

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 01/02.

QUESTION:

If an applicant admits to testing positive on or refusing to take a pre-employment test within the past two years, must the applicant be held out of safety-sensitive duties if he or she did not complete the return-to-duty process (i.e., the SAP process)?

ANSWER:

- If the applicant admits that he or she had a positive or a refusal to test result on a pre-employment test, the employer is not permitted to use the applicant to perform safety-sensitive duties until and unless the applicant documents successful completion of the return-to-duty process.
- This Part 40 requirement applies whether or not the pre-employment positive or refusal occurred before, on, or after August 1, 2001.
- Should no proof exist that the return-to-duty process was successfully complied with by the applicant, a current return-to-duty process must occur before the individual can again perform safety-sensitive functions.

QUESTION:

When an employee leaves an employer for a period of time (but not exceeding two years) and returns to that same employer, must the employer once again seek to obtain information it may have received previously from other employers?

ANSWER:

- No. If the information received previously is still on file with the employer, the employer need not seek to obtain the testing data again.
- However, the employer must seek information from all other employers for whom the employee performed safety-sensitive duties since the employee last worked for the employer.

QUESTION:

Because Part 40 requires collectors, MROs, BATs and STTs, and SAPs to maintain their own training records, can employers or training entities refuse to provide these service agents their training records?

ANSWER:

- No. Employers and trainers who provide training for these service agents must not withhold training documentation from them when they have successfully completed the training requirements.
- If a collector, BAT, STT, MRO, or SAP is not in possession of training documentation, he or she is in violation of Part 40.
- Therefore, Part 40 does not permit the withholding of such documentation from these service agents.

QUESTION:

Is error correction training required if a drug test is cancelled due to a specimen having an insufficient amount of urine?

ANSWER:

- If the laboratory finds there is an insufficient amount of urine in the primary bottle for analysis, the laboratory will report to the MRO that the specimen is “rejected for testing” (unless the laboratory can redesignate the specimens). Subsequently, the MRO must cancel the test.
- The MRO should seek to determine (with the assistance of the laboratory) if the specimen leaked in transit or if not enough urine was collected.
- Specimen leakage while in transit to a laboratory will not cause a cancellation requiring the collector to have error correction training.
- If the laboratory finds no evidence of leakage, indications would be strong that the collector failed to collect the appropriate amount of urine. If this were the case, the collector would need error correction training.
- If specimen leakage is a recurrent problem for a collection site, the MRO may be wise to inquire whether or not the shipping containers used are sufficient to adequately protect the specimens or whether or not collectors are securing the bottle lids properly.

QUESTION:

Where can billing information be entered onto the Federal Drug Testing Custody and Control Form (CCF)?

ANSWER:

- 40.45(c)(1) states that the CCF may include billing information if the information is in the area outside the border of the form.
- Therefore, if account codes or collection site codes are entered, they must be placed outside the border, only.
- CCFs with this information pre-printed inside the border (i.e., in the Step 1 box) may be used until the supply of these forms is exhausted. CCFs produced or re-ordered after February 15, 2002, must not have this information inside the border.
- No corrective action is needed nor will a result be impacted if the CCF contains this information inside the border. However, employers and service providers may be subject to enforcement action if this requirement is not met.

QUESTION:

What actual address is required for “Collection Site Address” in Step 1 of the CCF, and what telephone number should the collector provide?

ANSWER:

- The collection site address should reflect the location where the collection takes place. If the collection takes place at a clinic, the actual address of that clinic should be used: not a corporate or a “main office” address of the clinic/collection company.
- If the collection takes place on-site at the employer’s place of business (e.g., a bus terminal, a rail yard), the actual address of the employer site should be used.
- If the collection takes place in a “mobile unit” or takes place at an accident site, the collector should enter the actual location address of the collection (or as near an approximation as possible, under the circumstances).
- The required collector telephone number should be the number at which it is most likely that the laboratory, MRO, or employer, if necessary, may contact the collector and the collector’s supervisor.
- Pre-printing certain information onto the CCF is problematic if the information is subject to change.

