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(d) 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 such a refusal.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001; 88 FR 27649, May 2, 2023]

§ 40.263 What happens when an employee is unable to provide a sufficient amount of saliva for an alcohol screening test?

(a) As the STT, you must take the following steps if an employee is unable to provide sufficient saliva to complete a test on a saliva screening device (*e.g.*, the employee does not provide sufficient saliva to activate the device).

(1) You must conduct a new screening test using a new screening device.

(2) If the employee refuses to make the attempt to complete the new test, you must discontinue testing, note the fact on the ''Remarks'' line of the ATF, and immediately notify the DER. This is a refusal to test.

(3) If the employee has not provided a sufficient amount of saliva to complete the new test, you must note the fact on the ''Remarks'' line of the ATF and immediately notify the DER.

(b) As the DER, when the STT informs you that the employee has not provided a sufficient amount of saliva (see paragraph (a)(3) of this section), you must immediately arrange to administer an alcohol test to the employee using an EBT or other breath testing device.

§ 40.265 What happens when an employee is unable to provide a sufficient amount of breath for an alcohol test?

(a) If an employee does not provide a sufficient amount of breath to permit a valid breath test, you must take the steps listed in this section.

(b) As the BAT or STT, you must instruct the employee to attempt again to provide a sufficient amount of breath and about the proper way to do so.

(1) If the employee refuses to make the attempt, you must discontinue the test, note the fact on the ''Remarks'' line of the ATF, and immediately notify the DER. This is a refusal to test.

(2) If the employee again attempts and fails to provide a sufficient amount of breath, you may provide another opportunity to the employee to do so if you believe that there is a strong likelihood that it could result in providing a sufficient amount of breath.

(3) When the employee's attempts under paragraph (b)(2) of this section have failed to produce a sufficient amount of breath, you must note the fact on the ''Remarks'' line of the ATF and immediately notify the DER.

(4) If you are using an EBT that has the capability of operating manually, you may attempt to conduct the test in manual mode.

(5) If you are qualified to use a saliva ASD and you are in the screening test stage, you may change to a saliva ASD only to complete the screening test.

(c) As the employer, when the BAT or STT informs you that the employee has not provided a sufficient amount of breath, you must direct the employee to obtain, within five days, an evaluation from a licensed physician who is acceptable to you and who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen.

(1) You are required to provide the physician who will conduct the evaluation with the following information and instructions:

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

(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required alcohol test;

(iii) That the physician must provide you with a signed statement of his or her conclusions; and

(iv) That the physician, in his or her reasonable medical judgment, must base those conclusions on one of the following determinations:

(A) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of breath. The physician must not include in the signed statement detailed information on the employee's medical condition. In this case, the test is cancelled.

(B) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of breath. This constitutes a refusal to test.

(C) For purposes of paragraphs (c)(1)(iv)(A) and (B) of this section, a medical condition includes an ascertainable physiological condition (*e.g.*, a respiratory system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of ''situational anxiety'' or hyperventilation.

(2) As the physician making the evaluation, after making your determination, you must provide a written statement of your conclusions and the basis for them to the DER directly (and not through a C/TPA acting as an itermediary). You must not include in this statement detailed information on the employee's medical condition beyond what is necessary to explain your conclusion.

(3) Upon receipt of the report from the examining physician, as the DER you must immediately inform the employee and take appropriate action based upon your DOT agency regulations.

§ 40.267 What problems always cause an alcohol test to be cancelled?

As an employer, a BAT, or an STT, you must cancel an alcohol test if any of the following problems occur. These are ''fatal flaws.'' You must inform the DER that the test was cancelled and must be treated as if the test never occurred. These problems are:

(a) In the case of a screening test conducted on a saliva ASD or a breath tube ASD:

(1) The STT or BAT reads the result either sooner than or later than the time allotted by the manufacturer and this Part (see § 40.245(a)(8) for the saliva ASD and § 40.245(b)(8) for the breath tube ASD).

(2) The saliva ASD does not activate (*see* § 40.245(a)(7); or

(3) The device is used for a test after the expiration date printed on the device or on its package (see § 40.245(a)(1) for the saliva ASD and § 40.245(b)(1) for the breath tube ASD).

(4) The breath tube ASD is tested with an analyzer which has not been pre-calibrated for that device's specific lot (see § 40.245(b)(1)).

(b) In the case of a screening or confirmation test conducted on an EBT, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result (see § 40.253(c), (e) and (f)).

(c) In the case of a confirmation test:

(1) The BAT conducts the confirmation test before the end of the minimum 15-minute waiting period (see § 40.251(a)(1));

(2) The BAT does not conduct an air blank before the confirmation test (see § 40.253(a));

(3) There is not a 0.00 result on the air blank conducted before the confirmation test (see § 40.253(a)(1) and (2));

(4) The EBT does not print the result (see § 40.253(f)); or

(5) The next external calibration check of the EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this case, every result of 0.02 or above obtained on the EBT since the last valid external calibration check is cancelled (see § 40.233(a)(1) and (c)(3)).

[65 FR 79526, Dec. 19, 2000, as amended at 67 FR 61522, Oct. 1, 2002; 71 FR 49384, Aug. 23, 2006; 72 FR 1299, Jan. 11, 2007]

§ 40.269 What problems cause an alcohol test to be cancelled unless they are corrected?

As a BAT or STT, or employer, you must cancel an alcohol test if any of the following problems occur, unless they are corrected. These are ''correctable flaws.'' These problems are:

(a) The BAT or STT does not sign the ATF (see §§ 40.247(a)(1) and 40.255(a)(1)).

(b) The BAT or STT fails to note on the ''Remarks'' line of the ATF that the employee has not signed the ATF after the result is obtained (see § 40.255(a)(3)).

(c) The BAT or STT uses a non-DOT form for the test (see § 40.225(a)).

[65 FR 79526, Dec. 19, 2000, as amended at 71 FR 49384, Aug. 23, 2006]