PART 40 QUESTIONS AND ANSWERS

The Office of General Counsel and Office of Drug and Alcohol Policy and Compliance of the Department of Transportation are providing these questions and answers. They constitute official and authoritative guidance and interpretation concerning 49 CFR Part 40 (see 49 CFR 40.5).

These Questions and Answers are dated 07/06.

General Issue Update **07/06**

QUESTION:

Are employers and their service agents in the Department of Transportation (DOT) drug and alcohol testing program required to obtain employee written authorizations in order to disclose drug and alcohol testing information?

ANSWER:

• In the DOT drug and alcohol testing program, employers and service agents are not required to obtain written employee authorization to disclose drug and alcohol testing information where disclosing the information is required by 49 CFR Part 40 and other DOT Agency & U.S. Coast Guard (USCG) drug and alcohol testing regulations. 49 CFR Part 40 and DOT Agency & USCG regulations provide for confidentiality of individual test-related information in a variety of other circumstances.

• Even if drug and alcohol testing information is viewed as protected under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) rules, it is not necessary to obtain employee written authorization where DOT requires the use or disclosure of otherwise protected health information under 49 CFR Part 40 or the other DOT Agency & USCG drug and alcohol testing regulations.

• Unless otherwise stipulated by 49 CFR Part 40 or DOT Agency & USCG regulations, use or disclosure of the DOT drug and alcohol testing information without a consent or authorization from the employee is required by the Omnibus Transportation Employees Testing Act of 1991, 49 CFR Part 40, and DOT Agency & USCG drug and alcohol testing regulations.

• Consequently, an employer or service agent in the DOT program may disclose the information without the written authorization from the employee under many circumstances. For example:

-- Employers need no written authorizations from employees to conduct DOT tests.

-- Collectors need no written authorizations from employees to perform DOT urine collections, to distribute Federal Drug Testing Custody and Control Forms, or to send specimens to laboratories.

-- Screening Test Technicians and Breath Alcohol Technicians need no written authorizations from employees to perform DOT saliva or breath alcohol tests (as appropriate), or to report alcohol test results to employers.

-- Laboratories need no written authorizations from employees to perform DOT drug and validity testing, or to report test results to Medical Review Officers (MROs).

-- MROs need no written authorizations from employees to verify drug test results, to discuss alternative medical explanations with prescribing physicians and issuing pharmacists, to report results to employers, to confer with Substance Abuse Professionals (SAPs) and evaluating physicians, or to report other medical information (see §40.327).

-- SAPs need no written authorizations from employees to conduct SAP evaluations, to confer with employers, to confer with MROs, to confer with appropriate education and treatment providers, or to provide SAP reports to employers.

-- Consortia/Third Party Administrators need no written authorizations from employees to bill employers for service agent functions that they perform for employers or contract on behalf of employers.

-- Evaluating physicians need no written authorizations from employees to report evaluation information and results to MROs or to employers, as appropriate.

-- Employers and service agents need no written authorizations from employees to release information to requesting Federal, state, or local safety agencies with regulatory authority over them or employees.

§40.21 **07/06**

QUESTION:

If an employee fails to provide a sufficient amount of urine during an observed collection, can an employer remove the employee from performing safety-sensitive functions pending receipt of the verified result from the Medical Review Officer (MRO)?

ANSWER:

• The Department believes an employee's failing to provide a sufficient amount of urine during a directly observed collection is very similar to a laboratory's reporting a positive, adulterated, or substituted test result to MRO.

• While we do not believe it is appropriate for an employer to remove the employee from safety-sensitive duties until receiving the MRO's verified result, we think stand-down waiver provisions could be relevant.

• Therefore, employers can 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.

• The waiver request would need to meet all criteria outlined at 40.21 and should reference the fact that it is for standing an employee down who fails to provide an adequate amount of urine during an observed collection.

• The 40.21 waiver request for laboratory positive, adulterated, and substituted results will continue to be evaluated separately.

40.141 **07/06**

QUESTION:

Is a Medical Review Officer (MRO) permitted to accept an employee's prescription for medication obtained over the Internet?

ANSWER:

• An MRO is authorized to accept an employee's prescription for medication obtained over the Internet only if there is proof that a legitimate doctor-patient relationship had been established.

• The following four elements generally serve as an indication that a legitimate doctor-patient relationship has been established:

-- A patient has a medical complaint;

-- A medical history has been taken;

-- A physical examination has been performed; and

-- Some logical connection exists between the complaint, the medical history, the physical examination, and the drug prescribed.

• Standing alone, the completion of an online questionnaire reviewed later by a pharmacy-employed doctor fails to establish a proper doctor-patient relationship.

• The MRO should, at a minimum, consider the following items when verifying the test result:

-- The name, physical location, and state(s) of licensure of the prescribing practitioner;

-- Whether the employee was professionally evaluated for the current medical complaint by the prescribing practitioner, and the last time the employee was in direct contact with the prescribing practitioner;

-- Whether the employee initiated the request to the pharmacy for a particular medication; and

-- Whether a proper doctor-patient relationship existed.

• It is the employee's responsibility to provide sufficient documentation to address MRO inquiries as to whether there was a legitimate doctor-patient relationship.

40.191 **07/06**

QUESTION:

What are some examples of an employee's failure to cooperate with the testing process that would cause a refusal to test and how should the collector handle them?

ANSWER:

• Part 40 highlights two examples of failure to cooperate – the employee refuses to empty pockets when instructed to do so; and the employee behaves in a confrontational way that disrupts the testing process.

• Among others are:

-- 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 – for example, refusing to empty pockets or refusing to wash hands – 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 issue is admission of adulteration or substitution or when a device is found, there is no need for the collector to warn the employee or to seek assistance from the DER or supervisor.

• In every case, the collector must carefully follow the procedures at 40.191(d) by terminating the collection process, immediately notifying the DER of the refusal, and thoroughly documenting the circumstances surrounding the event in the remarks section of the CCF.

• Any specimen that had been collected before the refusal should be discarded.