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U.S. Department of Transportation
Federal Railroad Administration

Memorandum

Date: JUL 23 1993

Reply to Attn. of: OP-93-04

Subject: Part 40 Interpretive Issues

From: Edward R. English
Director, Office of Safety Enforcement

To: Regional Directors

Attached is a summary of DOT interpretations regarding Title 49 CFR, Part 40 - Procedures for Transportation Workplace Drug Testing Programs. The issues are presented in a question-and-answer format and are intended to assist Operating Practices Specialists and Inspectors in their day-to-day drug and alcohol enforcement activities.

The information contained herein is also available on the Anti-Drug Information Center's system, and is accessible to all subscribers, including railroads.

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§40.21 THE DRUGS

Q. Is testing for additional drugs authorized?/must a separate specimen be obtained?

A. Under 49 CFR Part 40, an employer must test for the following drugs: marijuana, cocaine, amphetamines, opiates, and phencyclidine. An employer may not currently test for any other controlled substances or alcohol using DOT authority. 49 CFR Part 40 does not, however, prohibit an employer from testing for other controlled substances or alcohol as long as that testing is done under the authority of the employer, i.e. alcohol testing is required because of a company drug testing policy.

Employers in the transportation industry who establish a drug testing program that tests beyond the five drugs currently required by 49 CFR Part 40 must also make a clear distinction to their employees what testing is required by DOT authority and what testing is required by the company. Additionally, employers must insure that DOT urine specimens are collected in accordance with the provisions outlined in 49 CFR Part 40 and that a separate specimen collection process including a separate act of urination is used to obtain specimens for company testing programs.

Q. Should lab conduct test for 5 drugs even if Drug Testing Custody and Control Form (DTCCF) fails to indicate what tests are to be performed?

A. As you stated in your correspondence, 49 CFR Part 40 indicates that DOT agency drug testing programs require that employers test for marijuana, cocaine, opiates, amphetamines, and phencyclidine (§40.21). All DOT specimens, therefore, must be tested for the above five categories of drugs even if the accompanying drug testing custody and control form fails to indicate this.

While the Department does not view this type of collection site error to be a fatal flaw, it, nevertheless, jeopardizes the integrity of the entire collection process and could lead the way to a challenge and subsequent third party review. I would strongly recommend, in cases like this, that you contact the collection site and address these errors with the site supervisor in the hope of preventing future mistakes.

§40.23 PREPARATION FOR TESTING

Q. Is collector's signature required on chain of custody section of Drug Testing Custody and Control Form (DTCCF)?

A. The collector's signature is required in both the "received by" and the "released by" spaces in Step VII of the drug testing custody and control form. 49 CFR Part 40 (§40.23(a)(1)(viii)) specifies that the form shall provide both "received by" and "released by" entries of the collector's signature and printed names. Combining of these entries is not authorized by the rule.

Q. Does regulation require the Drug Testing Custody and Control Form (DTCCF) to have a pre-printed specimen ID number?

A. Section 40.23 of 49 CFR Part 40 does require use of drug testing custody and control form that has a unique pre-printed specimen identification number on all copies of the form. The label on the specimen bottle must also bear the same specimen identification number as that on the custody and control form accompanying the specimen. There is no absolute requirement that the specimen identification number on the bottle label be pre-printed. It is acceptable practice for the specimen identification number to be recorded or entered on the bottle label by the collection site personnel. However, the use of a pre-printed bottle label is greatly recommended to decrease the risk of an error in the recording of the correct specimen identification number. If the specimen identification number on the bottle and on the custody and control form do not match, the specimen's chain of custody is broken and the specimen is invalid.

Q. Can Drug Testing Custody and Control Form (DTCCF) be used for non-DOT tests?

A. I have received your inquiry concerning the use of a drug testing custody and control form as prescribed in 49 CFR Part 40 for drug testing conducted outside of the Department of Transportation's (DOT) authority. The Department's concern continues to be that employee drug testing conducted under local, state or private authority should not be represented to the employee as being federally mandated or required. The use of the custody and control form required under 49 CFR Part 40 conveys that the testing is being conducted in accordance with applicable federal regulations.

As you know the Department has formed a working group from selected NIDA laboratories and collection facilities. This working group's objective is to achieve further standardization and applicability of custody and control forms currently in use for DOT mandated testing. The issue of general use of the form for any drug testing conducted using DOT procedures as outlined in 49 CFR Part 40 will also be discussed. Thus, I am deferring any approval or comment on modifications of the custody and control forms until the working group is convened in October 1991.

In the interim, we recommend that employers use custody and control forms that make no reference to federal regulation for testing conducted outside of the DOT mandated requirements. Thank you for your patience and cooperation as we work through these issues related to transportation workplace drug testing.

Q. Is collection of blood authorized?/Can blood specimen be supported by Drug Testing Custody and Control Form (DTCCF)?/ Can blood test results be used to take DOT required administrative actions?

A. 49 CFR Part 40 (54 FR 49854), Procedures for Transportation Workplace Drug Testing Programs: Final Rule, December 1, 1989, sets forth the guidelines for employers who must conduct urine testing programs under regulations issued by the various agencies of the Department of Transportation. 49 CFR Parts 391 and 394 (53 FR 47134), Controlled Substances Testing; Final Rule, November 21, 1988, provide the requirements for testing within the Federal Highway Administration.

Neither of the above references authorizes the collection of blood for drug testing under Department of Transportation (DOT) authority. Therefore, while a company, under its own authority, may require a blood specimen to be collected and tested for drugs and/or alcohol under certain circumstances, it is not acceptable for the company required blood specimen to be supported by the same custody and control form that accompanies a DOT required urine specimen.

If a urine specimen for a DOT reasonable cause test is rejected for testing at the laboratory, results from a blood specimen collected in accordance with a company policy could be used to take action against an employee depending upon the drug testing policy established by that company. Under no circumstances, however, can the results of the blood test be used to take administrative or disciplinary action against an employee using DOT authority for the reasons cited above.

Q. Is collector required to sign or initial shipping container label?

A. Sections 40.23(c) and 40.25(h) of 49 CFR Part 40 describe the requirements for packaging the specimen and custody and control form in preparation for shipment to the laboratory. Section 40.23(c) states that the shipping container must be sealed and initialed to prevent undetected tampering. Section 40.25(h) states that the collection site person shall sign and enter the date specimens were sealed in the shipping containers for shipment. The Department has determined that initialing and dating of the seal by the collection site person is sufficient to meet the intent of the regulation.

