

**Office of the Secretary****49 CFR Part 40****Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Substance Abuse Professional and the Return-to-Duty Process**

AGENCY: Office of the Secretary of Transportation (OST), U.S. Department of Transportation (DOT or Department).

ACTION: Notification: The Do's and Don'ts for the Substance Abuse Professional and the Return-to-Duty Process in the U.S. Department of Transportation Drug and Alcohol Testing Program.

SUMMARY: The Substance Abuse Professional (SAP) is the 'gatekeeper' for the Department of Transportation's return-to-duty process (RTD). As the 'gatekeeper', the SAP has a crucial role to play in recommending the level of treatment an employee may need in their path to returning to performing a safety-sensitive function after violating the DOT's drug and alcohol testing regulations. Given this critical role, the Department is publishing this notification in response to several SAP/RTD-related issues that the Department has recently become aware of, to remind DOT-qualified SAPs to follow all the RTD process procedures in the drug and alcohol testing regulation (49 CFR Part 40) and to remind DOT-regulated employers of the SAP responsibilities and RTD process.

DATES: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Purpose

The Department's drug and alcohol testing program requires that employees who test positive, refuse a test, or violate other DOT Agency testing regulation provisions to immediately be removed from performing safety-sensitive functions [§ 40.23] and to successfully complete the RTD requirements, outlined in 49 CFR Part 40 (Part 40), before the employee can again perform DOT-regulated safety-sensitive functions. SAPs play an important role as "gatekeepers" for DOT's RTD process. SAPs are responsible for several duties important to the evaluation, referral, and treatment of employees in the RTD process. SAPs represent the major decision point (and in some cases, the only decision point) an employer may have in choosing whether or not to place an employee behind the steering wheel of a school bus, in the cockpit of a plane, at the helm of an oil tanker, at the throttle of a train, in the engineer compartment of a subway car, or at the emergency control valves of a natural gas pipeline. The SAP's responsibility to the public is enormous.

On several occasions, the Department issued reminders to SAPs on their roles and responsibilities in the drug and alcohol testing program. For example, on October 4, 2022, the Office of Drug and Alcohol Policy and Compliance (ODAPC) sent a list serve notice titled "Reminder to Substance Abuse Professionals – Ensuring a Return-to-Duty Process Unique to Each Individual Employee." This list serve was in response to learning that some SAPs were telling employees how long their RTD process would take *before* conducting the required initial evaluation and SAP assessment of the employee. The list serve reminded the SAPs not to provide employees with estimated RTD timelines because each employee's situation was unique. It also reminded the SAPs of their Part 40 roles and responsibilities and that decisions they make and the actions they take regarding an employee who has violated the DOT drug or alcohol regulations have the potential to impact transportation safety.

On June 1, 2023, ODAPC issued updated Substance Abuse Professional Guidelines. This document addresses and provides guidance concerning the RTD process and the SAP's responsibilities in that process. Among other updates, it reiterated that assessments, evaluations, recommendations for education or treatment, and follow-up testing, had to be *unique to each employee*.

On August 2, 2023, ODAPC sent a list serve titled 'Back to Basics' directed at SAPs to '**Do it right the first time and every time**'. The notice in part said, "Your function is to **protect the public interest in safety** by professionally evaluating the employee and recommending appropriate education and/or treatment, follow-up tests, and aftercare. **Your decisions and actions** have the potential to impact transportation safety directly." The notice also highlighted several important points regarding SAP's role as the 'gatekeeper' of the RTD process.

'Back to Basics' was a series of short reminders for service agents (e.g., Substance Abuse Professionals, specimen collectors, Medical Review Officers, etc.). The series emphasized '**Doing it right**' because 'doing it right' is important for protecting the safety of the traveling public, protecting the integrity of the testing process, and making sure that the process is fair to employees. '**Back to Basics**' pointed out the more common issues we heard about regarding the drug and alcohol testing process. It was not a checklist for service agents, but a reminder that their role is crucial to the drug and alcohol testing process. We wanted to remind service agents to "**Do it right the first time, and every time.**"

