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223 DLR A-7

Drug & Alcohol Testing

DOT Makes Observed Urination Rule Optional Pending D.C. Circuit's Resolution of Challenge

In response to a court-ordered stay, the Department of Transportation once again is making it optional, rather than mandatory, for employers to require transportation workers to be directly observed when providing urine specimens for follow-up and return-to-duty drug tests.

According to a notice to be published Nov. 19 in the *Federal Register*, DOT is returning to the language of 29 C.F.R. § 40.67(b) that existed prior to Nov. 1, when the controversial amendment was supposed to take effect, until the U.S. Court of Appeals for the District of Columbia Circuit resolves a lawsuit challenging the observed urination rule.

BNSF Railway Co. and several transportation workers unions sued DOT Aug. 13 alleging that the observed urination rule violates the Fourth Amendment's protection against unreasonable searches and that it violates the Administrative Procedure Act because it is arbitrary and capricious and was issued without notice and an opportunity to comment (158 DLR A-8, 8/15/08).

The D.C. Circuit Oct. 31 granted a temporary stay and then Nov. 12 granted the petitioners' motion for a stay pending review of the amendment of Section 40.67(b) (*BNSF Railway Co. v. DOT*, D.C. Cir., No. 08-1264, *stay granted* 11/12/08). The appeals court also granted expedited consideration of the legal challenge to the amended rule and set a briefing schedule. The petitioners have until Dec. 12 to file a joint brief and joint appendix. DOT's brief is due Jan. 12, 2009, and the petitioners can file a joint reply brief by Jan. 26.

The petitioning unions include the United Transportation Union, the Brotherhood of Locomotive Engineers, the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters, the IBT, the American Train Dispatchers Association, the Brotherhood of Railroad Signalmen, the Transportation Communications Union, the International Brotherhood of Electrical Workers, and the National Conference of Firemen and Oilers associated with the Service Employees International Union.

Effort to Revise Testing Procedures Began in 2000.

DOT began an effort in December 2000 to revise procedures for drug and alcohol testing of the approximately 12 million workers in safety-sensitive positions in the aviation, motor carrier, rail, transit, maritime, and pipeline industries. An October 2005 notice of proposed rulemaking sought public comment on, among other issues, whether collectors should make sure that employees providing a specimen under direct observation are not using a prosthetic device. The 2005 notice did not specifically propose that direct observation be made mandatory, rather than discretionary, for follow-up and return-to-duty testing.

The agency issued final rules June 25 that, among other things, amended Section 40.67(b) to require transportation workers who previously tested positive for a prohibited drug to produce their urine specimen while the specimen collector watches. Previously, transportation workers suspected of tampering with their specimen had been required to

provide urine samples while being observed, and employers had the discretion to require direct observation for follow-up and return-to-duty tests.

The final rule also amended Section 40.67(i) to require "employees who are undergoing directly observed collections to raise their shirts, blouses, or dresses/skirts, as appropriate above the waist and lower their pants and underpants to show the observer, by turning around, that they do not have a prosthetic device on their person." The employees then may return their clothing to the proper position and then must "contribute a specimen in such manner that the observer can see the urine exiting directly from the individual into the collection container."

In the rule's preamble, DOT found that a "wide variety of products for adulteration of urine" and "various mechanical devices are now readily available to individuals who want to adulterate or substitute their urine specimen during a drug testing collection." The agency asserted that "[c]hecking for devices prior to observed collections is the most effective way to ensure the integrity of the testing process while providing individual privacy as much as practicable."

DOT acknowledged that the Omnibus Transportation Employee Testing Act of 1991 directs the agency to promote privacy "to the maximum extent practicable," but DOT found that "it is no longer 'practicable' to operate a drug testing program without adding countermeasures to well-publicized cheating techniques and devices."

The Transportation Trades Department of the AFL-CIO asked DOT to halt implementation of the observed urination provisions scheduled to take effect Aug. 25. In an announcement in the Aug. 26 *Federal Register*, the agency agreed to delay until Nov. 1 the new requirement that employers require transportation workers to be directly observed when providing urine specimens for follow-up and return-to-duty drug tests and invited public comments on the proposed amendment of Section 40.67(b). However, DOT went ahead with the amendment of Section 40.67(i) requiring certain procedures when employers use the direct observation method (166 DLR A-8, 8/27/08).

In an Oct. 22 *Federal Register* notice, DOT responded to the public comments submitted regarding Section 40.67(b) but said it would not revise the amendment and would let it take effect on Nov. 1. DOT said that when different testing methodologies, such as oral fluid and sweat specimens, are approved by the Department of Health and Human Services, DOT "intends to make these methods available to employers and employees as an alternative to direct observation urine testing" for follow-up and return-to-duty testing.

The D.C. Circuit's stay blocks the implementation of Section 40.67(b), but not Section 40.67(i).

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Text of the DOT final rule may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=sngk-7lhvrv>.

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