QUESTION:

Can a collector mark through pre-printed employer, MRO, collection site, and/or laboratory information on the CCF if that information is not accurate for a particular collection?

ANSWER:

- Yes. When the collector has no “blank” CCFs and the CCFs on-hand contain inaccurate pre-printed employer, MRO, collection site, and/or laboratory information, the collector is permitted to “line through” the inaccurate information and insert legibly the proper information.
- The likelihood of a collection site having CCFs with inaccurate information increases with unexpected collection events (e.g., employee arrives unannounced for post-accident testing).
- If the specimen will be sent to a laboratory different than the one pre-printed on the available CCF, it becomes important for the collector to modify the CCF so that it reflects the name and address of the laboratory to which the specimen will actually be sent. It is also important for the collector to line through any pre-printed billing code and insert the appropriate one, if it is available.
- Finally, laboratories should honor collection site requests to provide an adequate number of “blank” CCFs for use during unexpected collection events. It is important to note that the DOT permits overprinting or pre-printing of CCFs in an effort to streamline the entire testing process, not to limit the distribution of the forms to collection sites.

QUESTION:

If the primary laboratory must redesignate bottle B for bottle A, can the laboratory test the specimen if only 15 mL of urine is present in the redesignated bottle A?

ANSWER:

- The Department permits specimen redesignation only in limited circumstances – one such occurrence would be if the A specimen has leaked in transit, leaving only the B specimen to be tested.
- In such a case, the laboratory should test the redesignated specimen despite the fact that, under normal circumstances, a sufficient amount of specimen would not have been available for testing.

QUESTION:

Must a certifying scientist's signature be on Copy 1 of the CCF if the drug test result is negative?

ANSWER:

- The certifying scientist's signature must be on Copy 1 of the CCF for non-negative results only.
- Therefore, the certifying scientist may simply initial (and date) the CCF when the test result is negative.

QUESTION:

Must an employer or C/TPA who is required to submit blind specimens to laboratories send adulterated or substituted blinds if the employer or C/TPA is not yet having specimens undergo validity testing?

ANSWER:

- At the present time, validity testing remains an employer option.
- Therefore, if an employer or C/TPA required to submit blind specimens is not conducting validity testing during the course of its normal testing, the employer or C/TPA needs not send adulterated or substituted blind specimens to the laboratories used.
- However, if an employer or C/TPA conducts validity testing, adulterated or substituted blind specimens must be sent to the laboratories used.
- Part 40 requires that approximately 75 percent of the blinds must be blank (i.e., containing no drugs, nor adulterated or substituted); 15 percent must be positive for one or more drugs; and 10 percent must be adulterated or substituted.
- If the employer or C/TPA is not exercising the option to conduct validity testing, approximately 75 percent of blinds must be blank and 25 percent must be positive for one or more drugs.

QUESTION:

Is it appropriate for the MRO to attempt to contact the employee after normal office hours?

ANSWER:

- Yes. Copy 2 of the CCF contains spaces for the employee's daytime and evening telephone numbers. We expect MROs or their staffs to attempt to contact the employee at the evening phone number if the employee is not available at the daytime number.

QUESTION:

May the MRO report an “interim” or “preliminary” test result to the employer (or C/TPA) while awaiting receipt of the MRO copy and/or the laboratory result?

ANSWER:

- No. An MRO must not report tests results until and unless he or she has received all required information from the collection site and laboratory.
- This means the MRO must have Copy 2 or a legible copy of Copy 2 (or any legible copy of a CCF page signed by the employee) and must have the drug test result (sent in the appropriate manners for negatives and non-negatives) from the laboratory.
- An MRO sending “in-progress” negative or non-negative results will be considered to be in violation of Part 40.

QUESTION:

Can someone other than the employee direct that an MRO have the employee's split specimen tested?

