§ 40.193

(6) Fail or decline to take an additional drug test the employer or collector has directed you to take (see, for instance, § 40.197(b));

(7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under § 40.193(d). In the case of a pre-employment drug test, the employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment. If there was no contingent offer of employment, the MRO will cancel the test; or

(8) Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when directed by the collector, behave in a confrontational way that disrupts the collection process, fail to wash hands after being directed to do so by the collector).

(9) For an observed collection, fail to follow the observer’s instructions to raise your clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if you have any type of prosthetic or other device that could be used to interfere with the collection process.

(10) Possess or wear a prosthetic or other device that could be used to interfere with the collection process.

(11) Admit to the collector or MRO that you adulterated or substituted the specimen.

(b) As an employee, if the MRO reports that you have a verified adulterated or substituted test result, you have refused to take a drug test.

(c) As an employee, if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

(d) As a collector or an MRO, when an employee refuses to participate in the part of the testing process in which you are involved, you must terminate the portion of the testing process in which you are involved, document the refusal on the CCF (including, in the case of the collector, printing the employee’s name on Copy 2 of the CCF), immediately notify the DER by any means (e.g., telephone or secure fax machine) that ensures that the refusal notification is immediately received. As a referral physician (e.g., physician evaluating a “shy bladder” condition or a claim of a legitimate medical explanation in a validity testing situation), you must notify the MRO, who in turn will notify the DER.

(1) As the collector, you must note the refusal in the “Remarks” line (Step 2), and sign and date the CCF.

(2) As the MRO, you must note the refusal by checking the “Refusal to Test” box in Step 6 on Copy 2 of the CCF, checking whether the specimen was adulterated or substituted and, if adulterated, noting the adulterant/reason. If there was another reason for the refusal, check “Other” in Step 6 on Copy 2 of the CCF, and note the reason next to the “Other” box and on the “Remarks” lines, as needed. You must then sign and date the CCF.

(e) As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have not refused to take a DOT test. There are no consequences under DOT agency regulations for refusing to take a non-DOT test.

§ 40.193 What happens when an employee does not provide a sufficient amount of urine for a drug test?

(a) This section prescribes procedures for situations in which an employee does not provide a sufficient amount of urine to permit a drug test (i.e., 45 mL of urine).

(b) As the collector, you must do the following:

(1) Discard the insufficient specimen, except where the insufficient specimen was out of temperature range or showed evidence of adulteration or tampering (see § 40.65(b) and (c)).

(2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink. Document on the Remarks line
of the CCF (Step 2), and inform the employee of, the time at which the
three-hour period begins and ends.

(3) If the employee refuses to make the attempt to provide a new urine
specimen or leaves the collection site before the collection process is com-
plete, you must discontinue the collection, note the fact on the “Remarks”
line of the CCF (Step 2), and imme-
diately notify the DER. This is a re-

(4) If the employee has not provided a sufficient specimen within three hours
of the first unsuccessful attempt to
provide the specimen, you must dis-
continue the collection, note the fact on the “Remarks” line of the CCF
(Step 2), and immedi-
diately notify the DER.

(5) Send Copy 2 of the CCF to the
MRO and Copy 4 to the DER. You must
send or fax these copies to the MRO
and DER within 24 hours or the next
business day.

(c) As the DER, when the collector
informs you that the employee has not
provided a sufficient amount of urine
(see paragraph (b)(4) of this section),
you must, after consulting with the
MRO, direct the employee to obtain,
within five days, an evaluation from a
licensed physician, acceptable to the
MRO, who has expertise in the medical
issues raised by the employee’s failure
to provide a sufficient specimen. (The
MRO may perform this evaluation if
the MRO has appropriate expertise.)

(1) As the MRO, if another physician
will perform the evaluation, you must
provide the other physician with the
following information and instructions:

(i) That the employee was required to
take a DOT drug test, but was unable
to provide a sufficient amount of urine
to complete the test;

(ii) The consequences of the appro-
riate DOT agency regulation for refus-
ing to take the required drug test;

(iii) That the referral physician must
agree to follow the requirements of
paragraphs (d) through (g) of this sec-
tion.

(2) [Reserved]

(d) As the referral physician con-
ducting this evaluation, you must rec-

(1) A medical condition has, or with a
high degree of probability could have,
precluded the employee from providing
a sufficient amount of urine. As the
MRO, if you accept this recommenda-
tion, you must:

(i) Check “Test Cancelled” (Step 6)
on the CCF; and

(ii) Sign and date the CCF.

