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I would like to share the following comments on the proposed changes to the six- (6) modal rules and the technical corrections forthcoming for 49 CFR Part 40.

49 CFR Part 40 Technical Corrections

Having commented in both DOT and Industry public meetings I would like to provide in writing some of the areas of concern. I see some of these practical concerns getting in the way of successfully accomplishing what these significant rule revisions are attempting to achieve.

1. Cancelled tests due to collector error. Who is responsible for notification to the collector and in what form must such notification be made. What documentation must be kept to demonstrate that collector was notified by the notifying individual or service agent (i.e. MRO or Lab). What documentation must be kept and by whom (collector or collector's employer) regarding notification and subsequent compliance with "error correction training"?
2. Information transmitted to MRO and DER. §40.71(a)(9) indicates that copy 2 (MRO) and copy 4 (employer) are to be forwarded as follows; "You must fax or otherwise transmit these copies to the MRO and DER within 24 hours or during the next business day." It seems unclear as to the actual meaning of such language. Given the need for the MRO particularly to have the copy 2 of the form for reporting purposes (can't even determine a negative if collection has errors in donor consent or information) it would appear that the collection site will need to fax or possibly overnight if a large number of tests. As necessary as I feel this is to get information to the MRO I do not believe the language is clear enough for collectors to understand their responsibility to immediately transmit (24 hours or next business day). Nor do I believe MRO's are all prepared to receive large volumes of faxes of all tests. It appears most people believe that "dropping in mail" is sufficiently "transmitting". If this is the case we will continue the process of negatives being reported before anyone has reviewed copy 2 containing the donor information, in an effort to meet employers need for rapid information.

I think it is essential to require receipt of transmission information at the MRO within 24 hours or the next business day is the only practical way to accomplish full review of the required elements prior to reporting. Additionally, once transmitted, does the collection site then also have to mail the actual copy to the MRO, or like laboratories, is the “electronic” copy sufficient?

3. §40.203 &.205 address completing a DOT collection on a “non-DOT” form, which most of the public responses by DOT presenters and others includes the “old DOT CCF”. If a collection site must conduct a test on the “old” form, because it is all they have, (particularly in the first 90 days following 8/1/2001) whom should the Memo for the Record MFR be forwarded to? The lab? The MRO? Both? and should it be included with the specimen when it is shipped to the lab? Does the lack of the MFR stop the processing of the sample at the lab until the MFR is received? How will the MRO know a negative test reported by the lab as a DOT was on the wrong for?

4. Alcohol qualifications in §40.213. The current BAT and STT process include specific training and proficiency testing to complete the course. Generally 8 or more actual tests on the equipment or instrument the BAT or STT will be using. The Trainer had to be qualified as an instructor on the equipment the BAT or STT will be using. Is the new 3 error-free mock tests which are “similar to the urine collector requirements” as one DOT official indicated the only requirement or are they in addition to the model course requirements. Can an instructor who instructs on different instruments or EBT’s train now on equipment he/she has no “instructor qualification” form the manufacturer? Must an instructor even have manufacturer “instructor” status?

5. Alcohol testing form. §40.225 &. 275. Are the requirements for the alcohol test form (ATF) the same as for the urine CCF as regards using the “old Breath Alcohol Form”? If so whom does the MFR need to be forwarded to, and who must keep the documentation

6. Substance Abuse Professional (SAP) function in §40.293. The SAP is given specific instructions not to consider “A claim by the employee that the test was unjustified or inaccurate;” What does the SAP do who receives documentation on an alcohol test from the employer which clearly is done inaccurately and the employee refutes. (Clearly inaccurate being something like the screening and confirmation documentation attached to the form are just duplicates of one test.) Unlike the MRO the SAP was not involved in the review of the test and establishment of the result, but professionally if the SAP identifies some clear impropriety, much as the MRO would invalidate a test is it not appropriate to refer the test back to the employer as not meeting the requirements of a violation? (Even when the employer may not have known what a “valid” test document should have looked liked.) The SAP as a professional cannot just ignore obvious instances of impropriety or inaccuracy of a test on which the employee and SAP are then to base treatment education recommendations. There needs to be some language referring the employee back to the employer for resolution and canceling of the test, if and when necessary. Employers rely on the SAP’s professional judgement to consider all relevant facts (note separate from opinions) in making a clinical recommendation that has such significant implications.

