

Drug And Alcohol Testing In The Workplace

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A. Introduction

1. Little more than 10 years after the Department of Transportation's ground-breaking drug testing rules, the aviation and railroad industries continue to lead the nation in workplace and alcohol testing—and in facing the issues that arise in that context. Now, 98 percent of all Fortune 200 companies test for drug use among their workers, representing a 92 percent increase in testing over the last decade. As the transportation industry's experience in this area has matured, many questions have been settled, but new and interesting issues continue to arise. These materials will review both court and arbitration decisions concerning both the “bread and butter” issues and the latest twists in the law.

B. The Federal Legal Landscape Related To Drugs And Alcohol In The Workplace

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1. *Department Of Transportation Regulations For Workplace Drug Testing Programs*

- a. Program Requirements

- i. The Department of Transportation ("DOT") issued final rules requiring mandatory drug testing, including random testing, in 1988. *Anti-Drug Program for Personnel Engaged in Specified Aviation Activities*, 53 Fed. Reg. 47024 (Nov. 21, 1988). Following enactment of the Omnibus Transportation Employee Testing Act of 1991, which mandates alcohol testing in addition to drug testing for all safety-sensitive transportation workers, DOT issued new final drug and alcohol regulations on February 15, 1994. 59 Fed. Reg. 7380 (Feb. 15, 1994). In light of changes in testing technology and the structure of the drug and alcohol testing industry, as well as changes in DOT's drug and alcohol testing programs, DOT updated its testing regulations and issued a revised rule in 2000. 65 Fed. Reg. 79462 (December 19, 2000). The revised regulations include enhanced employee education and rehabilitation requirements and additional requirements for transfer of information among employers, as described below. The sections of the regulations have been renumbered, with subparts now organized by subject matter area. In 2001, DOT issued technical amendments to clarify certain provisions of the revised rule. 66 Fed. Reg. 41944 (August 9, 2001). Both the revised regulations and technical amendments became effective on August 1, 2001.

- (1) Workers affected by these regulations include pilots, flight attendants, and other airline personnel responsible for safety-sensitive functions; railroad workers responsible for safe passage of property and persons; interstate and intrastate commercial drivers including bus drivers; mass transit workers whose jobs affect the safety of the general public; and numerous other transportation workers who hold safety-sensitive jobs.

- ii. The DOT regulations extend drug and alcohol testing to all transit maintenance workers, eliminating the distinction between maintenance workers involved in ongoing, daily maintenance and repair work (for whom testing was required) and those who perform rebuilding and overhauling work on a routine basis (for whom testing was not required). 64 Fed. Reg. 425 (Jan. 5, 1999). Companies not covered by the final regulations are advised to provide for DOT compliance in contract documents where DOT-covered workers are involved.

iii. Covered employees are subject to pre-employment, reasonable suspicion, random, post-accident, return-to-duty and post-rehabilitation testing using DOT-specified procedures. Periodic testing was eliminated under the final regulations.

iv. A breath test or saliva device is to be used in connection with alcohol screening. Effective August 1, 2001, DOT's Alcohol Testing Form became mandatory for all DOT alcohol tests. For controlled substances testing, a urine sample is required. Effective August 1, 2001, DOT's revised Custody and Control Form became mandatory for all DOT drug tests. DOT decided not to permit blood testing for alcohol, except in very limited circumstances where Breathalyzer equipment is not available.

(1) DOT rejected blood testing for several reasons, including the lack of an HHS network of certified blood-testing laboratories, and Fourth Amendment concerns about the invasiveness of the procedure. Under the Breathalyzer procedure, carriers select breathalyzers from a list of certified equipment, and must perform the test with a certified technician who cannot be the employee's supervisor. The accuracy of the Breathalyzer and the proficiency of the technician will likely be the subjects of arbitration in numerous cases, as historically has been the case in automobile cases involving breathalyzers.

v. The final DOT regulations call for "split sample" testing for drugs, where a single urine specimen is split into two vials, with the second vial being preserved to independently confirm results related to the first vial. Alcohol breath samples cannot be split in this way. If the original test result had to be cancelled because the split specimen could not be tested, the employer must order an immediate direct observation collection with no advance notice to the employee.

vi. Covered employers are required to promulgate a policy on the misuse of drugs and alcohol and to distribute the policy before conducting any newly required test under the final regulations. The policy must identify categories of persons subject to DOT testing requirements, provide notice of specific conduct prohibited by the regulations, and specify the types of drug and alcohol testing to be conducted and the methods of testing. Employees must sign a statement certifying receipt of the policy.

vii. The revised regulations require education and/or treatment for all employees who violate DOT drug and alcohol rules. The evaluating

Substance Abuse Professional must now refer every such employee to an appropriate education and/or treatment program.

viii. Employers are now required to obtain an applicant's drug and alcohol test results from his or her previous employers over the past two years. Employers must first get written consent from the applicant before contacting the former employers and they must review the applicants' background before assigning them to safety-sensitive positions. If it is not feasible to obtain the testing information, employers may assign the employee to a safety-sensitive job for 30 days before obtaining the required information, or documenting their good faith efforts to obtain the information.

ix. The revised regulations add to the list of actions that constitute a refusal to take a DOT drug test. For example, the revised rule specifically states that a verified adulterated or substituted test result qualifies as a refusal to take a drug test.

x. The revised regulations allow DOT to impose a public interest exclusion ("PIE") on service agents that have failed seriously to comply with DOT testing procedures. A PIE alerts DOT-regulated employers not to use the service agent for a period of time.

xi. Substantial portions of the final regulations became effective September 19, 1994. The final regulations pertaining to drivers under the Federal Highway Administration rules became effective January 1, 1995, for employers with 50 or more covered drivers. Employers with fewer than 50 covered drivers had to have new drug and alcohol testing programs in place by January 1, 1996.

xii. Employers found in violation of the regulations will be subject to forfeiture penalties up to \$10,000.

xiii. DOT's Office of Drug and Alcohol Policy and Compliance ("ODAPC") added drug and abuse counselors, and has revised the Management Information System forms currently used within five DOT agencies for submission of annual drug and alcohol program data.

xiv. DOT has amended a provision of its drug and alcohol testing procedures to change the instructions to medical review officers ("MROs") with respect to reporting specimens as dilute or substituted.