FTA Drug and Alcohol
REGULATION UPDATES
October 2023
Special Edition

49 CFR Part 40 Updates: ODAPC Informational Notices Available

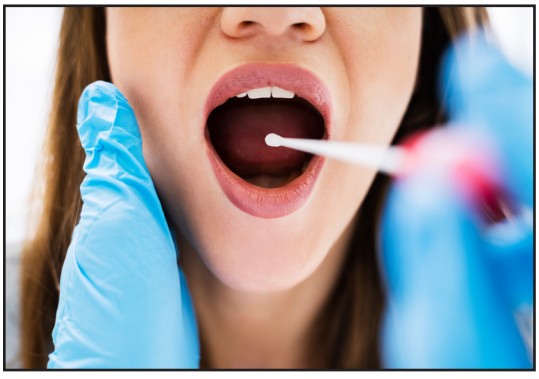
Effective June 1, 2023, DOT, through the Procedures for Transportation Workplace Drug and Alcohol Testing Programs rule (49 CFR Part 40), authorizes employers to use oral fluid drug testing as an alternative testing methodology to urine drug testing. In publishing this regulation, DOT also removed or amended some definitions for conformity and made other miscellaneous technical changes and corrections.

To help stakeholders understand the changes, the Office of Drug and Alcohol Policy and Compliance (ODAPC) provides the following informational notices:

- Summary of Changes: summarizes the changes and what they mean for employees, consortiums/third party administrators (C/TPAs), employers, collectors, laboratories, medical review officers (MROs), and substance abuse professionals (SAPs).
- CCF Notice: summarizes the effects of the regulation updates as they relate to drug testing custody and control forms (CCFs).
- DOT Policies Notice: provides guidance to DOT-regulated employers about their DOT policies and the changes to 49 CFR Part 40.

Oral Fluid Testing Not Yet Allowed

While the final rule for oral fluid testing was published on May 2, 2023 and came into effect on June 1, 2023, employers cannot use oral fluid testing at this time. Before employers can implement oral fluid testing for DOT-regulated tests, the U.S. Department of Health and Human Services (HHS) must certify at least two laboratories for oral fluid testing. Please refer to ODAPC's website for the latest information.



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U.S. Department of Transportation
Federal Transit Administration

Who Cannot Be Your Collector

DOT authorizes any individual who has received training specified in 49 CFR § 40.33 to act as a urine collector, and in § 40.35 to act as an oral fluid collector, except in the following situations:

1. The immediate supervisor of a particular employee must not act as the collector when that employee is tested.
2. An employee who is in a safety-sensitive position and is subject to the DOT drug testing rules should not be a collector (or an observer or monitor) for co-workers who are in the same testing pool or who work together with that employee on a daily basis.
3. The employee must not be the collector of his or her own specimen.
4. A collector must not be related to the employee being tested (e.g., spouse, ex-spouse, relative) or a close personal friend.

MRO Prescription Verification with Pharmacies

In the previous version of Part 40, only the MRO was allowed to contact a pharmacy to verify an employee's stated prescription. The revised 49 CFR § 40.141 now allows MRO staff to contact the pharmacy to verify these prescriptions. The MRO must ensure they have operational control over their staff, and the MRO must oversee this process to ensure quality control. This may include, for example, providing an outline or script of questions needed to authenticate specific prescriptions or occasionally monitoring calls.

Importance of Accurate DER Contact Information on CCFs

With the addition of oral fluid testing in 49 CFR Part 40, it has become paramount that employers have the correct and up-to-date contact information for the Designated Employer Representative (DER) listed on the CCF. DERs must be available during all times when collections may be performed to discuss any problems in testing, including determining if a refusal to test has occurred. Additionally, DERs must be available to discuss the type of test (urine or oral fluid) to conduct in certain problem situations. For example, in a shy bladder situation, should the DER want the collector to switch to an oral fluid collection, the DER must be available to the collector to make these decisions.

Policy Changes

Due to the changes to 49 CFR Part 40, it may be necessary for FTA-covered employers to revise their Drug and Alcohol Policy.

