

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****Workplace Drug and Alcohol Testing Programs**

AGENCY: Office of the Secretary, DOT.

ACTION: Notice: Guidance on the Role of Consortia and Third-Party Administrators in DOT Drug and Alcohol Testing Programs.

SUMMARY: The Department of Transportation encourages the provision of drug and alcohol testing services through consortia and third-party administrators. The guidance in this notice responds to a number of questions that have arisen about the proper role of these organizations in assisting employers to meet the requirements of the Department's drug and alcohol testing regulations.

FOR FURTHER INFORMATION CONTACT: Albert Alvarez, Director, Office of Drug Enforcement and Program Compliance 400 7th Street SW., Room 9404A. 202-366-3784; or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street SW., Room 10424. 202-366-9306.

SUPPLEMENTARY INFORMATION: The Department of Transportation's drug and alcohol testing programs require employers to take a variety of actions to ensure a transportation workplace free of drug and alcohol misuse. Consortia and third-party administrators (C/TPAs) can play an important role in assisting employers to meet these requirements, and the Department's policy is to encourage their availability to employers. At the same time, the Department is committed to ensuring that the confidentiality of the testing process for employees is not compromised.

The following guidance spells out the Department's views and interpretations of the proper role of C/TPAs in DOT drug and alcohol testing programs. It responds to a number of questions that participants have raised about the place of these organizations. This is Department-wide guidance, applying to participants in the programs of all DOT operating administrations involved: the Federal Aviation Administration (FAA), Federal Railroad Administration (FRA), Federal Highway Administration (FHWA), Federal Transit Administration (FTA), United States Coast Guard (USCG), and Research and Special Programs Administration (RSPA).

General Role and Functions of C/TPAs

- Employers are permitted to use C/TPAs to carry out certain aspects of their drug and alcohol testing programs.
- If an employer uses a C/TPA to implement its program, the employer must ensure that the C/TPA performs its services in accordance with the applicable rules.
- C/TPAs may operate random testing programs for employers and may facilitate the conduct of other functions (e.g., contracting with labs or collectors, conducting collections).
- C/TPAs may combine employees from more than one entity or one industry in a random pool. It should be noted that employees not covered by DOT rules may not be part of the same random pool with DOT employees, that adjustment to random testing rates in various industries may complicate the ability of C/TPAs to operate multi-industry pools, and that any C/TPA including aviation employees must be approved by the FAA.
- C/TPAs may assist medical review officers and substance abuse professionals (MROs/SAPs) in ensuring that follow-up testing is conducted in accordance with the schedule established by the MRO/SAP. Like an employer, a C/TPA may not *randomly* select employees from a "follow-up pool" for follow-up testing. (Follow-up testing, while unannounced, is not random: it follows individualized directions established by the MRO/SAP for the particular employee.)
- The C/TPA acts as an agent of the employer, and "stands in the shoes" of the employer, subject to certain limits. Within these limits, the duties the rule assigns to employers are to be carried out by the C/TPAs acting as their agents. Because the C/TPA acts as an agent of the employer, it is not required that the employee provide written consent to permit the employer to provide confidential information to the C/TPA (e.g., individual test results). In their role as agents of the employer, C/TPAs must follow the same confidentiality rules as the employer itself.
- Limits on use of C/TPAs as agents include the following:
 - * A C/TPA cannot make reasonable suspicion, post-accident, or refusal determinations. This is a non-delegable duty of the employer itself.
 - * The employer itself is responsible for making sure that an employee who has tested positive for alcohol or drugs, or otherwise violated the rules, is removed from performance of safety-sensitive positions.
 - * As noted above, an employer cannot delegate responsibility for

compliance to C/TPA. The employer remains obligated to DOT for compliance, and the C/TPA's failure to implement any aspect of the program as required in Part 40 and applicable operating administration regulations makes the *employer* subject to enforcement action by the Department.

* A C/TPA cannot act as "program manager" in FAA and RSPA programs, which call for the employer itself to have an individual designated to manage the drug and alcohol testing program for the employer.

* The fact that a C/TPA stands in the employer's shoes does not obviate the C/TPA's obligation to transmit quarterly laboratory statistical summaries to each actual employer.

* The limitations on self-referrals by SAPs for treatment apply in situations in which SAPs are part of a C/TPA.

* It is not appropriate for laboratories to receive drug and alcohol forms for an individual packaged or attached (e.g., stapled) together, since this is inconsistent with the privacy and confidentiality of personally-identified test records. Consequently, C/TPAs (including those that are operated by or affiliated with laboratories) must ensure that laboratories receive only the drug chain of custody form. One useful way in which C/TPAs can implement this guidance is to establish separate addresses for the receipt of drug and alcohol forms, respectively. C/TPAs could also establish procedures to separate alcohol and drug forms that arrive together.