Q. How and to whom are Drug Testing Custody and Control Forms (DTCCFs) distributed?

A. The only acceptable procedures for the handling of the custody and control form as specified in 49 CFR Part 40 (§ 40.23 (a)) are as follows: copy 1 and 2 must accompany the urine specimen in a sealed container to the laboratory; copy 3 (MRO) must be sent from the collection site directly to the physician (MRO); copy 4 is given to the donor at the collection site; copy 5 is retained by the collection site personnel; and copy 6 is provided to the employer representative. It is unacceptable for the MRO copy of the form to accompany the urine specimen either to the laboratory or to the MRO. Clearly the intent of the regulation is for the urine specimen and copy 1 and 2 of the custody and control form to be sent directly from the collection site to the laboratory, and the MRO copy (3) of the custody and control form to be sent directly to the physician. There is no need to maintain a chain of custody tracking the handling of the sealed shipping container or the MRO copy of the form.

Q. Should specimen be rejected by lab if donor identifying information is erroneously provided?

A. The intent of the DOT procedures (49 CFR Part 40 §40.23 (a)(6)) is to limit the amount of personal identifying information that is recorded on the specimen bottle and those copies of the drug testing custody and control form that accompany the specimen bottle to the laboratory. The rule only requires that a donor initial the specimen bottle label/ seal and provide a social security number or employee identification number to be recorded on the laboratory copies of the drug testing custody and control form. The rule does not allow for additional personal information to be provided to the laboratory. In fact, the intent was to prevent the donor's identity from being routinely disclosed to the laboratory.

It was never intended, however, that the inadvertent or erroneous disclosure of the donor's identity (i.e. name or signature) on the specimen bottle or laboratory copies of the drug testing custody and control form) be justification, in and of itself, for a laboratory to reject the specimen for testing or for a medical review officer to invalidate the test results. Furthermore, all accessioning procedures at laboratories certified by the National Institute of Drug Abuse require that specimens be identified by specimen identification number, donor identification number, and laboratory accession number only. Even though laboratory accessioning personnel may have access to a donor's name in these cases, the analytical personnel will not. Therefore, the donor's identity is still protected during the actual testing process.

Q. Must collector provide real name on collector certification section of Drug Testing Custody and Control Form (DTCCF)?

A. The intent of the DOT drug testing custody and control form is to provide complete documentation of the specimen collection process including the name of the collector and the location of the collection site. The collection site person who receives the urine specimen from the donor should be identified by name on the block specifying "collector's name". Use of a "code name", collector I.D. number, or other substitution for the collector's name is not acceptable. The collector's name should be the same as that appearing on the identification each collector is required to make available to the donor, if so requested.

Q. Are middle names required on Drug Testing Custody and Control Form (DTCCF)?

A. This letter responds to your recent inquiry concerning Department of Transportation (DOT) drug testing procedures. Section 40.25(a) of 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs, specifies that the custody and control form used to document DOT mandated drug testing shall provide space for collector, donor, and laboratory certifying scientist names and signatures. The regulation does <u>not</u> specify that a middle name must be used. The intent of the regulation is to provide for the identification of the person(s) signing the certification statements. The use of supplemental instructions on the custody and control form (e.g. further defining name to include first, middle, last), does not impact on the security, identification or integrity of the urine specimen and should not be used as a basis for invalidating the specimen results.

Q. Is MRO name required on Drug Testing Custody and Control Form (DTCCF)?/Can MRO company name be used instead?

A. The regulation, 49 CFR Part 40.23(a)(i)(iv), specifies that the form must have a block that would accommodate the MRO's name and address. The laboratory that does the test must know where to send the test result. The donor has the right to know who will be doing the verification of the laboratory result.

Having stated the above, it is the interpretation of this office that a specific physician's name and address should appear on the form. If that physician does not perform the MRO functions himself/herself, the clinic or MRO service should have documentation of physicians who are authorized to conduct MRO functions on behalf of the named MRO. It is always the employer's responsibility to designate a physician(s) to perform the MRO duties.

§40.25 SPECIMEN COLLECTION PROCEDURES

Q. Is collector's name required on Drug Testing Custody and Control Form (DTCCF)?

A. Pursuant to 49 C.F.R. Part 40, the collector's name and certification are required as part of the collection process (§40.25). This is necessary to ensure the integrity of the testing process and to initiate the chain of custody. It is the Department's position that an individual submitting to testing under this rule shall have a reciprocal right to know the collector's name and to see the collector's work identification (§40.25(f)[27]). Any collection site which deviates from this process will be violating the rule.

Q. Are split sample collections authorized?

A. The Department's final rule issued December 1, 1989, 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs does permit the use of "split sample" procedures. In a split sample procedure, a sufficient volume of urine is collected so that it may be divided into two specimens (the first containing at least 60 ml of urine, the "split" containing the remainder). If the first specimen is positive, the split specimen may be analyzed at another Department of Health and Human Services certified laboratory.

The use of split specimen procedures is entirely voluntary on the part of the employer. The Department does not believe that split samples should be required. Given the stringent safeguards embodied in the DOT drug testing procedures, the extra costs and administrative burdens of a split sample system would be unlikely to provide significant additional necessary protection for employees. If employers wish to use a split sample approach, the DOT rule permits them to do so. It is, however, an employer, not an employee decision.

Q. May donors be required to strip, wear a hospital gown, or empty pockets?

A. The Department's procedures for transportation workplace drug testing programs contained in 49 CFR Part 40, December 1, 1989, §40.25(f)(4) states: "The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet." (emphasis added)

While it is clear that the rule does allow for collectors to request that donors remove unnecessary outer garments in order to insure the integrity of the collection, the rule does not authorize collectors to require or request that donors remove other garments as well, e.g. shirts, blouses, pants, or skirts, thereby insuring a modicum of privacy and reducing potential embarrassment. Additionally, donors may not be required or requested to wear hospital or examination gowns when providing a specimen.

There is an exception to the above. The Department has determined that if a urine specimen is being collected as part of a DOT required physical examination in which an individual is required to disrobe and wear a hospital or examination gown, the collection may be completed with the donor so attired.

It should also be noted that if a collection site person, during the course of a collection procedure, notices an unusual indicator that an individual may attempt to tamper with or adulterate a specimen as evidenced by a bulging or overstuffed pocket for example, the collector may request that the donor empty his or her pockets, display the items, and explain the need for them during the collection. This procedure may be done only when individualized suspicion exists that an individual may be about to tamper with or adulterate a specimen. Otherwise, requiring donors to empty their pockets as a common practice is also prohibited under the current rules.