7. SAP authority and role in §40.295 &.297. The rule very appropriately indicates that “SAP shopping” is not permitted. There are occasions though when employers contract with a qualified SAP to manage SAP services for accuracy and consistency in a variety of



locations. What recourse does an employer have directly or by contract in addressing inappropriate SAP evaluations? Situations such as employers receiving SAP evaluations that are considered both the initial and follow-up evaluation in a single face-to-face evaluation; employers unable to get the follow-up evaluation completed, or can't locate the original SAP etc. There are appropriate times when employers seek the counsel and advice of more experienced SAP's to address problems with inadequate SAP services. Specific provisions, and the requisite documentation, need to be identified to assist employers with practical issue of addressing making appropriate changes by another more experienced SAP. Including some reporting to the appropriate modal of those cases where such a change was necessary due to non-compliance with this rule.

It is possible, I understand to consider in §40.295 (b) that some of such cases are "non-qualified" SAP services, but there are those cases where those SAP's will continue providing inadequate services to other employers, some of which will be unaware of the inadequacy of the provider.

Modal changes.

1. Pre-employment alcohol testing. All the modals will be adding a uniform pre-employment alcohol testing requirement. That requirement reads "5. You must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04." Testing under 49CFR Part 40 clearly states that an employee cannot perform safety sensitive functions unless his/her alcohol concentration is below 0.02. Above a 0.04 constitutes a violation of the DOT rules and therefore would mean a positive test. Assignment to safety-sensitive functions must be consistent between applicants and existing employees and reference that assignment is dependent on a reading below 0.02

2, FAA Anti-drug plan and Alcohol Misuse Prevention Program (AMPP) The FAA should look very closely at the process of dropping the approval of consortium plans since they allow for individuals and small operators to benefit from the enrollment in an approved plan. Aviation has a unique safety system that involves approval of many procedures, manuals and operating programs for a certificate holder. The approval process for the consortium enrollee assures those operators that the service agent providing a program is familiar with the FAA's specific rules. On more than one occasion I have had to assist an aviation client change C/TPA programs because they were operated as though the organization was under the FMCSA instead of a FAA client. Unlike others I would suggest that approving Consortiums is a necessary process. Approval of a specific program benefits both DOT, through simplification for inspectors and consistency of programs; and the Employer, through ease of access and compliance through enrollment in a program they know is already approved. Interestingly enough, approved consortium programs already operated under the same threat of "loss of revenue" that the new Public Interest Exclusion (PIE) will hold for individual service agents. If you are not going to require each operator to get approval than consortium approval is appropriate.



All modals are not the same and the FAA approval process sorted out for the FAA client those C/TPA's that had some focused expertise or experience in the FAA rules from those that didn't. I am not sure a similar modal approval or certification process isn't appropriate for any C/TPA that wants to represent understanding of a particular DOT modal's specific differences. 49CFR part 40 covers the universal requirements, but each modals specific requirements aren't always so similar. Operating a consortium in each of three modes of DOT we find that often we are taking on new clients who have been audited and found that their C/TPA lumped them in a group with dissimilar employers and employees. That although the collections and urine testing requirements might be similar statistical reporting, MRO responsibilities, training or other facets may be very different. Those very familiar with the largest FMCSA rules often don't recognize the differences of other modals. . There is more different in the modal rules than random rates.

3. FTA definition of "employer" Although I understand the need for the access to information for compliance purposes for State's and other grantees operating transit systems through contract, it appears very unwise to consider those review responsibilities "employer" related just by changing definition. The term employer generally refers to those with very specific day to day supervisory and operational responsibilities, not oversight and compliance responsibilities. A term for "recipients or grantees" authorizing the specific responsibilities and authority to review and receive such access would appear to better accomplish the rationale indicated in the analysis.

I hope these comments can assist you in developing a better system of safety for all, operators, customers, the general public, employers and most specifically the employees themselves.

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