Rules and Regulations

Federal Register
Vol. 73, No. 15
Wednesday, January 23, 2008

DEPARTMENT OF ENERGY

10 CFR Part 707

RIN 1992–AA38

Workplace Substance Abuse Programs at DOE Sites

AGENCY: Office of Health, Safety and Security, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) today publishes a final rule to amend the Department's regulations to decrease the random drug testing rate of DOE contractor employees in testing designated positions (TDP). Today's final rule also makes minor technical changes that delete: A sentence pertaining to specimen collection and handling in order to conform the section with the current U.S. Department of Health and Human Services' *Mandatory Guidelines for Federal Workplace Drug Testing Programs*; and obsolete references to the Personnel Security Assurance Program and the Personnel Assurance Program.

EFFECTIVE DATE: This rule is effective February 22, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Jacqueline D. Rogers, U.S. Department of Energy, Office of Health, Safety and Security, HS–11, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586–4714 or *jackie.rogers@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the Department of Energy's (DOE or the Department) statutory authority, including the Atomic Energy Act of 1954, as amended and the Drug-Free Workplace Act of 1988, DOE promulgated a rule on July 22, 1992, on DOE contractor workplace substance abuse programs (57 FR 32652). The rule established minimum requirements for DOE contractors to use in developing and implementing programs that deal with the use of illegal drugs by their employees. The rule provided for drug testing of contractor employees in, and applicants for, testing designated positions (TDP) at sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954. The Department determined that possible risks of serious harm to the environment and to public health, safety, and national security justified the imposition of a uniform rule establishing a baseline workplace substance abuse program, including drug testing. The rule created a new Part 707 of Title 10 in the Code of Federal Regulations entitled *Workplace Substance Abuse Programs at DOE Sites*.

In consideration of the February 2007 report on the Task Force Review of the Departmental Personnel Security Program, the Secretary of Energy issued a memorandum on September 14, 2007 addressing drug testing for DOE positions that require access authorizations (security clearances) (*http://www.directives.doe.gov/pdfs/reftools/Drug_Testing.pdf*). The DOE Secretarial Memorandum stated the Secretary's determination that all Federal and contractor positions that require a security clearance (''Q'' and ''L'') and all positions occupied by individuals who currently have security clearances have the potential to significantly affect the environment, public health and safety, or national security. The Secretary determined that all applicants for, and employees in, such positions are considered to be in TDPs, meaning they are subject to applicant, random, and for cause drug testing. This decision regarding TDPs is being implemented in accordance with DOE Order 3792.3 (for Federal employees) and 10 CFR Part 707 (for DOE contractor employees). The Secretary further determined, with regard to random drug testing, that employees in TDPs other than those designated to be included in the 100 percent annual sample pool be tested at a 30 percent annual sample rate.

II. Discussion of Amendments

Today's final rule amends the Department of Energy's regulations on workplace substance abuse programs at DOE sites to decrease the random drug testing rate of contractor employees in TDPs other than those in the 100 percent rate of testing pool. Currently, 10 CFR 707.7(a)(2) provides that for these TDPs, contractor programs ''shall provide for random tests at a rate equal to 50 percent of the total number of employees [in these TDPs] for each 12 month period.'' Today's final rule replaces ''50'' with ''30,'' consistent with the Secretary's decision to decrease the random drug testing rate in conjunction with his decision to expand the TDPs to include all applicants for, and employees in, positions requiring a security clearance.

This final rule makes a minor technical amendment to update the specimen collection and handling provision to reflect current U.S. Department of Health and Human Services' (HHS) *Mandatory Guidelines for Federal Workplace Drug Testing Programs*. Contractor substance abuse programs are subject to the HHS Mandatory Guidelines, as well as Part 707 (see 10 CFR 707.5(a)). Section 707.12 addresses specimen collection, handling, and laboratory analysis. Section 707.12(b)(2) requires collecting a sufficient amount of urine to conduct an initial test, a confirmatory test, and a retest, in accordance with the HHS Mandatory Guidelines. If there is not a sufficient amount, the collection site person may give the individual additional time in which to provide urine for testing. In this situation, the current regulation provides that the partial specimens are to be combined in

a single container. The sentence requiring the combining of partial specimens in a single container is not consistent with current HHS Mandatory Guidelines, and, therefore, this final rule removes the sentence.

The final rule also makes a minor technical amendment to delete references to the Personnel Security Assurance Program and the Personnel Assurance Program since both of these programs were cancelled with the publication of 10 CFR part 712, *Human Reliability Program*.