Q. What if a donor is physically unable to provide a specimen?

A. The Department's procedures in 49 CFR Part 40 do not address the circumstance of individuals physically unable to provide a urine specimen except in §40.25 (f)(10)(i)(C). Specific documentation of the individual's medical condition, including the fact that he/she is unable to provide a urine specimen should be obtained and furnished to the employer. The Medical Review Officer (MRO) should, after a thorough evaluation of the individual's circumstance, notify the employer that the individual cannot provide a urine specimen.

Q. Please clarify donor identifying information requirements on the Drug Testing Custody and Control Form (DTCCF).

A. In accordance with 49 CFR Part 40 (54 FR 49854) Section 40.25(f)(20), the donor/employee is required to initial the specimen bottle seal/label. The employee/donor's identification number or SSN is to be provided on the custody and control form and may be included on the specimen bottle seal/label. Other donor identification (i.e., name, signature) should not be provided on the copies of the custody and control form that accompany the specimen to the laboratory. However, disclosure of the donor's name/ signature does not, in and of itself, require that the specimen be rejected for testing by the laboratory.

Q. Is a consent form authorized?

A. 49 CFR Part 40, §40.25 (f)(22)(ii) addresses this issue and has not been changed since its publication in the Federal Register on December 1, 1989. Specifically, it states, "*When specified by DOT agency regulation or required by the collection site (other than an employer site) or by the laboratory, the employee may be required to sign a consent or release form authorizing the collection of the specimen, analysis of the specimen for designated controlled substances, and release of the results to the employer.*" The purpose of this statement is to allow collection sites or laboratories, under their own accord, or when required by a DOT agency regulation to utilize consent or release of information forms for the collection, analysis, and release of specimen results to the employer. §40.25 (f)(22)(ii) continues, "*The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others.*" The intent of this statement is to prevent anyone who participates in either the collection, handling, or analysis of the specimen to have the employee exempt them from liability arising from their actions. This pertains not only to collection site and laboratory personnel, but also to Medical Review Officers, their staff, if applicable and to the employer.

Q. In a shy bladder situation, may a donor leave the collection site?

A. The rules with respect to collections seek to accomplish two purposes. First, there is an attempt to make the initial effort at collection successful, both with respect to obtaining the specimen and ensuring to the extent possible that it is a valid specimen. Second, recognizing that a fall-back position may sometimes be necessary, the rule allows reasonable employer discretion in dealing with exceptional cases so as to ease overall logistical burdens associated with drug testing.

To accomplish the first purpose, the random test is ordered on short notice, with notification given only so far in advance as is necessary to ensure the employee's appearance at the time and place set for collection. This means that the donor's ability to escape providing a specimen, or to prepare for the collection by obtaining a substitute specimen or by abstaining from drug use to avoid detection, is limited. The donor is required to wash his hands and remove bulky outer garments. The donor is then requested to provide a specimen. If the donor is unable to provide a specimen initially, fluids are provided, with the dual objectives of assisting the willing donor and encouraging the unwilling donor. There is no indication in the rules that the employee may be excused during this period. Only "[i]f the employee is still unable to provide a complete specimen" do additional procedures come into play.

Once administering fluids has failed to produce sufficient urine, then alternatives are available for the random testing situation. They consist of having the employee "remain at the collection site and continue to consume quantities of fluids until the specimen has been provided [up to 8 hours from inception of the collection]" [emphasis supplied] or discontinue the collection and conduct a subsequent collection at a later time. Section 219.703 of the FRA rule explains that the "later time' would be immediatly on expiration of statutory rest or within 30 days on an unannounced basis.

Within this context, sending the employee away from the collection site during pendency of a collection would obviously have no ill effects with respect to employees who do not use drugs. However, the drug abuser might be encouraged to evade detection. The abuser can do this by "holding" his urine, by finding a clean urine, or by manufacturing some other kind of problem that will serve as an excuse not to complete the procedure.

The principal risk is that the drug abuser may continue to feign inability to provide a specimen by deliberate urine retention. He will be aided by being able to relive his bladder (unless continuously supervised) and also by not receiving fluids while away from the collection site. This will see the unwilling donor through the initial phase of the collection process safely. (To the extent the railroad does not employ the 8-hour alternative, the drug abuser will defeat the intended "short notice" character of the random test by having the procedure interrupted until another day when he may be able to abstain, manufacture an excuse, or produce a substitute specimen. To the extent the railroad does intend to use the 8-hour alternative and no specimen is provided, the employee may later contend that the intent of the rule was defeated since fluids were not being administered during the entire 8-hour period.

Second, the abuser may attempt to rig the test. We believe that the short-notice character of random tests reduce significantly the likelihood that abusers will substitute "clean" urine or adulterate the specimen. But allowing the employee to return to the general work environment may offer a fresh opportunity to access substitute specimens and/or adulterants (e.g., to access materials in grips, automobiles or lockers). Certainly the collection procedure limit to an extent the degree to which any such efforts may be successful (e.g., hand washing, temperature check, bar on bulky outer garments, etc.). Nevertheless, we know that in the absence of direct observation some degree of risk exists that a specimen may be substituted or adulterated without detection. Allowing the employee to return to the work environment increases that risk.

Third, the drug abuser may find a way to create a "family or medical emergency" or other crisis to avoid testing. Granted, the railroad can and will require documentation of any emergency and may discern the genesis of other ploys, as well. However, there is some increase in risk here.

As you can see from this discussion, our understanding of the rule is that it effectively require that the employee remain at the collection site (or at least remain under continuous supervision with fluids made available) during the entire collection procedure on that day. It could be argued that a dispatcher who remains under continuous supervision and has fluids available to him at his station has remained at the collection site for all intents and purposes, where the collection is on premises. It would be up to the railroad to prove the factual predicates for the argument. I think it would be difficult to contend, however, that an employee preforming general yard or local service is remain[ing] at the collection site" or is otherwise closely supervised; and clearly the purpose behind close supervision and Administration of fluids would be substantially defeated.