ANSWER:

- No. Because the split specimen exists to provide the employee with “due process” in the event that he or she desires to challenge the primary specimen's results, only the employee can request that the split specimen be tested.
- In addition, an employer or a union (or other labor representative) may not act on the behalf of the employee in requesting that the split specimen be tested.
- The employee must make the request directly to the MRO.

QUESTION:

Can a split specimen be sent to a second laboratory that is under the same corporate title as the primary laboratory?

ANSWER:

- Yes. The rule requires the split to be tested at a different or second HHS-certified laboratory. For example, if the primary specimen was tested at XYZ Laboratory in Dallas, TX, the split specimen may be sent to XYZ Laboratory in Chicago, IL.
- HHS certifies each laboratory separately and on its own merits. Laboratories on the HHS listing of certified laboratories, even those under the same corporate title, are individually certified and are considered separate and unique from one another.

QUESTION:

Can the MRO require an employee's split specimen test request to be in writing rather than verbal?

ANSWER:

- 40.171(a) states that the employee's request may be verbal or in writing. Therefore, the MRO must accept a verbal request.
- The MRO may ask the employee for written documentation, but must immediately honor the verbal request.
- An MRO should always document whether or not an employee requested to have the split tested.
- The MRO must document the date and time of the employee's request.

QUESTION:

Do the five days within which an employee is given to obtain a medical evaluation after providing an insufficient amount of urine or breath include holidays and weekends, or does this refer to five business days?

ANSWER:

- The five-day limit for obtaining an examination by a licensed physician refers to business days.
- Therefore, holidays and weekend days should not be included in the 5-day time frame.

QUESTION:

Is error correction training required if an alcohol test is cancelled due to equipment failure?

ANSWER:

- Normally, equipment failure will not require the BAT to have error correction training.
- However, if it is determined that the equipment failure was related to the BAT's failure to properly maintain equipment (e.g., the EBT), error correction training would be in order.
- In addition, error correction would be required if the BAT does not attempt to accomplish the test following equipment failure using another device – provided that another device was reasonably available.

QUESTION:

Is an employer considered to be in compliance with Part 40 if EBTs are not available within 30 minutes of an alcohol screening test location?

ANSWER:

- An employer is not considered to be in compliance if an EBT is not available for use within 30 minutes to confirm the screening test.
- However, there may exist unusual circumstances (e.g., post-accident testing) in which an EBT is not available within the appropriate time frame. In such a case, the employer would not be considered out of compliance with the regulation if documentation exists showing a “good faith” effort to get an EBT. [It is important to note that most operating administrations give employers up to 8 hours to administer the appropriate alcohol test following a qualifying accident.]

QUESTION:

May an employer conduct follow-up testing under company authority that goes beyond the follow-up testing which the SAP determines necessary?

ANSWER:

- No. The regulation (at 40.307(d)(4)) and SAP guidelines state that employers must not impose additional testing requirements that go beyond the SAP's follow-up testing plan. This includes additional testing requirements under company authority.
- In addition to follow-up testing and random testing, an employer has other means available to ascertain an employee's alcohol- and drug-free performance and functions.
 - The employer can choose to monitor the employee's compliance with the SAP's recommendations for continuing treatment and/or education as part of a return-to-duty agreement with the employee.
 - The employer can conduct reasonable suspicion testing if the employee exhibits signs and symptoms of drug or alcohol use.
 - The employer can meet regularly with the employee to discuss the employee's continuing sobriety and drug-free status.
- The Department is not opposed to an employer discussing his or her desires for having more than the minimum rule requirement (i.e., 6 tests in the first year) for follow-up testing with SAPs they intend to utilize.

QUESTION:

If an employee requests his/her records from the MRO, do these records include the MRO's notes and comments or only copies of the CCF and laboratory result?

ANSWER:

- In general, the MRO should provide all records that are available related to that employee, to include written notes, checklists, or comments. All of this information was obtained from the employee or from appropriate individuals or organizations (with the employee's authorization) or from documentation provided by the employee.
- Consistent with appropriate medical record constraints, the MRO may need to withhold or interpret sensitive medical, psychiatric, and mental health record information.