread efforts by workers to "beat" drug tests.

The new final rules include various mandatory laboratory-based tests intended to improve the detection of samples that have been adulterated by masking agents or diluted by water. Concern about the proliferation of mechanical devices designed to be worn by an individual to simulate the act of urination while delivering a "clean" urine sample has also triggered new, broader requirements for observed collections. Commencing with the rule's effective date, all return-to-work and follow-up urine collections must be observed collections.

At present, observed collections are required only in a handful of situations, such as when the collector believes that the specimen donor has attempted to tamper with or adulterate his test specimen. The new rules will require any employee who is taking either a return-to-work drug test (after a prior positive result) or who is subject to follow-up testing (after having violated the regulations and completing an evaluation and prescribed treatment) to submit to observed collections.

Affected workers will be required "to raise their shirts, blouses, or dresses/skirts above the waist, and lower their pants and underpants, to show the observer, by turning

around, that they do not have a prosthetic device on their person. After this is done, they may return their clothing to its proper position," and produce a specimen "in such a manner that the observer can see the urine exiting directly from the individual into the collection container." Observed collections will continue to be monitored by same-gender collection site personnel.

Workers in a wide range of businesses are subject to drug and alcohol prohibitions and testing requirements pursuant to the Omnibus Transportation Employee Testing Act (OTETA), including most drivers who operate large commercial motor vehicles. As currently drafted, the Department of Transportation (DOT), which is charged with implementing that law, requires workers subject to regulation by the Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), and Pipeline and Hazardous Materials Administration (PHMSA), to be tested according to a uniform set of procedural guidelines, codified at 49 C.F.R. Part 40. (Individual agencies have adopted unique regulations regarding when an employee or applicant may be subject to testing.) The most recent announcement amounts to the most significant change to the "Part 40" guidelines since 2001.

Although the new rules may seem draconian, the DOT's action follows a number of well-publicized events calling into question the current rules' ability to identify drug abusers. In May 2008, a report released by the Government Accounting Office (GAO) on the drug and alcohol testing program administered by the FMCSA found widespread

noncompliance with testing and collection procedures and recommended several changes to existing DOT rules. In particular, the report suggested that: (1) the FMCSA should strengthen its enforcement of safety audits for new carriers; (2) Congress should authorize FMCSA to levy fines when collection sites do not follow federal drug and alcohol testing protocols; and (3) Congress should create a national database of drug testing information for reducing the number of drivers who test positive but who continue to drive, so that states can more effectively revoke commercial motor vehicle licenses.

The report cited as a significant concern the widespread availability and use of adulterants, mechanical delivery devices, and synthetic urine that can effectively mask evidence of substance abuse. Moreover, the GAO report found that a significant number of collection sites appear to be out of compliance in ensuring that DOT protocols are followed when specimen testing occurs under the existing regulations. In one GAO investigation, collectors at 10 of 24 sites failed to ask the undercover drivers to empty their pants pockets to ensure that no items were present that could be used to adulterate the specimen, as required by DOT protocols. The investigators also were able to purchase adulterants and synthetic urine and to use them in 8 of the 24 tests; the laboratories failed to discover the adulterants or substitutes.

Last fall, the U.S. House of Representatives' Committee on Infrastructure and Transportation held subcommittee hearings that revealed widespread problems with collectors who were not implementing the DOT regulations correctly.

One source estimated that as many adulterated specimens as positive specimens are received. A study conducted roadside on anonymous truckers by the Oregon State Police last spring found that one in ten tested positive for a banned substance. While the GAO report and congressional hearings focused on the FMCSA and not the other DOT operating administrations subject to testing (*i.e.*, the FAA, FRA, FTA and PHMSA), drivers represent the greatest number of covered transportation workers subject to testing, and the new rules will apply to all DOT-mandated drug testing programs.

On August 8, 2008, the Transportation Trades Department, the AFL-CIO's umbrella organization for transportation unions, asked the DOT to reconsider and halt implementation of the portion of the new rule requiring observed collections. The union has stated that if the DOT does not rescind the rule, it will file a lawsuit challenging the new rule as overly invasive and a violation of the Fourth Amendment to the U.S. Constitution, which prohibits the government from engaging in unreasonable searches. DOT has stated only that it will consider the union's request.

Advice to Employers

Employers with regulated workers should review and consider amending their DOT drug and alcohol testing programs, particularly for those workers where regulatory oversight rules require that they be presented with detailed information on the testing process, so as to ensure that workers understand the circumstances in which observed collections may occur. More importantly, perhaps, employers should consider auditing their collection processes to ensure compliance with the rules and should make sure that those charged with implementing the policy, from management to outside collection personnel, are aware of the new regulatory requirements.

Businesses that conduct drug testing according to DOT procedures, but which are not actually subject to DOT requirements, should also consider updating their policies and procedures. Observed collections, soon to become common within the DOT regulatory framework, are clearly prohibited by statute in a number of states and are not advised for non-regulated workers in jurisdictions with strong privacy protections. Although the DOT regulations do preempt contrary state law as to regulated transportation workers, state law will take precedence for those not actually subject to DOT regulation.

The new regulations can be found in the Federal Register at 73 Fed. Reg. 33735 (June 13, 2008) and are effective August 25, 2008.

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