Q. Please address the issue of low specific gravity/creatinine.

A. The DOT drug testing procedures rule, 49 CFR Part 40, addresses the issue of creatinine and specific gravity levels in urine specimens only in the context of the employee's (donor's) right to privacy during collection of a urine specimen [see §40.25 (e)(2)(ii)]. If the last specimen provided by the employee was determined by the laboratory to have a specific gravity of less than 1.003 and a creatinine concentration below .2g/L, the donor may lose his/her right to privacy during any subsequent urine collection. There is no authority under the rule for an MRO to cancel a test result based on creatinine and specific gravity levels. The MRO may, however, inform the employer when specific gravity and creatinine levels are below 1.003 and .2g/L respectively, so that subsequent collections may be conducted under direct observation. It is the responsibility of the employer representative or collection site supervisor to determine when a direct observation collection is warranted. A second specimen (under direct observation) must be collected as soon as possible when the donor has presented a specimen that falls outside the designated temperature range, or the collector observes donor behavior clearly indicating an attempt to adulterate or substitute the specimen.

These adulteration tests can be run by the contracted NIDA certified laboratory used by the employer. Collection procedures are clearly detailed in the rule and do not contemplate such testing occurring at the collection site.

Q. Is donor presence required when collector prepares specimen for shipment?

A. Your letter implies that the governing regulation, 49 CFR Part 40, should be "clarified" to indicate that the seal on the shipping container must be affixed in the presence of the donor.

The tamperproof seal placed on the specimen bottle must be affixed in the presence of the donor but the regulation is clear that the donor does not have to be present when the specimens are prepared for shipment to the laboratory. The collection site person is the only person required to sign or initial the seal on the shipment container. In fact, the rule allows the use of shipment containers that accommodates multiple specimen bottles. It would be impossible to have more than one donor witness the sealing of their specimen bottles in one shipment container when collectors are restricted by rule to administer to only one donor at a time.

Q. What should donors do if specimen collection procedures are not being followed?

A. Under DOT agency regulations, the employer is responsible for ensuring that specimens are collected in accordance with 49 CFR Part 40.

If the employees subject to DOT mandated drug testing regulations believe that collection procedures are not being followed as prescribed in 49 CFR Part 40, they should so inform the employer. If the employer does not respond to the complaints and take appropriate corrective actions, the employees may seek resolution of their complaints by DOT agency that has regulatory authority over the employer.

Q. In a post-accident situation requiring both a company test and a DOT test, which should be collected first?

A. In a post-accident situation in which drug/alcohol testing is required under company authority or policy, and a DOT mandated drug test is required, the DOT urine specimen must be collected first, and the "company" urine specimen collected from a subsequent void.

Q. Is failure to check the temperature box on the Drug Testing Custody and Control Form (DTCCF) considered a fatal flaw?

A. In accordance with 49 CFR Part 40 (54 FR 49854) Section 40.29, the collector is to check the temperature of the specimen, to ensure the integrity of the specimen, and the fact that it was checked should be marked appropriately on the custody and control form. Inadvertently <u>not</u> marking the temperature taken box, in and of itself, does not constitute a "fatal flaw" in the DOT chain of custody process.

Q. Can company fire an employee using a more stringent temperature range?

A. This is in response to your letter concerning ******* practices with respect to urine samples that are within the temperature range provided for in the Department of Transportation's drug testing procedures (49 CFR Part 40) but are outside the more stringent temperature range provided for in ******* corporate drug testing policy. According to your letter, ***** fires any employee whose urine sample, collected in response to DOT requirements, falls into this category. In this situation, ***** does not complete the DOT-mandated drug testing process for the employee, but discards the employee's specimen. Your inquiry about whether ********* current procedures are consistent with DOT rules arises in the context of the dismissal of an employee on the basis that the temperature of his urine specimen did not register on the temperature measuring device that ***** uses.

Part 40 requires the measurement of urine sample temperature to determine, for purposes of ascertaining when a directly observed donation of a specimen is appropriate, whether there is a reason to believe that an individual may have altered or substituted a specimen. Paragraph 40.25 (e)(2) provides as follows:

> *For purposes of this part, the following circumstances are the exclusive grounds constituting a reason to believe that the individual may alter or substitute a specimen:*
>
> *(i) The employee has presented a urine specimen that falls outside the normal temperature range (32.5 °-37.7 ° C/90.5-° 99.8F°), and*
>
> *(A) The employee declines to provide a measurement of oral body temperature...or*
>
> *(B) Oral body temperature varies by more than 1° C/8 ° F from the temperature of the specimen;...*
>
> *(iii) The collection site person observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample (e.g., substitute urine in plain view, blue dye in specimen presented, etc..)* (emphasis added)

Paragraph 40.25(f)(12) emphasizes that the time between urination and temperature measurement of the specimen "in no case shall exceed 4 minutes." Paragraph 40.25(f)(13) reiterates the requirement for testing specimen temperature to determine whether it is within the stated range, and specifically ties this requirement to §40.25(e)(2)(i).

Paragraphs 40.25 (f) (15) and (16) then mandate the consequences in a situation in which there is a reason to believe that the individual may alter or substitute a specimen:

> *(15) All specimens suspected of being adulterated shall be forwarded to the laboratory for testing.*

(16) Whenever there is a reason to believe that a particular individual has altered or substituted the specimen as described in paragraph (e)(2)(i) or (iii) of this section, a second specimen shall be obtained as soon as possible under the direct observation of a same gender collection site person. (emphasis added)

The provisions of the rule concerning the custody and control form also refer to temperature measurement of specimens. Paragraph 40.23 (a)(1)(vii) provides for

- *A block specifying whether or not the collector read the temperature within 4 minutes, and then notation, by the collector, that the temperature of the specimen just read is within the range of 32.5-37.7 ° C/90.5-99.8 ° F; if not within the acceptable range an area is provided to record the actual temperature.*

According to your letter, ***** has determined that any temperature reading below 96° F or above 98° F, more than being a reason to believe that an individual "may alter or substitute a specimen," is conclusive evidence that the individual has tampered with the specimen. It is our understanding that, on the basis of this evidence, ***** then fires the individual, declines to complete the DOT-mandated drug test, and discards the urine sample.

This approach is inconsistent with the Department's rules. First, under Part 40, only when a specimen temperature is below 90.5° or above 99.8° F does a "reason to believe that the individual may alter or substitute the specimen" arise. For purposes of "this part" (i.e., all of Part 40, not merely §40.25(e)), a reading outside this specified range is the "exclusive" ground relating to temperature that constitutes a reason so to believe. A reading below 96° F but not below 90.5° F cannot, under DOT rules, constitute such a reason. The only consequence provided under Part 40 of a "reason to believe" is a directly observed second test.

