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## **REGION 10 BULLETIN NO: 09-48**

Subject: Mandatory Direct Observation for Return-to-Duty and Follow-Up Testing

Program Area: DOT Drug and Alcohol Testing

Date: September 8, 2009

Effective August 31, 2009, Direct Observation collections are mandatory for all United States Department of Transportation (DOT) Return-to-Duty and Follow-Up drug testing.

On May 15, 2009, the United States Court of Appeals for the District of Columbia Circuit unanimously upheld DOT's Direct Observation drug testing rules applicable to return-to-duty, safety-sensitive transportation industry employees who have already failed or refused to take a prior drug test. The Court found that the rules were not arbitrary or capricious and did not violate the Fourth Amendment constitutional prohibition on unreasonable searches and seizures.

Because there was an opportunity for the parties to seek rehearing of the Court's ruling, the Court's stay of the Direct Observation rule continued in effect. The Court issued a Mandate on July 1, 2009, which finalized the decision, thereby lifting the stay on Direct Observation for Return-to Duty and Follow-Up testing. We published an amendment to Part 40.67(b) on July 30, 2009, reinstating the Direct Observation requirement, effective August 31, 2009.

As with other DOT Direct Observation collections conducted since August 25, 1998, DOT Return-to-Duty and Follow-up drug testing will now require that a same gender observer check for prosthetic and other devices that could be used to cheat a drug test. This is in addition to the observer's subsequently watching the employee urinate into the collection container.

DOT's 49 CFR Part 40 directly observed collections are authorized and required only when:

- The employee attempts to tamper with his or her specimen at the collection site.
- The specimen temperature is outside the acceptable range;

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- The specimen shows signs of tampering - unusual color/odor/characteristic; or
  - The collector finds an item in the employee's pockets or wallet which appears to be brought into the site to contaminate a specimen; or the collector notes conduct suggesting tampering.
- The Medical Review Officer (MRO) orders the Direct Observation because:
    - The employee has no legitimate medical reason for certain atypical laboratory results; or
    - The employee's positive or refusal [adulterated/substituted] test result had to be cancelled because the split specimen test could not be performed (for example, the split was not collected).
  - The test is a Follow-Up test or a Return-to-Duty test.

Be sure to check-out the DOT web site at <http://www.dot.gov/ost/dapc/index.html> for updates to the following downloadable documents:

What Employees Need to Know About DOT Drug and Alcohol Testing

What Employers Need to Know About DOT Drug and Alcohol Testing

DOT's Direct Observation Procedures Poster

Urine Specimen Collection Guidelines

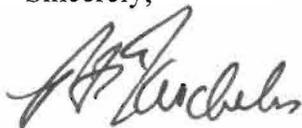
The Substance Abuse Professionals Guidelines

Drug and Alcohol Testing Rule [49 CFR Part 40]

Full text of the Part 40 Amendment published on July 30, 2009 is available at:  
<http://edocket.access.gpo.gov/2009/pdf/E9-18156.pdf>.

For further information, contact Region 10's Ted Uyeno at email [ted.uyeno@dot.gov](mailto:ted.uyeno@dot.gov).

Sincerely,



R.F. Krochalis  
Regional Administrator