Recently, the Department has become aware of other issues related to the SAP's roles and responsibilities. For example, employers were having a hard time getting the follow-up testing plans from SAPs; SAPs were referring employees solely to online programs as opposed to in-person programs as appropriate; SAPs were prescribing the minimum number of follow up tests in response to pressure from consortium/third-party administrators (C/TPA) to only prescribe the minimum number of follow up tests or risk being removed from the C/TPA's list of

recommended SAPs; SAPs were administering follow up tests; SAPs not holding an appropriate credential to act as a DOT-qualified SAP; SAPs were performing the RTD process in a very short timeframe to get the employee back to work quicker; SAPs were going outside their credential's geographical limit to perform remote evaluations; and SAPs were performing remote evaluations without real time two-way audio and visual communication with the employee.

As previously stated, the SAP's responsibility to the public is enormous. When an employee tests positive for drugs, has an alcohol violation, or refuses to submit to testing, the employee has chosen to violate their responsibility to safety. Due to this threat to safety, they are immediately removed from performing safety-sensitive functions and cannot return to performing those functions until they have successfully completed the SAP/RTD process.

SAPs clinically evaluate employees, make treatment recommendations based on those evaluations, let the employer know when the employee has 'successfully' completed the RTD process, and provide a follow-up testing plan to the employer. The decisions SAPs make and the actions SAPs take regarding an employee who has violated the DOT drug or alcohol regulations have the potential to impact transportation safety. Based on this, employers decide whether to place the employee back in a safety-sensitive position. This is why the Department has emphasized the importance of the SAP/RTD process from the beginning and is now reminding SAPs to strictly adhere to Part 40. SAPs must not prioritize 'volume' of evaluations over the 'quality' of the evaluation. **There is no room for error in this process by DOT-qualified SAPs, nor for non-qualified SAPs to act as DOT-qualified SAPs.**

The following outlines the RTD process in DOT's drug and alcohol testing program, including the SAP's role; however, it is not a substitute for Part 40, and SAPs should refer to Part 40 and the SAP Guidelines as the authoritative documents. It addresses several questions participants have raised about the process and the SAP role and applies to participants in the programs of all DOT operating administrations involved: the Federal Aviation Administration (FAA), Federal Railroad

Administration (FRA), Federal Motor Carrier Safety Administration (FMCSA), Federal Transit Administration (FTA), Pipeline and Hazardous Materials Safety Administration (PHMSA), and the United States Coast Guard (USCG).

General Role and Functions of a Substance Abuse Professional (SAP)

The following can be found in Part 40, which we reference:

<https://www.transportation.gov/odapc/part40>

- As a SAP, your function is to protect the public interest in safety by evaluating the employee and recommending appropriate education or treatment, follow-up tests, and aftercare [§ 40.291(b)].
- You are not an advocate for the employer or employee [§ 40.291(b)].
- To be a SAP, you need to have certain credentials, possess specific knowledge, receive training, and achieve a passing score on an examination. You must meet all the requirements before performing any SAP functions [§ 40.281(c)(3)]. You must also take 12 professional development hours (e.g., CEUs) every three years, relevant to your performing SAP duties [§ 40.281(d)].
- SAPs should be current on the permissions and jurisdictional limitations of their qualifying credentials [§ 40.281(f)].
- If a State licensing authority or DOT-recognized credentialing organization decides that it is appropriate for one or more of their authorized practitioner categories that qualify a person to be a SAP to practice across State lines, DOT will defer to that granting authority.
- SAPs must evaluate each employee within the parameters of the SAP's State-issued license or other credential [§ 40.291(a)].

- All assessments and evaluations must be done face-to-face (whether in-person or remote) [§ 40.291(a)(1)].
- The evaluation should be comprised of a review of the employee's psychosocial history, an in-depth review of the employee's drug and alcohol use history (with information regarding onset, duration, frequency, and amount of use; substance(s) of use and choice; emotional and physical characteristics of use; and associated health, work, family, personal, and interpersonal problems), and an evaluation of the employee's current mental status [§ 40.281(f)].
- The evaluation should provide a diagnosis, treatment recommendations, and a treatment plan that the employee must complete before becoming eligible for the required follow-up evaluation and subsequent return (if the employer desires) to safety-sensitive functions.
- You must conduct a comprehensive assessment and clinical evaluation **unique to each employee** [§ 40.293(e)].
 - It is never appropriate to provide employees with an estimated RTD timeline before conducting an initial SAP evaluation and assessment.
- You must recommend a course of education or treatment **unique to each employee**.
 - It is never appropriate to assign the same education or treatment to every employee.
- As a SAP, when determining what your recommendations will be, you must not take into consideration any of the following [§ 40.293(g)]:
 - Claims that the testing process was unjust or inaccurate;