From the temperature measuring device ***** uses, according to your letter, you can determine that a specimen temperature is below 96° F. ***** cannot determine, using the device, whether or not the specimen temperature is below 90.5° F. For this reason, ***** cannot know whether or not the only "low temperature" reason to believe that an employee may alter or substitute a specimen recognized by Part 40 exists.

Your letter asserts that a temperature above 90.5° F but below 96° F may constitute a "reason to believe" under §40.25(e)(2)(iii), as "conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample." Leaving aside the issue of whether a reading of a temperature measurement device constitutes an observation of "conduct," this argument relies on an inappropriate reading of §40.25(e)(2). If an employer is free, under §40.25(e)(2)(iii), to use any temperature range it chooses to constitute a "reason to believe," then the very specific

temperature range set forth in §40.25(e)(2)(i) is mere surplusage. As a general rule of construction, it is incorrect to interpret two related portions of a statute or regulation so that one loses all significance. The Department interprets these two paragraphs to give meaning to both. Paragraph 40.25(e)(2)(i) constitutes the exclusive temperature-related ground for determining that there is a "reason to believe;" §40.25(e)(2)(iii) provides for a "reason to believe" based on conduct evidenced by something other than a temperature discrepancy.

Even if, for sake of argument, an unspecified temperature somewhere below 96° F constituted a "reason to believe" (whether under §40.25(e)(2)(i) or (iii)), ******* ensuing procedures are contrary to the requirements of Part 40. When a "reason to believe" exists, the rule mandates that certain consequences follow, in every case: a second specimen shall be collected under direct observation, the sample suspected of adulteration shall be forwarded to the laboratory for analysis, and the appropriate notations shall be made on the custody and control form. According to your letter, ***** follows none of these requirements. Consequently, ******* procedures fail to comply with the rule. (We note that the manufacturer's instructions for the temperature measuring device ***** uses state that "Any specimen suspected of adulteration should always be forwarded for testing and a second specimen obtained under direct observation." In this respect, the manufacturer appears to take Part 40's requirements nearer to heart than does *****.)

Your response would appear to be that at the instant an employee submits a sample that falls below 96° F, he ceases to be an employee, releasing ***** from any obligation to follow DOT rules for the drug testing process with respect to his test. A legal fiction is a solemn thing. (When, for example, an employee's test occurs at 9-9:30 a.m. and his firing occurs at 4:45 p.m., the notion that he becomes an ex-employee instantaneously upon passing "cold urine" is quite clearly fictional.) However solemn, such a fiction does not release ***** from its obligations under Part 40, which apply to "transportation employers conducting...drug testing programs pursuant to regulations issued by agencies of the Department of Transportation" (49 CFR §40.1). Part 40 requires the employer to forward "all specimens suspected of being adulterated" to the laboratory for testing and to obtain a second specimen under direct observation "whenever there is a reason to believe that a <u>particular individual</u> has altered or substituted the specimen" (emphasis added). Part 40 makes neither of these obligations contingent upon the intent of the company to retain the individual as an employee.

Paragraph 40.35(f) does, indeed, refer to "minimum precautions to ensure that unadulterated specimens are obtained and correctly identified." Two of the minimum precautions are the provisions of §40.25(f)(15) and (16). By declining to follow these two provisions, ******* policy does not add to, but falls below, the Department's minimum

requirements.

As your letter notes, ***** believes that it has developed "more reliable test procedures" than those called for by §40.25(e)(2)(i) and should be allowed to use them. In this regard, ******* position is similar to the views of various employers we have heard from in the years since Part 40 was adopted, who "have a better idea" concerning drugs to be tested, cutoff levels, on-site testing, or other aspects of testing procedures. Often, as in this case, the employer's "better idea" was a practice that it had in place before Part 40 took effect.

Our reply in such situations is straightforward: employers may use procedures of their choice for their own, separate testing programs. For testing conducted under DOT rules, compliance with those rules, as written, is required. ***** may petition the Department, under the procedures of 49 CFR Part 5, to amend the rules to incorporate any "better ideas" that ***** supports. DOT would consider such a request based on all relevant information, including information ***** chose to submit concerning the merits of the temperature measurement method ***** prefers to use.

The General Counsel's office of the Department of Transportation concurs with this response. I hope the information we have provided you is helpful.

Q. What are collection site requirements?

A. The Department's procedures for transportation workplace drug testing programs contained in 49 CFR Part 40, December 1, 1989, §40.25(a)-(b) outlines employer requirements for designating and maintaining the security of collection sites. To summarize the contents of this section, a collection site must at a minimum provide:

(1) an enclosure where privacy for urination is possible.

(2) a toilet for urination (unless a single use, disposable container is used with sufficient capacity to contain the entire void.

(3) a source of water for washing hands.

(4) a suitable writing surface for completing the required paperwork (drug testing custody and control form).

(5) restricted access so that the site is secure during collection.

Any facility, to include a physician's office, that meets the above minimum requirements may be used as a collection site for DOT required drug tests. I should emphasize that it is the employer's responsibility to not only designate and ensure collection sites meet these minimum requirements but also to ensure that collection site personnel at these locations are properly trained and/or qualified to collect urine specimens in accordance with the provisions outlined in 49 CFR Part 40.

§40.29 LABORATORY ANALYSIS PROCEDURES

Q. Explain the requirements for monthly lab summaries.

A. Section 40.29(g)(6) of 49 CFR Part 40 requires each laboratory to "provide the employer official responsible for coordination of the drug testing program a monthly statistical summary of urinalysis testing of the employer's employees."

The above reference also contains the following information: "Monthly reports shall not include data from which it is reasonably likely that information about individuals' tests can be readily inferred. If necessary, in order to prevent the disclosure of such data, the laboratory shall not send a report until data are sufficiently aggregated to make such an inference unlikely. In any month in which a report is withheld for this reason, the laboratory will so inform the employer in writing."

Further, the Department has held that during a month in which there was "no activity" the laboratory is still required to inform the employer, in writing, of the negative activity. This provision is currently necessary to assist federal auditors during inspections of employers that are required by an Operating Administration to conduct a drug testing program. Unless the auditor has a complete month by month history and record of drug testing results from a laboratory, there is nothing to preclude an employer, for example, from destroying a monthly summary that does contain a confirmed positive result and claim that there simply was no activity during the month. This, of course, would allow the company to continue to use that individual in a safety-sensitive function with no evidence that there was a confirmed positive drug test result. In effect, the negative lab report serves as an important check and balance used by auditors in their compliance and enforcement efforts.

