

CLIENT ALERT: The Department of Transportation Requires Direct Observation Collections for Return to Duty and Follow-Up Drug Testing

Effective August 31, 2009, the Department of Transportation ("DOT") requires mandatory direct observation ("DO") collection for all return-to-duty and follow-up drug testing. This includes employees currently in follow-up drug testing programs who will still be in those programs on and after August 31, 2009.

By way of background, the Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing of transportation employees in safety-sensitive positions in aviation, trucking, railroads, mass transit, pipelines, and other transportation industries. This law and the regulations implemented pursuant to it cover more than twelve (12) million employees. Employees who have failed or refused a drug test are subject to return to duty and follow-up testing. The regulations define a refusal to take a drug test broadly, including:

- Failure to appear at a drug testing site or taking too much time to get there;
- Leaving the site before the testing process is complete;
- Failure to provide a urine sample or a sufficient amount of urine;
- Failure to cooperate with any part of the urine collection process;
- Adulteration or substitution of specimens;
- Possession or wearing of a prosthetic device that could interfere with the collection process.

Any employee who fails or refuses a drug test must be removed from his/her safety sensitive position. The employee must then complete a treatment program administered by a Substance Abuse Professional ("SAP"). Before returning to a safety sensitive position, the employee must undergo and pass a return-to-work drug test. Assuming the employee passes such a test, he/she is subject to follow-up testing as directed by the SAP. This follow-up testing will include at least six (6) follow-up tests in the first twelve (12) months after the employee returns to safety sensitive duties. The SAP can direct more tests and for a testing period of up to five (5) years.

It is this return-to-duty and follow-up drug testing which is now subject to mandatory DO collections. Under DOT's Direct Observation Procedures, the observer must be the same gender as the employee. There is also a procedure requiring the employee to raise and lower clothing and turn around so that a check can be done for a prosthetic or other device designed to carry "clean" urine and urine substitutes. A failure of the employee to permit any part of the direct observation procedure is a refusal to submit to a test.

The mandatory DO collection procedures for return-to-duty and follow-up drug testing supersede any contrary provisions in collective bargaining agreements. Also, the DOT rules have been unanimously upheld by the United States Court of Appeals for the District of Columbia in *BNSF Railway Company v. Department of Transportation*, 566 F.3d 200 (D.C. Cir. 2009).

Employers covered by DOT drug and alcohol testing rules must ensure that the laboratories or other locations that perform return-to-duty and/or follow-up testing are prepared to properly conduct DO collections, as now required by the DOT. Employers should also be prepared for possible uproar in the workplace and collective bargaining challenges through the grievance-arbitration procedures of their union contracts.

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This alert was published on September 21, 2009.

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