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In This Issue:

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Court Rules Transportation Industry Employers Must Implement Observed Urine Collection Testing Procedures

By Nancy N. Delogu

Employers in the transportation industry will soon have to implement tougher urine collection procedures designed to thwart cheating by workers in safety-sensitive positions now that challenged regulations have been upheld by a federal appeals court.

On Friday, May 15, 2009, the United States Court of Appeals for the District of Columbia Circuit in *BNSF Railway Co. v. United States Department of Transportation*, No. 08-1264 (May 15, 2009) denied a challenge to certain drug testing regulations issued by the U.S. Department of Transportation (DOT) in June 2008.[1] The 2008 regulations require employers in the aviation, rail, motor carrier, mass transit, maritime, and pipeline industries to directly observe employees producing a urine sample for return-to-work and follow-up drug tests. Those individuals subject to observed collections now 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." A group of employers and unions had challenged the regulation, arguing first that it violated provisions of the Administrative Procedure Act (APA) prohibiting arbitrary and capricious agency action, and second, that the regulation was unconstitutional under the Fourth Amendment, which protects against unreasonable searches by the government.

The D.C. Circuit concluded that the DOT's promulgation of the 2008 observed collection regulations was not "arbitrary and capricious" and, therefore, did not violate the APA. In reaching its conclusion, the court noted that the increasing availability of a variety of products designed to circumvent and defeat drug tests, "coupled with returning employees' higher rate of drug use and heightened motivation to cheat, presented an elevated risk of cheating on return-to-duty and follow-up tests that justified the mandatory use of direct observation."

The court also upheld the regulation against the Fourth Amendment challenge, reasoning that "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" make direct observation a "reasonable procedure for situations posing such a heightened risk of cheating." Observed collections are already required for regulated workers who have previously been caught attempting to substitute or adulterate a urine specimen; the new regulation expands the observed collection and partial disrobing requirement to individuals who have also refused or failed a drug test.

The parties must now decide whether to seek review of the decision by the entire D.C. Circuit or by the U.S. Supreme Court. The regulations adopted pursuant to the Omnibus Transportation Testing Act and other federal testing programs have been reviewed by the U.S. Supreme Court in the past, with the Court upholding those regulations each time.[2] If no such challenge is mounted, the DOT's Office of Drug and Alcohol Program Compliance (ODAPC) will no doubt publish a timetable for mandatory compliance with the regulations. In the interim, the existing regulations permit, but do not require, employers in the transportation industry to conduct observed collections for return-to-work and follow-up tests.

Recommendations and Practical Considerations

Absent further court action, employers subject to regulation by the Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), or Pipeline and Hazardous Materials Administration (PHMSA) will be required to directly observe return-to-work and follow-up urine collections for drug tests of safety-sensitive employees. Employers with regulated workers should, therefore, review and consider amending their DOT drug and alcohol testing programs. This may be particularly helpful for those industries where regulatory oversight rules require that workers be presented with detailed information about the testing process to ensure that they 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 and can implement them according to the regulations.

Businesses that conduct drug testing according to DOT procedures, but which are not subject to DOT requirements, should also consider updating their policies and procedures. Observed collections are 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 preempt contrary state law as to regulated transportation workers, state law will take precedence for those employers not actually subject to DOT regulation.

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[1] The June 2008 regulations can be found in the Federal Register at 73 Fed. Reg. 33,735 (June 13, 2008).

[2] *See, e.g., Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).