While the Department recognizes that the possibility does exist that a laboratory could potentially be monitoring an employer which it may have lost to another laboratory, the benefits of requiring the monthly summary, even in the face of a "no activity" report, far outweigh this concern.

Q. May lab transmit results to MRO using fax of copy 2 of Drug Testing Custody and Control Form (DTCCF)?

A. Laboratory test results may be provided to the medical review officer (MRO) via facsimile transmission of the custody and control form. However, the "true copy" of the custody and control form must also be sent to the MRO. The purpose of permitting facsimile transmission of the custody and control form is to facilitate a quicker administrative review of test results by the MRO. The MRO may complete verification of a negative result based on the facsimile of the custody and control form; however, the verification of a positive result cannot be completed until the "true copy" of the custody and control form bearing the original signature of the laboratory's certifying scientist is received by the MRO.

Q. Can lab certifying scientist use a "signature stamp"?

A. In accordance with 49 CFR Part 40 (54 FR 49854) Section 40.29, paragraph (g)(5) "in the case of a report positive for drug use, shall be signed (after the required certification block) by the individual responsible for day-to-day management of the drug testing laboratory or the individual responsible for attesting to the validity of the test reports... ."

In accordance with 49 CFR Part 40 (54 FR 49854) Section 40.29, paragraph (g)(3) "Before any test result is reported (the results of initial tests, confirmatory tests, or quality control data), it should be reviewed and the test certified as an accurate report by the responsible individual." The Department's opinion is that negative reports must be reviewed and the test certified as an accurate report by the laboratory's responsible individual. This certification can be accomplished by a signature or a signature stamp with initials on the custody and control form.

Q. Does regulation require lab "batch reporting" of drug test results?

A. The laboratory may report results to the MRO as soon as the results have been reviewed by the appropriate laboratory personnel. There is no requirement for "batch reporting," or reporting simultaneously all results for specimens received in a given shipment. Nor does 49 CFR 40 require "batch reporting" of results by the MRO to the employer. While, the practice of reporting negative results before positive results have been verified, may lead to an employer making premature assumptions about a particular test result, the rule provides no authority for an employer to take any adverse action against an employee whose test result is pending. The differences in reporting time of test results may be due to a variety of circumstances including laboratory processing time, MRO administrative review processes for negatives, or the verification process for positives.

Q. Is lab required to send results directly to the MRO?

A. With regards to the routing of laboratory test results, 49 CFR Part 40.29 (g)(4) states: *The laboratory may transmit results to the Medical Review Officer by various electronic means...in a manner designed to ensure confidentiality of the information...The laboratory and the employer must ensure the security of the data transmission and limit access to any data transmission, storage, and retrieval system.* § 40.29 (g)(5) further explains: *The laboratory shall send only to the Medical Review Officer the original or a certified true copy of the drug testing custody and control form (part 2)...*

Regarding the Medical Review Officer review process of positive test results, § 40.33 (b)(3) states: *The role of the Medical Review Officer is to review and interpret confirmed positive test results obtained through the employer's testing program.* In § 40.33 (c)(2): *The MRO shall contact the individual directly, on a confidential basis, to determine whether the employee wishes to discuss the test result. A staff person under the MRO's supervision may make the initial contact, and a medically licensed or certified staff person may gather information from the employee.*

The duties of the MRO with respect to reviewing negative results are administrative. This administrative review should include a review of the drug testing custody and control form to substantiate that the reported negative result is correctly identified with the donor and to ensure that the form is complete and sufficient on its face. This is contained in § 40.33 (a)(1) and (2). Since publication of 49 CFR Part 40, The Department has allowed for this review to be conducted and verified by a staff person under the MRO's supervision.

Given all of the above, it should be clear that the intent of the current regulations is that all laboratory test results would be sent directly to the MRO. The MRO must make the verification determination on positive results and the MRO may delegate to a person under his/her direct supervision the administrative review of the negative results.

Q. Does the regulation allow the MRO to disclose to the employer the drug(s) involved in a positive test.

A. Section 40.29(g)(3) of 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs: Final Rule, December 1, 1989 requires MROs to report to employers whether the drug test was positive or negative. It also allows the MRO to report the drug(s) for which there was a positive test.

As you mentioned in your correspondence, 49 CFR Part 391, the Federal Highway Administration's Controlled Substances Testing regulation, in §391.87(f)(5) is more specific and, in fact, does require MROs to report whether the test finding was positive or negative and, if positive, the controlled substance(s) identified.

Since 49 CFR Part 391 requires that this information be provided to employers and 49 CFR Part 40 does not prohibit it from being disclosed, the provisions of 49 CFR Part 391 should apply in this case.

As you know, the Department is currently considering a number of modifications to 49 CFR Part 40 procedures. The requirements for MRO reporting of drug test results to employers are among those items being reviewed.

§40.31 QUALITY ASSURANCE AND QUALITY CONTROL

Q. Please explain the timing of blind performance test specimens.

A. 49 CFR Part 40 in Section 40.31(d) delineates employer and consortia blind performance test requirements. The intent of the requirements in 49 CFR Part 40 is to test the laboratory's ability to correctly identify positive and negative samples. These samples are to be unidentifiable as blind samples by the laboratory.

The regulation does not specify the distribution or the timing of the submissions except to stipulate in Section 40.31(d)(2) that each "employer shall submit three blind performance test specimens for each 100 employee specimens it submits, up to a maximum of 100 blind performance test specimens submitted per quarter." This is the basic requirement. The optimum program would be to evenly space the submission of blind samples throughout the period.

§40.33 REPORTING AND REVIEW OF RESULTS

Q. 1.When can MRO notify employer of positive drug test result?

A. The MRO may not notify the employer of a positive test until he/she has verified the test as positive. Verification requires that the MRO review the chain of custody documentation, contact the employee, review any documentation of a legitimate medical explanation for a positive test, and determine that the positive resulted from unauthorized use of a controlled substance. The MRO is not required to delay verification pending the outcome of the reanalysis or the split analysis. Only upon verification shall the MRO notify the employer of the positive result, and the employer shall then remove the employee from the safety-sensitive duties/ position. Once having received notice of a verified positive from the MRO, the employer shall not delay removal of the employee from safety-sensitive duties pending the outcome of the reanalysis or the split analysis.

