

(e) As an employer who receives a drug test result indicating that the employee's specimen was dilute, take action as provided in § 40.197.

(f) As an employer who receives a drug test result indicating that the employee's specimen was invalid and that a second collection must take place under direct observation—

(1) You must immediately direct the employee to provide a new specimen under direct observation.

(2) You must not attach consequences to the finding that the test was invalid other than collecting a new specimen under direct observation.

(3) You must not give any advance notice of this test requirement to the employee.

(4) You must instruct the collector to note on the CCF the same reason (*e.g.*, random test, post-accident test) as for the original collection.

(g) As an employer who receives a cancelled test result when a negative result is required (*e.g.*, pre-employment, return-to-duty, or follow-up test), you must direct the employee to provide another specimen immediately.

(h) As an employer, you may also be required to take additional actions required by DOT agency regulations (*e.g.*, FAA rules require some positive drug tests to be reported to the Federal Air Surgeon).

(i) As an employer, you must not alter a drug or alcohol test result transmitted to you by an MRO, BAT, or C/TPA.

**§ 40.25 Must an employer check on the drug and alcohol testing record of employees it is intending to use to perform safety-sensitive duties?**

(a) Yes, as an employer, you must, after obtaining an employee's written consent, request the information about the employee listed in paragraph (b) of this section. This requirement applies only to employees seeking to begin performing safety-sensitive duties for you for the first time (*i.e.*, a new hire, an employee transfers into a safety-sensitive position). If the employee refuses to provide this written consent, you must not permit the employee to perform safety-sensitive functions.

(b) You must request the information listed in this paragraph (b) from DOT-

regulated employers who have employed the employee during any period during the two years before the date of the employee's application or transfer:

(1) Alcohol tests with a result of 0.04 or higher alcohol concentration;

(2) Verified positive drug tests;

(3) Refusals to be tested (including verified adulterated or substituted drug test results);

(4) Other violations of DOT agency drug and alcohol testing regulations; and

(5) With respect to any employee who violated a DOT drug and alcohol regulation, documentation of the employee's successful completion of DOT return-to-duty requirements (including follow-up tests). If the previous employer does not have information about the return-to-duty process (*e.g.*, an employer who did not hire an employee who tested positive on a pre-employment test), you must seek to obtain this information from the employee.

(c) The information obtained from a previous employer includes any drug or alcohol test information obtained from previous employers under this section or other applicable DOT agency regulations.

(d) If feasible, you must obtain and review this information before the employee first performs safety-sensitive functions. If this is not feasible, you must obtain and review the information as soon as possible. However, you must not permit the employee to perform safety-sensitive functions after 30 days from the date on which the employee first performed safety-sensitive functions, unless you have obtained or made and documented a good faith effort to obtain this information.

(e) If you obtain information that the employee has violated a DOT agency drug and alcohol regulation, you must not use the employee to perform safety-sensitive functions unless you also obtain information that the employee has subsequently complied with the return-to-duty requirements of Subpart O of this part and DOT agency drug and alcohol regulations.

(f) You must provide to each of the employers from whom you request information under paragraph (b) of this section written consent for the release

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of the information cited in paragraph (a) of this section.

(g) The release of information under this section must be in any written form (*e.g.*, fax, e-mail, letter) that ensures confidentiality. As the previous employer, you must maintain a written record of the information released, including the date, the party to whom it was released, and a summary of the information provided.

(h) If you are an employer from whom information is requested under paragraph (b) of this section, you must, after reviewing the employee's specific, written consent, immediately release the requested information to the employer making the inquiry.

(i) As the employer requesting the information required under this section, you must maintain a written, confidential record of the information you obtain or of the good faith efforts you made to obtain the information. You must retain this information for three years from the date of the employee's first performance of safety-sensitive duties for you.

(j) As the employer, you must also ask the employee whether he or she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied for, but did not obtain, safety-sensitive transportation work covered by DOT agency drug and alcohol testing rules during the past two years. If the employee admits that he or she had a positive test or a refusal to test, you must not use the employee to perform safety-sensitive functions for you, until and unless the employee documents successful completion of the return-to-duty process (see paragraphs (b)(5) and (e) of this section).

### **§ 40.26 What form must an employer use to report Management Information System (MIS) data to a DOT agency?**

As an employer, when you are required to report MIS data to a DOT agency, you must use the form and instructions at appendix H to part 40. You must submit the MIS report in accordance with rule requirements (*e.g.*, dates for submission; selection of companies required to submit, and method

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of reporting) established by the DOT agency regulating your operation.

[68 FR 43952, July 25, 2003]

### **§ 40.27 May an employer require an employee to sign a consent or release in connection with the DOT drug and alcohol testing program?**

No, as an employer, you must not require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by this part (including, but not limited to, collections, laboratory testing, MRO and SAP services).

[66 FR 41950, Aug. 9, 2001]

### **§ 40.29 Where is other information on employer responsibilities found in this regulation?**

You can find other information on the responsibilities of employers in the following sections of this part:

§ 40.3—Definition.

§ 40.35—Information about DERs that employers must provide collectors.

§ 40.45—Modifying CCFs, Use of foreign-language CCFs.

§ 40.47—Use of non-Federal forms for DOT tests or Federal CCFs for non-DOT tests.

§ 40.67—Requirements for direct observation.

§§ 40.103-40.105—Blind specimen requirements.

§ 40.173—Responsibility to ensure test of split specimen.

§ 40.193—Action in "shy bladder" situations.

§ 40.197—Actions following report of a dilute specimen.

§ 40.207—Actions following a report of a cancelled drug test.

§ 40.209—Actions following and consequences of non-fatal flaws in drug tests.

§ 40.215—Information about DERs that employers must provide BATs and STTs.

§ 40.225—Modifying ATFs; use of foreign-language ATFs.

§ 40.227—Use of non-DOT forms for DOT tests or DOT ATFs for non-DOT tests.

§ 40.235 (c) and (d)—responsibility to follow instructions for ASDs.

§ 40.255 (b)—receipt and storage of alcohol test information.

§ 40.265 (c)-(e)—actions in "shy lung" situations.

§ 40.267—Cancellation of alcohol tests.

§ 40.271—Actions in "correctable flaw" situations in alcohol tests.

§ 40.273—Actions following cancelled tests in alcohol tests.

§ 40.275—Actions in "non-fatal flaw" situations in alcohol tests.

§§ 40.287-40.289—Responsibilities concerning SAP services.