III. Issuance of a Final Rule

DOE has determined, pursuant to 5 U.S.C. 553(b)(B), that prior notice and an opportunity for public comment on this rule are unnecessary. DOE has determined that the two changes DOE is making to Part 707 are so minor or technical that the public would have no particular interest in providing comments. As explained earlier in this preamble, DOE is revising section 707.7(a)(2) to reduce the annual random drug testing sample from 50 percent to 30 percent. The change in the rate of testing of Federal employees in TDPs (other than employees in the 100 percent testing pool) already is being implemented by the Office of Human Resources. Today's amendment of section 707.7(a)(2) establishes parity in the treatment of Federal employees and contractor employees, and by decreasing the frequency of testing, reduces any burden associated with drug testing of contractor employees in these positions.

As to the amendment of section 707.12(b)(2), the deletion of the sentence pertaining to specimen collection and handling is a technical change that is necessary to conform the section with the current HHS Mandatory Guidelines.

Based on the foregoing, DOE finds that good cause exists to waive the requirement to provide prior notice and an opportunity to comment for this rulemaking.

IV. Procedural Review Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action is not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. Review Under the National Environmental Policy Act

DOE has determined that this final rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.5 of Appendix A to Subpart D, 10 CFR, Part 1021, which applies to a rulemaking that amends an existing rule or regulation which does not change the environmental effect of the rule or regulation being amended.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://www.gc.doe.gov*.

DOE has found that based on good cause prior notice and opportunity for public comments are unnecessary; and, therefore, the Regulatory Flexibility Act does not apply to today's rule. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking.

D. Review Under the Paperwork Reduction Act

This rule does not impose any new collection of information subject to review and approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

E. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate, which may result in costs to State, local or tribal governments, or to the private sector, of $100 million or more in any one year (adjusted annually for inflation). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

This final rule does not impose a Federal mandate on State, local or tribal governments. The rule would not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

F. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277), requires Federal agencies to issue a Family Policymaking Assessment for any rulemaking that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

G. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

I. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rule under OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's rule would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Congressional Notification

As required by 5 U.S.C. 801, the Department will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this rule. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

V. Approval by the Office of the Secretary of Energy

Issuance of this rule has been approved by the Office of the Secretary.

List of Subjects in 10 CFR Part 707

Classified information, Drug testing, Employee assistance programs, Energy, Government contracts, Health and safety, National security, Reasonable suspicion, Special nuclear material, Substance abuse.

Issued in Washington, DC, on January 15, 2008.

Glenn S. Podonsky,

Chief Health, Safety and Security Officer, Office of Health, Safety and Security.

■ For the reasons set out in the preamble, DOE amends part 707 of Chapter III of Title 10 of the Code of Federal Regulations as set forth below:

PART 707—WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES

■ 1. The authority citation for part 707 is revised to read as follows:

Authority: 41 U.S.C. 701 *et seq.;* 42 U.S.C. 2012, 2013, 2051, 2061, 2165, 2201b, 2201i, and 2201p; 42 U.S.C. 5814 and 5815; 42 U.S.C. 7151, 7251, 7254, and 7256; 50 U.S.C. 2401 *et seq.*

■ 2. Section 707.7 is amended as follows:

■ a. Paragraph (a)(2) is amended by removing ''50'' and adding in its place ''30'' in the first sentence.

■ b. Paragraph (b)(1) is revised;

■ c. Paragraph (b)(2) is removed;

■ d. Paragraphs (b)(3) and (b)(4) are redesignated as (b)(2) and (b)(3).

The revision read as follows:

§ 707.7 Random drug testing requirements and identification of testing designated positions.

* * * * *

(b) * * *

(1) Positions determined to be covered by the Human Reliability Program (HRP), codified at 10 CFR part 712. HRP employees will be subject to the drug testing standards of this part and any additional requirements of the HRP rule.

* * * * *

§ 707.12 [Amended]

■ 3. In § 707.12, paragraph (b)(2) is amended by removing the fifth sentence.

[FR Doc. E8–1084 Filed 1–22–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–25609; Directorate Identifier 2005–NM–263–AD; Amendment 39–15335; AD 2008–02–05]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 777–200 and –300 Series Airplanes Equipped With Rolls-Royce RB211–TRENT 800 Series Engines

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 777–200 and –300 series airplanes. This AD requires revising the airplane flight manual to provide the