

§ 26.67

(g) *Sanctions.* If an individual has confirmed positive, adulterated, or substituted test results from any drug, validity, or alcohol tests that may be required in this section, the licensee or other entity shall, at a minimum and as appropriate—

(1) Deny authorization to the individual, as required by § 26.75(b), (d), (e)(2), or (g);

(2) Terminate the individual's authorization, if it has been reinstated, under § 26.75(e)(1) or (f); or

(3) Grant authorization to the individual under § 26.69.

§ 26.67 Random drug and alcohol testing of individuals who have applied for authorization.

(a) When the licensee or other entity collects specimens from an individual for any pre-access testing that may be required under §§ 26.65 or 26.69, and thereafter, the licensee or other entity shall subject the individual to random testing under § 26.31(d)(2), except if—

(1) The licensee or other entity does not grant authorization to the individual; or

(2) The licensee or other entity relies on drug and alcohol tests that were conducted before the individual applied for authorization to meet the applicable requirements for pre-access testing. If the licensee or other entity relies on drug and alcohol tests that were conducted before the individual applied for authorization, the licensee or other entity shall subject the individual to random testing when the individual arrives at a licensee's or other entity's facility for in-processing and thereafter.

(b) If an individual is selected for one or more random tests after any applicable requirement for pre-access testing in §§ 26.65 or 26.69 has been met, the licensee or other entity may grant authorization before random testing is completed, if the individual has met all other applicable requirements for authorization.

(c) If an individual has confirmed positive, adulterated, or substituted test results from any drug, validity, or alcohol test required in this section, the licensee or other entity shall, at a minimum and as appropriate—

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(1) Deny authorization to the individual, as required by § 26.75(b), (d), (e)(2), or (g);

(2) Terminate the individual's authorization, if it has been granted, as required by § 26.75(e)(1) or (f); or

(3) Grant authorization to the individual under § 26.69.

§ 26.69 Authorization with potentially disqualifying fitness-for-duty information.

(a) *Purpose.* This section defines the management actions that licensees and other entities who are subject to this subpart shall take to grant or maintain, at the licensee's or other entity's discretion, the authorization of an individual who is in the following circumstances:

(1) Potentially disqualifying FFD information within the past 5 years has been disclosed or discovered about the individual by any means, including, but not limited to, the individual's self-disclosure, the suitable inquiry, drug and alcohol testing, the administration of any FFD program under this part, a self-report of a legal action, behavioral observation, or other sources of information, including, but not limited to, any background investigation or credit and criminal history check conducted under the requirements of this chapter; and

(2) The potentially disqualifying FFD information has not been reviewed and favorably resolved by a previous licensee or other entity under this section.

(b) *Authorization after a first confirmed positive drug or alcohol test result or a 5-year denial of authorization.* The requirements in this paragraph apply to individuals whose authorization was denied or terminated unfavorably for a first violation of an FFD policy involving a confirmed positive drug or alcohol test result and individuals whose authorization was denied for 5 years under § 26.75(c), (d), (e)(2), or (f). To grant, and subsequently maintain, the individual's authorization, the licensee or other entity shall—

(1) Obtain and review a self-disclosure and employment history from the individual that addresses the shorter period of either the past 5 years or

since the individual's last period of authorization was terminated, and verify that the self-disclosure does not contain any previously undisclosed potentially disqualifying FFD information before granting authorization;

(2) Complete a suitable inquiry with every employer by whom the individual claims to have been employed during the period addressed in the employment history obtained under paragraph (b)(1) of this section, and obtain and review any records that other licensees or entities who are subject to this part may have developed related to the unfavorable termination or denial of authorization;

(3) If the individual was subject to a 5-year denial of authorization under this part, verify that he or she has abstained from substance abuse for at least the past 5 years;

(4) Ensure that an SAE has conducted a determination of fitness and concluded that the individual is fit to safely and competently perform his or her duties.

(i) If the individual's authorization was denied or terminated unfavorably for a first confirmed positive drug or alcohol test result, ensure that clinically appropriate treatment and followup testing plans have been developed by an SAE before granting authorization;

(ii) If the individual was subject to a 5-year denial of authorization, ensure that any recommendations for treatment and followup testing from an SAE's determination of fitness are initiated before granting authorization; and

(iii) Verify that the individual is in compliance with, and successfully completes, any followup testing and treatment plans.