(2) There is not an adequate basis for
determining that a medical condition
has, or with a high degree of prob-
ability could have, precluded the em-
ployee from providing a sufficient
amount of urine. As the MRO, if you
accept this recommendation, you must:

(i) Check the “Refusal to Test” box
and “Other” box in Step 6 on Copy 2 of
the CCF and note the reason next to
the “Other” box and on the “Remarks”
lines, as needed.

(ii) Sign and date the CCF.

(e) For purposes of this paragraph, a
medical condition includes an ascer-
tainable physiological condition (e.g., a
urinary system dysfunction) or a medi-
cally documented pre-existing psycho-
logical disorder, but does not include
unsupported assertions of “situational
anxiety” or dehydration.

(f) As the referral physician making
the evaluation, after completing your
evaluation, you must provide a written
statement of your recommendations
and the basis for them to the MRO.
You must not include in this statement
detailed information on the employee’s
medical condition beyond what is nec-

(g) If, as the referral physician mak-
ing this evaluation in the case of a pre-
employment test, you determine that
the employee’s medical condition is a
serious and permanent or long-term
disability that is highly likely to pre-
vent the employee from providing a
sufficient amount of urine for a very
long or indefinite period of time, you
must set forth your determination and
the reasons for it in your written state-
ment to the MRO. As the MRO, upon
receiving such a report, you must fol-
low the requirements of §40.195, where
applicable.

(h) As the MRO, you must seriously
consider and assess the referral physi-
cian’s recommendations in making
your determination about whether the
employee has a medical condition that
§ 40.195 What happens when an individual is unable to provide a sufficient amount of urine for a pre-employment follow-up or return-to-duty test because of a permanent or long-term medical condition?

(a) This section concerns a situation in which an employee has a medical condition that precludes him or her from providing a sufficient specimen for a pre-employment follow-up or return-to-duty test and the condition involves a permanent or long-term disability. As the MRO in this situation, you must do the following:

(1) You must determine if there is clinical evidence that the individual is an illicit drug user. You must make this determination by personally conducting, or causing to be conducted, a medical evaluation and through consultation with the employee’s physician and/or the physician who conducted the evaluation under §40.193(d).

(2) If you do not personally conduct the medical evaluation, you must ensure that one is conducted by a licensed physician acceptable to you.

(3) For purposes of this section, the MRO or the physician conducting the evaluation may conduct an alternative test (e.g., blood) as part of the medically appropriate procedures in determining clinical evidence of drug use.

(b) If the medical evaluation reveals no clinical evidence of drug use, as the MRO, you must report the result to the employer as a negative test with written notations regarding results of both the evaluation conducted under §40.193(d) and any further medical examination. This report must state the basis for the determination that a permanent or long-term medical condition exists, making provision of a sufficient urine specimen impossible, and for the determination that no signs and symptoms of drug use exist.

(1) Check “Negative” (Step 6) on the CCF.

(2) Sign and date the CCF.

(c) If the medical evaluation reveals clinical evidence of drug use, as the MRO, you must report the result to the employer as a cancelled test with written notations regarding results of both the evaluation conducted under §40.193(d) and any further medical examination. This report must state that a permanent or long-term medical condition exists, making provision of a sufficient urine specimen impossible, and state the reason for the determination that signs and symptoms of drug use exist. Because this is a cancelled test, it does not serve the purposes of a negative test (i.e., the employer is not authorized to allow the employee to begin or resume performing safety-sensitive functions, because a negative test is needed for that purpose).

(d) For purposes of this section, permanent or long-term medical conditions are those physiological, anatomic, or psychological abnormalities documented as being present prior to the attempted collection, and considered not amenable to correction or cure for an extended period of time, if ever.

(1) Examples would include destruction (any cause) of the glomerular filtration system leading to renal failure; unrepaired traumatic disruption of the urinary tract; or a severe psychiatric disorder focused on genito-urinary matters.

(2) Acute or temporary medical conditions, such as cystitis, urethritis or prostatitis, though they might interfere with collection for a limited period of time, cannot receive the same exceptional consideration as the permanent or long-term conditions discussed in paragraph (d)(1) of this section.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41953, Aug. 9, 2001]