Q. Please explain MRO qualifications. Is certification required?

A. 49 CFR Part 40 (§40.33(b)(1)) states that the MRO shall be a licensed physician with knowledge of substance abuse disorders. There is no DOT certification program for MRO's; nor is there a requirement that physicians complete any specialized training for MRO duties.

Q. Please explain requests/requirements for reanalysis.

A. Under the provisions of 49 CFR Part 40, reanalysis/retest of the original urine specimen is authorized at the request of the employee within 72 hours of being notified of the positive result. Since the Federal Highway Administration drug testing regulation does not extend the time period for requesting a reanalysis of the specimen, the 72 hour limit specified in §40.33 (e) applies to commercial motor vehicle drivers. Any request for specimen reanalysis after 72 hours is to be at the direction of the MRO.

The Research and Special Program Administration drug testing regulation (49 CFR Part 199.17) does extend the time period for an employee requesting a reanalysis of the urine specimen to 60 days. Thus employees tested under the provisions of 49 CFR part 199 have 60 days to request a reanalysis.

Q. Must MRO reports to employers be in writing?

A. 49 CFR Part 40, Procedures of Transportation Workplace Drug Testing Programs does not require the MRO to provide written notification to employers of verified drug test results. Such written notification, however, is encouraged.

Q. Can MRO use copy 2 of Drug Testing Custody and Control Form (DTCCF) to report negatives?

A. The drug testing laboratory is required to send the original or copy of the drug testing custody and control form to the medical review officer (MRO). The results of the drug test are to be recorded on the custody and control form, and in the case of a positive result, the laboratory's certifying scientist must sign the custody and control form. Upon receipt of the copy of the custody and control form from the laboratory, the MRO shall verify the test result (contacting the donor if required) and notify the employer of the MRO decision. The MRO, however, should not provide the employer with a copy of the custody and control form bearing the results from the laboratory. Often, positive results reported by the laboratory are determined by the MRO to be explained by authorized medical use of a substance, and thus are verified and reported negative. Employers are not permitted to have the laboratory information, only the MRO's determination. In the case of verified positive results, the MRO may provide the employer with a copy of the custody and control form bearing the laboratory results, so long as quantitative levels of the drugs discovered are not provided.

Q. Please explain MRO review of negative results.

A. The duties of the MRO with respect to reviewing negative urine drug test results are strictly administrative but must include a review of the drug testing custody and control form prior to releasing the results to the employer. This is necessary in order to substantiate that the reported negative result is correctly identified with the donor and to ensure that the form is complete and sufficient on its face (49 CFR Part 40.33(a)(1-2)). While the Department, through interpretation, has permitted the administrative review to be conducted by a staff person working under the direct supervision of the MRO, the requirement to conduct the review in accordance with current regulations remains in effect.

Q. Please explain MRO verification of opiate positives.

A. The MRO verification process of any positive laboratory report requires several specific actions. These include a review of the drug testing custody and control form for completeness and accuracy, notifying and providing the donor an opportunity to discuss the results, reviewing the donor's medical history and medical records, and investigating other biomedical factors that may account for the positive result.

The above actions are especially important when the MRO is confronted with an opiate positive, as the result may be caused by the use of a legally prescribed medication or an ingested substance, such as poppy seeds. Using the above steps as a guide, the MRO first insures that the drug testing custody and control form is complete and accurate on its face. Next, the MRO notifies the donor of the positive test result and offers the individual an opportunity to discuss the results. If the donor expressly declines the opportunity to discuss the test results, or fails to contact the MRO within five days after being notified by a designated employer representative to do so, the MRO may verify the laboratory test result as a positive. This includes results that are positive for opiates.

If the donor accepts the opportunity to discuss the results with the MRO, the MRO must review any medical records provided by the donor to determine if the opiate positive resulted from a legally prescribed medication. If the donor is unable to produce medical evidence and either admits to unauthorized use of an opiate or acknowledges using another individual's prescribed opiate medication the MRO should also verify the result as a positive.

However, if the donor is unable to produce medical evidence, denies unauthorized use of an opiate, or denies using another individual's medication, the MRO *must determine that there is clinical evidence - in addition to the urine test - of unauthorized use of any opium, opiate, or opium derivative before verifying the test result as positive.* Examples of clinical evidence include recent needle tracks or behavioral or psychological signs of acute opiate intoxication or withdrawal. Clinical evidence is also required to verify a positive opiate result whether or not the donor claims poppy seed ingestion as a defense for the positive result.

As you can see from the brief general discussion above, the verification process for an opiate positive result can be a very complex and very difficult task for the MRO and should be undertaken with a great deal of caution.

Q. Please clarify the MRO/lab relationship.

A. 49 CFR part 40.33(b)(2) states: The MRO shall not be an employee of the laboratory conducting the drug test unless the laboratory establishes a clear separation of functions to prevent any appearance of a conflict of interest, including assuring that the MRO has no responsibility for, and is not supervised by or the supervisor of, any persons who have responsibility for the drug testing or quality control operations of the laboratory. While the current rule does not prohibit an employer-employee relationship between the laboratory and the MRO, it is obvious that there must be a clear separation of functions between the MRO and the laboratory.

Q. In what situations can an MRO reopen a verification.

A. The provisions of 49 CFR Part 40 specifically permit the reopening of a Medical Review Officer's (MRO) verification of a confirmed positive drug test in only one situation (40.33 (c) (6)). Reopening of an MRO's verification in other situations is not specifically barred or permitted by explicit regulatory language in 49 CFR Part 40. However, it is my understanding that OST and C-50 have taken the position that once an MRO has verified a drug test as positive or negative, the only circumstance in which the verification may be reopened is in accordance with the above-cited provision of 49 CFR Part 40.

§40.35 PROTECTION OF EMPLOYEE RECORDS

Q. Please clarify release of drug test results with/without written authorization.

A. The rules governing release of employee test results (49 CFR Part 40 § 40.35 and 46 CFR Part 16 § 16.380(b)) permit disclosure to persons other than the employee, employer, or decisionmaker in a lawsuit or grievance action, only with the written authorization of the employee. If the employee authorizes release to a trade association and the association intends to release the information to its members, the employee authorization should include such provisions. The authorization should be an informed consent, in that the employee fully understands the intended use and disclosure of the test results. Each test result would require a separate authorization.