(5) Within 10 business days before granting authorization, perform a pre-access alcohol test, collect a specimen for drug testing under direct observation, and ensure that the individual is subject to random testing thereafter. Verify that the pre-access drug and alcohol test results are negative before granting authorization.

(6) If the individual's authorization was denied or terminated unfavorably for a first confirmed positive drug or alcohol test result and a licensee or

other entity grants authorization to the individual, ensure that the individual is subject to unannounced testing at least quarterly for 3 calendar years after the date the individual is granted authorization. Both random and followup tests, as defined in § 26.31(c), satisfy this requirement. Verify that the individual has negative test results from a minimum of 15 tests distributed over the 3-year period, except as follows:

(i) If the individual does not continuously hold authorization during the 3-year period, the licensee or other entity shall ensure that at least one unannounced test is conducted in any quarter during which the individual holds authorization;

(ii) If the 15 tests are not completed within the 3-year period specified in this paragraph due to periods during which the individual does not hold authorization, the followup testing program may be extended up to 5 calendar years to complete the 15 tests;

(iii) If the individual does not hold authorization during the 5-year period a sufficient number of times or for sufficient periods of time to complete the 15 tests required in this paragraph, the licensee or other entity shall ensure that an SAE conducts a determination of fitness to assess whether further followup testing is required and implement the SAE's recommendations; and

(7) Verify that any drug and alcohol tests required in this paragraph, and any other drug and alcohol tests that are conducted under this part since authorization was terminated or denied, yield results indicating no further drug abuse, as determined by the MRO after review, or alcohol abuse, as determined by the result of confirmatory alcohol testing.

(c) *Granting authorization with other potentially disqualifying FFD information.* The requirements in this paragraph apply to an individual who has applied for authorization, and about whom potentially disqualifying FFD information has been discovered or disclosed that is not a first confirmed positive drug or alcohol test result or a 5-year denial of authorization. If potentially disqualifying FFD information is obtained about an individual by any means, including, but not limited to,

the individual's self-disclosure, the suitable inquiry, the administration of any FFD program under this part, a self-report of a legal action, behavioral observation, or other sources of information, including, but not limited to, any background investigation or credit and criminal history check conducted under the requirements of this chapter, before granting authorization to the individual, the licensee or other entity shall—

(1) Obtain and review a self-disclosure and employment history that addresses the shortest of the following periods:

- (i) The past 5 years;
- (ii) Since the individual's eighteenth birthday; or
- (iii) Since the individual's last period of authorization was terminated;

(2) Complete a suitable inquiry with every employer by whom the individual claims to have been employed during the period addressed in the employment history required under paragraph (c)(1) of this section. If the individual held authorization within the past 5 years, obtain and review any records that other licensees or entities who are subject to this part may have developed with regard to potentially disqualifying FFD information about the individual from the past 5 years;

(3) If the designated reviewing official determines that a determination of fitness is required, verify that a professional with the appropriate qualifications, as specified in § 26.189(a), has indicated that the individual is fit to safely and competently perform his or her duties;

(4) Ensure that the individual is in compliance with, or has completed, any plans for treatment and drug and alcohol testing from the determination of fitness, which may include the collection of a urine specimen under direct observation; and

(5) Verify that the results of pre-access drug and alcohol tests are negative before granting authorization, and that the individual is subject to random testing after the specimens have been collected for pre-access testing and thereafter.

(d) *Maintaining authorization with other potentially disqualifying FFD information.* If an individual is authorized

when other potentially disqualifying FFD information is disclosed or discovered, in order to maintain the individual's authorization, the licensee or other entity shall—

(1) Ensure that the licensee's or other entity's designated reviewing official completes a review of the circumstances associated with the information;

(2) If the designated reviewing official concludes that a determination of fitness is required, verify that a professional with the appropriate qualifications, as specified in § 26.189(a), has indicated that the individual is fit to safely and competently perform his or her duties; and

(3) If the reviewing official determines that maintaining the individual's authorization is warranted, implement any recommendations for treatment and followup drug and alcohol testing from the determination of fitness, which may include the collection of urine specimens under direct observation, and ensure that the individual complies with and successfully completes the treatment plans.