Confidentiality, Test Results, Recordkeeping

• C/TPAs may receive from employers or other parties and maintain all records concerning DOT alcohol and drug testing programs, including individual test results, both positive and negative. Record retention requirements (i.e., requirements that records be maintained for a certain amount of time) apply to records maintained by C/TPAs in the same way as the requirements apply to employers.

• Where operating administration rules or policies require employers to keep certain information in their own files (e.g., for purposes of review during inspections), employers must do so, even though the same information is maintained by a C/TPA for other purposes.

• Information needed for operating a drug/alcohol program (e.g., names of employees in random pool, random selection lists, copies of notices to employers of selected employees) may be maintained by C/TPAs. Consortia may make random selections from the

pool and notifications of random tests. If the C/TPA does not maintain this information, the employer itself must do so.

- If the C/TPA is conducting or arranging for drug testing, the employer's copy of the COC form may pass through the C/TPA to provide notice to the C/TPA that the employee's specimen has been collected. The document must be forwarded to the actual employer, if required by applicable operating administration rules.

- C/TPAs must follow all confidentiality requirements applicable to employers.

- * Like an employer, a C/TPA may not provide individual test results or other confidential information to another employer without a specific, written consent from the employee. For example, suppose a consortium has employers X and Y as members. Employee Jones works for X, and has a drug or alcohol test result kept for X by the consortium. Jones wants to change jobs and work for Y. The consortium may not inform Y of the test result without obtaining specific, written consent from Jones. Likewise, the consortium cannot provide this information to Z, who is not a consortium member, without Employee Jones' consent.

- * Blanket consent forms authorizing the release of employee testing information by C/TPAs to a third party are not permitted.

- * C/TPAs must establish adequate confidentiality and security measures to ensure that confidential employee records are not available to unauthorized persons. This includes protecting the physical security of records, limiting the number of persons with access to the records and other appropriate access controls, and computer security measures to safeguard confidential data in electronic data bases.

Medical Review Officer Issues

- Employers may obtain MRO services through C/TPAs. While the conflict-of-interest provisions of Part 40

concerning relationships between laboratories and MROs apply, they do not prevent independent C/TPAs (e.g., a C/TPA not operated by a laboratory) from employing or contracting with MROs or contracting for laboratory services.

- If an MRO is employed or contracted for by a C/TPA, the MRO must perform duties independently and confidentially. C/TPAs which have relationships with MROs must structure these relationships to ensure that this independence and confidentiality are not compromised. Specific means (including both physical and operational provisions, as appropriate) to separate MRO functions and other C/TPA functions are essential. The purpose of this mechanism is to ensure that the MRO is independently in charge of all MRO functions and that, with respect to performing MRO-related functions, C/TPA staff are subject to the direction and control only of the MRO.

- Only those C/TPA staff members who are actually under the day-to-day supervision and control of an MRO with respect to MRO functions may perform these functions. This does not mean that those staff may not perform other functions at other times. However, the designation of C/TPA staff as MRO purposes should be limited and not used as a subterfuge to circumvent confidentiality requirements in DOT rules and guidance. MRO staff must also operate under controls sufficient to ensure that the independence and confidentiality of the MRO process are not compromised (see previous paragraph).

- Confirmed test results must be sent *directly* from the laboratory to the MRO or MRO staff designated in accordance with this guidance. For example, a practice in which results are transmitted from a laboratory to a C/TPA computer system, and then assigned to an available MRO, is inconsistent with this guidance.

- MROs must personally conduct the final interviews with employees who have tested positive and must personally make the decision

concerning whether to verify a test as positive or negative. MRO staff cannot perform these functions.

- MROs and BATs must send final individual test results directly to the actual employer as soon as the results are available, since it is employers who have the authority to remove employees from performing safety-sensitive functions. While results may be maintained afterwards by the C/TPA, and while there is no objection to the MRO or BAT transmitting results simultaneously both to the employer and to the C/TPA, it is not appropriate for the MRO or BAT to send the results only to the C/TPA, which subsequently retransmits them to the employer. This is true even where the MRO or BAT is employed by or under contract with the C/TPA. Operating administrations are authorized to make exceptions to this general rule in situations where it may be impracticable for the individual test results to be sent to individual employers before going to the C/TPA (e.g., where a C/TPA is the only party in a position to inform an owner-operator who has tested positive that he or she must cease performing safety-sensitive functions).

Enforcement

- Consistent with this guidance, employers may contract out their drug and alcohol testing functions to C/TPAs; employers may not contract away their responsibility to comply with DOT rules.

- DOT regulates employers, not C/TPAs (with the exception of FAA's approval process for C/TPAs in the aviation industry). It is the employer, not the C/TPA, who must answer to DOT for noncompliance with DOT requirements if the employer's C/TPA does not properly carry out the requirements of DOT rules.

Issued this 11th day of July, 1995 at Washington D.C.

Federico Peña,

Secretary of Transportation.

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