- Employee attempts to mitigate the seriousness of the violation (*e.g.*, hemp oil, “medical marijuana” use, “contact positives”, poppy seed ingestion, job stress);
- Personal opinions about the justification or rationale for the drug and alcohol testing.
- SAPs should not provide employees with an estimated RTD timeline because each employee’s situation is different. SAPs should not ‘fast-track’ the RTD process with a promise to get the employee back to performing safety-sensitive functions as soon as possible. Again, each employee’s situation is unique, and the RTD process will progress accordingly.
- You must NEVER give the employee a copy of their follow-up testing plan. You should also instruct the employer not to share the follow-up testing plan with the employee.
- SAPs may direct an employee to be tested for both alcohol and drugs for the RTD test and for the follow-up testing plan.
 - **FAA ONLY** – SAPs must understand the FAA's requirements for RTD testing. The type of RTD test (drug or alcohol) must be in accordance with 14 CFR §§ 120.109(e) and/or 120.217(e).
 - **FAA ONLY** – When working with individuals who hold or are required to hold an airman medical certificate issued under 14 CFR Part 67 to perform a safety-sensitive function for an employer, the SAP must follow 14 CFR §§ 120.113(d)(2) or 120.221(c)(4) to ensure the individual has an airman medical certificate dated after their drug or alcohol violation before recommending to the employer that the individual may be returned to a safety-sensitive position.
 - **FMCSA ONLY** – SAPs are required to report specific information to FMCSA's Clearinghouse. This reporting must comply with the requirements outlined in 49 CFR § 382.705(d).

- **FRA ONLY** - SAPs performing the role of the ‘Drug and Alcohol Counselor (DAC)’ as outlined in FRA’s crewmember certification rules (see §§ 240.115 and 240.111) for non-DOT testing violations, DUIs, and voluntary self-referrals must not apply Part 40 requirements. Any follow-up testing resulting from a DAC evaluation must be non-DOT. SAPs and employers must verify and re-verify together, the authority under which the violations or referrals occur. Using DOT authority for directly observed RTD and follow-up testing without a Part 40 violation is a serious breach of an employee’s Constitutional right to reasonable search and seizure.

Confidentiality and Recordkeeping

- Part 40 authorizes SAPs to provide written reports (including the follow-up testing plan) directly to the employer or the gaining employer when requested. Ensure the SAP report includes all required elements [§ 40.311].
- When requested by the employee, you must provide the SAP reports, from which you must redact the follow-up testing requirements [§ 40.329(c)].
- You may communicate with the MRO or the education or treatment program personnel [§ 40.293(h) & § 40.301(b)(1)].
- Maintain copies of the employee’s reports for five years (from the date of the 2nd report) [§ 40.311(g)]. All records should be maintained in limited-access areas that permit no unauthorized entry.
- Nothing in Part 40 limits the number of times a SAP can provide the follow-up testing plan to a potential or gaining employer.

Enforcement

- Examples of the kinds of serious noncompliance that the Department views as appropriate grounds for starting a Public Interest Exclusion (PIE) proceeding (not an exclusive list) [§ 40.365]:
 - Providing SAP services while not meeting the SAP qualifications required in § 40.281 or performing evaluations without interviews meeting the requirements of § 40.291(a)(1);
 - Any service agent falsely representing that the service agent, or its activities, are approved or certified by the Department or a DOT agency (such presentation includes, but is not limited to, the use of a Department or DOT agency logo, title, or emblem);
 - Any service agent maintaining a relationship with another party that constitutes a conflict of interest under Part 40.

Issued in Washington, D.C.

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