Q. Can employees be required to sign release forms for third party disclosures?

A. The intent of 49 CFR Part 40 (§40.29(g)(3), 40.35 and 40.37) is to ensure confidentiality of employee drug test results. Employees should <u>not</u> be required to sign release or consent statements for third party disclosure as part of the drug testing process. You are correct, however, in your interpretation of 40.35 that information concerning the drug test may be released by the employer in un-employment or workmen's compensation proceedings, or other situations in which the employee challenges an action taken by the employer as a result of a drug test. I would point out, however, that the DOT drug testing program does not require employees who test positive to be discharged. The rule states only that employees who test positive shall not perform specified sensitive safety functions. Accordingly, any decision to discharge an employee who tests positive must be based on some grounds independent of the positive test result (an employer policy, for example). If a discharged employee later asserted, in a claim for unemployment compensation, that he had not violated the company rule on drug use, information about the results of the drug test could be introduced.

Q. Please explain the release of drug test results for unemployment compensation.

A. The provisions of 49 CFR part 40 (§40.35) do not permit the employer, simply on the basis of a claim for unemployment compensation being filed, to protest in full from the outset, citing the positive drug test, and furnishing all related documents. If the employee's dismissal is based on misconduct as defined in company policy, and the employee protests the dismissal for cause, the employer may introduce drug test information during the hearing or appeal process as evidence of violation of the company policy prohibiting drug use.

In accordance with 49 CFR 40.35, the drug testing laboratory may release drug test information to the Illinois Department of Employment Security as the decisionmaker in a proceeding initiated by or on behalf of the employee and arising from a certified positive drug test. Drug test results may be released by the laboratory to the employer at the hearing or appeal process, but not at the initial filing for benefits. Documentation of the medical review officer's verification of a certified laboratory result is available to the employer and the employee.

In the example you provided in your letter, when a drug test is conducted by and reported to Company A, Company B cannot obtain or introduce the test results without the written consent of the employee. Company A may introduce drug test information at the hearing or appeal. In the case of an owner-operator, Company A may introduce drug test information at the hearing or appeal.

The DOT regulations do not require that employees who test positive be discharged, only that they cannot perform safety-sensitive functions until again qualified in accordance with the applicable provisions of the regulations. Accordingly, any decision to discharge an employee who tests positive must be based on some grounds independent of the positive test result (an employer policy, for example). If a discharged employee later asserts, in a claim for unemployment compensation, that he/she had not violated the company policy on drug use, information about the results of a drug test could be introduced by the employer.
Additionally, the DOT has no opinion on the state's ruling on the employee's entitlement to unemployment compensation.

§40.39 USE OF DHHS CERTIFIED LABORATORIES

Q. Why use DHHS certified laboratories?

A. The Department of Transportation (DOT) requires that all drug testing mandated under the provisions of its drug testing rules must be conducted in NIDA certified laboratories. The DOT decided to require the use of NIDA certified laboratories for drug testing mandated in the regulated industries for several reasons. Most significantly, the NIDA standards for certification and the proficiency testing requirements comprise the most stringent laboratory accreditation program available in analytical forensic toxicology for urine drug testing. Additionally, the NIDA certification program provides for standardization of laboratory methodology and procedures, ensuring equal treatment of all specimens analyzed. And finally, the use of NIDA certified laboratories provides a standard that has withstood the test of legal challenges in federal drug testing. The requirement to use NIDA certified laboratories is not based on a preference for large central laboratories, but rather on the reasons cited above.

MISCELLANEOUS INTERPRETATIONS

Q. Please explain the 50% random testing rate.

A. The Department of Transportation drug testing rules require employers to conduct random testing at a rate equal to 50 per cent of its covered employees. Thus, if an employer has 100 covered employees, the employer must administer 50 random drug tests. As your letter indicates the number of random tests is determined by the covered employee population, while the number of employees randomly tested varies depending on the random selection process. It is indeed possible that 50 random tests may be conducted on less than 50 employees, some employees being tested two or more times due to the random selection of donors.

Q. Is use of a consortium to conduct random testing allowed?

A. The Department allows and even advocates the use of a consortium to assist smaller companies in complying with the current drug testing regulations. While it is true that in a combined employer pool, some employers will have a higher percentage of their employees selected for testing than others in a given twelve month period, over time this will even out. Additionally, the Department believes that the deterrent effect of random drug testing remains as powerful in a combined employers pool as it would be in a stand alone single company pool. With this in mind, the Department has determined that combining employer pools within a consortium meets the spirit and intent of the drug testing regulations and is, therefore, permissible.

The only exception is with the Federal Aviation Administration (FAA) regulated covered employees. The FAA rule requires a <u>separate</u> pool for FAA covered employees.

Q. Can an employer combine DOT and non-DOT random pools?

A. While it would seem to be advantageous for an employer to combine all employees into one random testing pool, this move could dilute the number of DOT covered employees who would actually be tested. For example, in a pool that is comprised of 50 DOT covered employees and 50 non-DOT employees, and assuming a testing rate of 50 percent, it is possible that no DOT covered employees would be tested (100 employees, 50 tests, all 50 tests conducted on non-DOT employees). The likelihood of this happening, albeit remote, is possible under a true random scheme. On the other hand, keeping the above two classes of employees in separate pools assures that at least 25 of the tests conducted by the company will be conducted on DOT employees. It is this assurance that ultimately mandates that DOT covered employees remain in separate random pools.

Q. Can an employer combine employees covered by different operating administration rules into a single pool for random testing?

A. The Department has determined that it is, indeed, permissible for an employer to combine covered employees from different operating administrations, (e.g. Research and Special Programs Administration (RSPA), Coast Guard, and Federal Highway Administration) into a single selection pool for the purpose of conducting random drug testing under DOT authority. When exercising this option, however, the employer must insure that the random testing rate is at least equal to the highest rate required by each of the operating administrations. In your particular case, even though the Federal Highway Administration random drug testing rate for the initial year is only 25 percent, you must test at the higher rate of at least 50 percent required by both the Coast Guard and RSPA if you are going to combine all three covered groups of employees into a single pool.

Q. Is it permissible to separate union and non-union employees both covered by DOT into stand alone pools?

A. The Department has determined that it is permissible for an employer to separate union and nonunion employees into separate pools for the purpose of random drug testing. If using this approach, the employer must insure that employees from each pool are tested at equal rates. For example, if pool "A" consists of 50 nonunion employees and pool "B" consists of 50 union employees, the employer must insure, if testing is done at a 50 percent rate, that 25 tests are conducted annually on employees from each pool.