

§ 40.299 What is the SAP's role and what are the limits on a SAP's discretion in referring employees for education and treatment?

(a) As a SAP, upon your determination of the best recommendation for assistance, you will serve as a referral source to assist the employee's entry into a education and/or treatment program.

(b) To prevent the appearance of a conflict of interest, you must not refer an employee requiring assistance to your private practice or to a person or organization from which you receive payment or to a person or organization in which you have a financial interest. You are precluded from making referrals to entities with which you are financially associated.

(c) There are four exceptions to the prohibitions contained in paragraph (b) of this section. You may refer an employee to any of the following providers of assistance, regardless of your relationship with them:

(1) A public agency (*e.g.*, treatment facility) operated by a state, county, or municipality;

(2) The employer or a person or organization under contract to the employer to provide alcohol or drug treatment and/or education services (*e.g.*, the employer's contracted treatment provider);

(3) The sole source of therapeutically appropriate treatment under the employee's health insurance program (*e.g.*, the single substance abuse in-patient treatment program made available by the employee's insurance coverage plan); or

(4) The sole source of therapeutically appropriate treatment reasonably available to the employee (*e.g.*, the only treatment facility or education program reasonably located within the general commuting area).

§ 40.301 What is the SAP's function in the follow-up evaluation of an employee?

(a) As a SAP, after you have prescribed assistance under § 40.293, you must re-evaluate the employee to determine if the employee has successfully carried out your education and/or treatment recommendations.

(1) This is your way to gauge for the employer the employee's ability to demonstrate successful compliance with the education and/or treatment plan.

(2) Your evaluation may serve as one of the reasons the employer decides to return the employee to safety-sensitive duty.

(b) As the SAP making the follow-up evaluation determination, you must:

(1) Confer with or obtain appropriate documentation from the appropriate education and/or treatment program professionals where the employee was referred; and

(2) Conduct a face-to-face clinical interview with the employee to determine if the employee demonstrates successful compliance with your initial evaluation recommendations.

(c) (1) If the employee has demonstrated successful compliance, you must provide a written report directly to the DER highlighting your clinical determination that the employee has done so with your initial evaluation recommendation (see § 40.311(d)).

(2) You may determine that an employee has successfully demonstrated compliance even though the employee has not yet completed the full regimen of education and/or treatment you recommended or needs additional assistance. For example, if the employee has successfully completed the 30-day in-patient program you prescribed, you may make a "successful compliance" determination even though you conclude that the employee has not yet completed the out-patient counseling you recommended or should continue in an aftercare program.

(d)(1) As the SAP, if you believe, as a result of the follow-up evaluation, that the employee has not demonstrated successful compliance with your recommendations, you must provide written notice directly to the DER (see § 40.311(e)).

(2) As an employer who receives the SAP's written notice that the employee has not successfully complied with the SAP's recommendations, you must not return the employee to the performance of safety-sensitive duties.

(3) As the SAP, you may conduct additional follow-up evaluation(s) if the employer determines that doing so is

§ 40.303

consistent with the employee's progress as you have reported it and with the employer's policy and/or labor-management agreements.

(4) As the employer, following a SAP report that the employee has not demonstrated successful compliance, you may take personnel action consistent with your policy and/or labor-management agreements.

§ 40.303 What happens if the SAP believes the employee needs additional treatment, aftercare, or support group services even after the employee returns to safety-sensitive duties?

(a) As a SAP, if you believe that ongoing services (in addition to follow-up tests) are needed to assist an employee to maintain sobriety or abstinence from drug use after the employee resumes the performance of safety-sensitive duties, you must provide recommendations for these services in your follow-up evaluation report (see § 40.311(d)(10)).

(b) As an employer receiving a recommendation for these services from a SAP, you may, as part of a return-to-duty agreement with the employee, require the employee to participate in the recommended services. You may monitor and document the employee's participation in the recommended services. You may also make use of SAP and employee assistance program (EAP) services in assisting and monitoring employees' compliance with SAP recommendations. Nothing in this section permits an employer to fail to carry out its obligations with respect to follow-up testing (see § 40.309).

(c) As an employee, you are obligated to comply with the SAP's recommendations for these services. If you fail or refuse to do so, you may be subject to disciplinary action by your employer.

§ 40.305 How does the return-to-duty process conclude?

(a) As the employer, if you decide that you want to permit the employee to return to the performance of safety-sensitive functions, you must ensure that the employee takes a return-to-duty test. This test cannot occur until after the SAP has determined that the employee has successfully complied

49 CFR Subtitle A (10-1-02 Edition)

with prescribed education and/or treatment. The employee must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties.

(b) As an employer, you must not return an employee to safety-sensitive duties until the employee meets the conditions of paragraph (a) of this section. However, you are not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that you have the discretion to make, subject to collective bargaining agreements or other legal requirements.

(c) As a SAP or MRO, you must not make a "fitness for duty" determination as part of this re-evaluation unless required to do so under an applicable DOT agency regulation. It is the employer, rather than you, who must decide whether to put the employee back to work in a safety-sensitive position.

§ 40.307 What is the SAP's function in prescribing the employee's follow-up tests?

(a) As a SAP, for each employee who has committed a DOT drug or alcohol regulation violation, and who seeks to resume the performance of safety-sensitive functions, you must establish a written follow-up testing plan. You do not establish this plan until after you determine that the employee has successfully complied with your recommendations for education and/or treatment.

(b) You must present a copy of this plan directly to the DER (see § 40.311(d)(9)).

(c) You are the sole determiner of the number and frequency of follow-up tests and whether these tests will be for drugs, alcohol, or both, unless otherwise directed by the appropriate DOT agency regulation. For example, if the employee had a positive drug test, but your evaluation or the treatment program professionals determined that the employee had an alcohol problem as well, you should require that the employee have follow-up tests for both drugs and alcohol.