(e) *Accepting followup testing and treatment plans from another FFD program.* Licensees and other entities may rely on followup testing, treatment plans, and determinations of fitness that meet the requirements of § 26.189 and were conducted under the FFD program of another licensee or entity who is subject to this subpart.

(1) If an individual leaves the FFD program in which a treatment and/or followup testing plan was required under paragraphs (b), (c), or (d) of this section, the licensee or other entity who imposed the treatment and/or followup testing plan shall ensure that information documenting the treatment and/or followup testing plan is identified to any subsequent licensee or other entity who seeks to grant authorization to the individual. If the individual is granted authorization by the same or another licensee or entity, the licensee or other entity who grants authorization to the individual shall ensure that any followup testing requirements are met and that the individual complies with any treatment plan, with accountability assumed by the granting licensee or other entity. If

it is impractical for the individual to comply with a treatment plan that was developed under another FFD program because of circumstances that are outside of the individual's or licensee's or other entity's control (e.g., geographical distance, closure of a treatment facility), then the granting FFD program shall ensure that an SAE develops a comparable treatment plan, with accountability for monitoring the individual's compliance with the plan assumed by the granting licensee or other entity.

(2) If the previous licensee or other entity determined that the individual successfully completed any required treatment and followup testing, and the individual's last period of authorization was terminated favorably, the receiving licensee or entity may rely on the previous determination of fitness and no further review or followup is required.

(f) *Sanctions.* If an individual has confirmed positive, adulterated, or substituted test results from any drug, validity, or alcohol test required in this section, the licensee or other entity shall, at a minimum and as appropriate—

(1) Deny authorization to the individual, as required by § 26.75(b), (d), (e)(2), or (g); or

(2) Terminate the individual's authorization, if it has been granted, as required by § 26.75(e)(1) or (f).

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§ 26.71 Maintaining authorization.

(a) Individuals may maintain authorization under the following conditions:

(1) The individual complies with the licensee's or other entity's FFD policies and procedures, as described in § 26.27, including the responsibility to report any legal actions, as defined in § 26.5;

(2) The individual remains subject to a drug and alcohol testing program that meets the requirements of § 26.31, including random testing;

(3) The individual remains subject to a behavioral observation program that meets the requirements of § 26.33; and

(4) The individual successfully completes required FFD training on the schedule specified in § 26.29(c).

(b) If an authorized individual is not subject to an FFD program that meets the requirements of this section for more than 30 continuous days, then the licensee or other entity shall terminate the individual's authorization and the individual shall meet the requirements in this subpart, as applicable, to regain authorization.

Subpart D—Management Actions and Sanctions To Be Imposed

§ 26.73 Applicability.

The requirements in this subpart apply to the licensees and other entities identified in § 26.3(a), (b), and, as applicable, (c) for the categories of individuals specified in § 26.4(a) through (d) and (g). The requirements in this subpart also apply to the licensees and other entities specified in § 26.3(c), as applicable, for the categories of individuals in § 26.4(e). At the discretion of a licensee or other entity in § 26.3(c), the requirements of this subpart also may be applied to the categories of individuals identified in § 26.4(f). In addition, the requirements in this subpart apply to the entities in § 26.3(d) to the extent that a licensee or other entity relies on the C/V to meet the requirements of this subpart. The regulations in this subpart also apply to the individuals specified in § 26.4(h) and (j), as appropriate.

§ 26.75 Sanctions.

(a) This section defines the minimum sanctions that licensees and other entities shall impose when an individual has violated the drug and alcohol provisions of an FFD policy. A licensee or other entity may impose more stringent sanctions, except as specified in paragraph (h) of this section.

(b) Any act or attempted act to subvert the testing process, including, but not limited to, refusing to provide a specimen and providing or attempting to provide a substituted or adulterated specimen, for any test required under § 26.31(c) must result in the immediate unfavorable termination of the individual's authorization and permanent denial of authorization thereafter.

(c) Any individual who is determined to have been involved in the sale, use, or possession of illegal drugs or the