As a best practice, FTA recommends employers do not include the technical details about the testing procedures of Part 40 in their policy, and instead include a statement that all FTA drug and alcohol testing will be conducted in accordance with 49 CFR Part 40, as amended. However, employers whose policies describe the details of specimen collection, laboratory testing, MRO verification, etc. must ensure such details are technically accurate. Some revisions may include the following:

- ***Specimens Authorized for Drug Testing***: If the policy specifically states urine is the only specimen authorized by DOT for drug testing, the policy must be updated to include oral fluid.
- ***Refusal Behaviors***: Employers who authorize oral fluids must update the policy description of what can constitute a refusal to take a drug test to include language changes to take oral fluid testing into account, or to specify those applicable to only urine testing.
- ***When Oral Fluid Collections Are Authorized***: Employers who authorize oral fluid testing may choose to state in the policy the testing events (e.g., pre-employment, random) for which an oral fluid collection will occur. Employers may also choose to state whether oral fluid collections will be authorized for shy bladder situations and direct observation collections.

FTA-regulated employers who update their policy to include oral fluid testing must ensure the policy is re-approved by the employer's local governing board (or other responsible individual with appropriate authority). The employer must provide written notice of the revisions to all covered employees. However, to avoid confusion, FTA recommends that those employers who choose to conduct oral fluid testing should not disseminate the revised policy until oral fluid testing is implemented in the DOT testing program (i.e., when HHS certifies at least two laboratories).

FTA has updated the Policy Builder, available on the Tools and Resources page, to reflect these changes.

MRO May Un-cancel a Test

49 CFR Part 40 now allows the MRO to 'un-cancel' a previously cancelled test in the event the cancellation was due to an uncorrected flaw (e.g., the MRO cancels a test because they did not receive their copy of the CCF, but later receives it). The power to reverse the cancellation lies solely with the MRO who initially cancelled the test, and it must be done within 60 days following the cancellation. After this 60-day period, the MRO who cancelled the test cannot reverse the cancellation without obtaining permission from ODAPC. It is important to note that an MRO must not reverse the cancellation of a test that the laboratory has already reported as rejected for testing. Fatal flaws can never be un-cancelled.

Employee ID on CCFs and ATFs

Under the new ruling, for FTA-regulated tests, several identifiers may be used for the Employee ID listed on the Federal Drug Testing Custody and Control Form (CCF) and DOT Alcohol Testing Form (ATF). This may be a unique identifier issued by the employer, the individual's Social Security Number, a state-issued identification card number, a state-issued driver's license number, including a Commercial Driver's License (CDL) number, or any other state- or federally-issued identification number. Tests performed under the regulations of the Federal Motor Carrier Safety Administration (FMCSA) must use the CDL number and state of issuance.

Criteria and Limitations for Remote SAP Evaluations

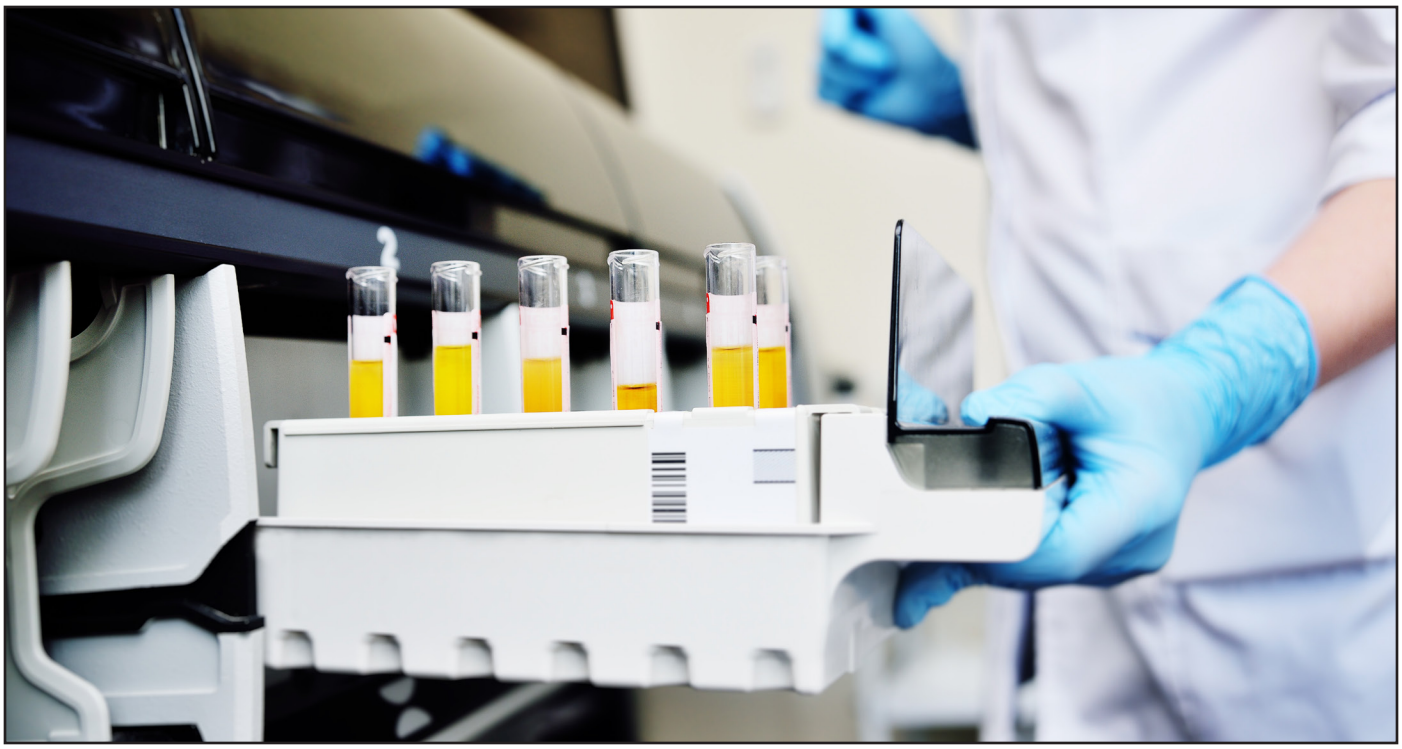
Qualified substance abuse professionals (SAPs) may conduct assessments either in-person or remotely but must adhere to certain requirements when performing assessments remotely. For remote assessments, the SAP must use technology permitting real-time, two-way audio and visual interaction between the SAP and employee. This technology must be of sufficient quality so the SAP is able to gather all the visual and audible information they would normally observe during an in-person session. The technology used must also provide adequate security to protect the confidentiality of the conversation. SAPs must abide by geographic limitations applicable to their credentials for these remote assessments. SAPs who are unsure of their geographic limitations should contact the organization that provided their credentials.

The Employer Is the Sole Determiner of Collection Site Refusals

Under 49 CFR § 40.355(i), making collection site refusal decisions is a "non-delegable" duty of the actual employer. Service agents, such as collectors, breath alcohol technicians (BATs) or screening test technicians (STTs), are not and never have been authorized to make this decision. The service agent's role is to provide information to the employer concerning the circumstances of the event (e.g., noting the employee's behavior in the Remarks section of the CCF or ATF). The employer should, as a matter of responsible decision-making, contact the collector or BAT/STT to gather more information, if necessary, and should also consider information from the employee to determine if there is evidence that satisfactorily excuses the employee's conduct. Taking the entirety of the circumstances into account, the employer must then make the decision about whether a refusal occurred.

Note, refusal consequences specified by 49 CFR Part 40 and Part 655 cannot be overturned by an arbitration, grievance, State court or other non-Federal forum adjudicating personnel decisions taken by the employer.

Semi-Annual Laboratory Reports to Employers



49 CFR § 40.111 directs HHS-certified laboratories to transmit an aggregate statistical summary, *by employer*, to the employer on a semi-annual basis (by January 20 of each year for July 1 through December 31 of the prior year, and by July 20 of each year for January 1 through June 30 of the current year). These reports must list the reporting period, the name and address of the laboratory, the identification of the employer, and the C/TPA (if applicable). The updated Appendix D of Part 40 requires laboratories to include the following information for each specimen type (i.e., urine, oral fluid) for which the employer conducts tests:

- Number of specimen results reported by test reason (e.g., pre-employment, random)
- Number of specimens reported as negative, and as negative and dilute
- Number of specimens reported as rejected for testing by reason (i.e., fatal flaw, uncorrected flaw)
- Number of specimens reported as positive by drug
- Number of adulterated specimens
- Number of substituted specimens
- Number of invalid results

For the full list of required information, view 49 CFR Part 40, Appendix D.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. Employers should refer to applicable regulations, 49 CFR Part 655 and Part 40 for Drug and Alcohol Program requirements.

Regulation Updates

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