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Public Comment 8400095

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Drug Testing Section
Division of Workplace Programs
CSAP
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Re: Public Comment: FR Doc 04-7984

Dear Dr. Vogl:

Thank you for according the public to comment on the aforementioned "Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs," hereinafter referred to as "FWD Testing Programs"

I am writing on behalf of the Nebraska State Legislative Board of the United Transportation Union. **We support proper drug and alcohol testing in the workplace as long as <u>all</u> protocols and due process measures are followed.**

Indeed government intervention and the subsequent regulation of drug and alcohol testing during the past 20 years, has made a positive impact on safety, in the right way. The regulatory oversight which has, through umbrella agencies transcended to into the workplace has enhanced safety but not without some valid concerns about the variations of the "FWD Testing Programs," as adopted by some agencies.

The validity testing fiasco accords is a testimonial that we must re-invent clear "due process" in the rules. This must also be reinforced by technology available to the donor that has been denied use in the past.

DNA technology has been used in criminal cases with regularity, both to convict and to decriminalize albeit oftentimes years after the individual has been wrongly convicted. DNA testing must not be offered to employers as an analytical means, as there are confirmed cases of abuse where an employer has abused the DNA testing protocols for their own selfish gain.

There are multiple and separate issues which our views will be offered. Therefore each must be separated out, consistent with each subpart.

Subpart A -- Applicability

In section 1.5, add the following language:

"The term DNA means deoxyribonucleic acid which is located in the cells and provides an individual's personal genetic blueprint."

"The term Confidentiality, as used in context with DNA testing means such results shall not be shared with an employer, but rather the MRO only."

"The term Due Process shall mean all rights which are of such fundamental importance as to require compliance with due process standards of fairness and justice."

Also add other definitions consistent with those encompassing a donors right to request a State and/or Federal Laboratory to conduct such DNA test at the request of and expense incurred by the donor only.

Subpart B -- Specimens

In 2.2 (b), what alternative is the Federal agency allowing the collector to be collected? Pray tell we are not re-inventing a "blood" collection, that is why it must be defined.

In 2.5(a), the provision for collecting of head hair only really defeats the scientific advancements in that analytical field. Research, I am certain, would qualify other body hair as "testable". I am hopeful the agency will rethink this and broaden this section without providing for collection of hair in an intrusive and demeaning manner.

Subpart H – Specimen Collection Procedure

In 8.5 (10) (ii), the "shy bladder" collection process should be unchanged and remain as it currently is. The 40 ounce, 3 hour rule as currently standardized works relatively well. To the contrary, if you initiate a limitation of 8 ounces each 30 minutes not to exceed 24 ounces (90 minute period) you are really slowing down the process, as the existing 40 ounce limitation can be consumed by the donor, without staggering the time-limit.

Subpart K -- Laboratory

In the laboratory standards, some form of "due process" shall be re-invented, voluntarily by FWD Programs to serve as a benchmark for other agencies to follow, without having to undergo a challenge by litigation. Please review the language in the Department of Transportation (DOT) 49 Code of Federal Regulations Part 40 in the 10-1-98 Edition. More specifically, it states in 49 CFR Subpart 40.29 (n)(5), ***Personnel available to testify at proceedings.*** **"A laboratory shall have qualified personnel available to testify in an administrative or disciplinary proceeding against an employee when that proceeding is based on positive urinalysis results reported by the laboratory."** This was not enforced, by DOT, prior to the controversy involving the laboratories in that period 1998-2001. Subsequently the abuse and embarrassment incurred by all, except those employees who had their records cleared as a result of the government investigation, could have been avoided. We had raised concerns for years. Any donor must have clear due process and currently that is amiss from the analytical protocols. We are requesting that due process measures be re-instated in this rule.

In 11.33, insert Section (c) which shall read as follows *"An employee who has been accused of a confirmed positive result, and/or any result other than a negative test analysis, who is subject to discipline shall be accorded an opportunity to request an employer to, and be accorded an opportunity to question the collector, laboratory personnel who accessioned, had access to, and/or processes such employees body fluid and/or any other body fluid, cell or hair follicle for analytical purposes, and the Medical Review Officer*

at any initial disciplinary hearing, and not at the expense of the employee.

Subpart L – Point of Collection Testing

In this section, please follow the proven logic of the "on-site" or "point of collection" screening studies, and current workplace testing. Point of Collection Testing, provides an opportunity to review an initial screen result in a timely manner at the collection site. This works very well in a current proven methodology, Breath Alcohol Testing.

We must be cognizant of the existing alcohol testing, which has built in protocols to confirm a positive test result on-site. For illegal drug testing, it would appear at this juncture there is not an ability for most employers to confirm a result, and those shall be qualified as an other than negative until such result can be and is scientifically confirmed using all protocols.

Clearly, we must have an initial analysis of the donor specimen, in the presence of the donor, in the point of collection process. If that initial result is "other than negative", a donor could be accorded two options. One, the donor could volunteer to enter a rehabilitation program, if he/she knows the result will be confirmed at a laboratory as a positive result for illegal drugs. Secondly, if the donor knows the "other than negative" result cannot be as initially screened, such donor could and shall be granted a same gender witnessed collection. This would remove any doubt about the legitimacy of the donor sample and quash any claims about laboratory wrongdoing, as long as the chain of custody was properly maintained after the collection.

On behalf of the Nebraska State Legislative Board of the United Transportation Union, I appreciate the opportunity to comment on the proposed rulemaking.

Should you have questions, or desire more clarification of the recommendations in this correspondence, please contact me.

Respectfully,

Ray Lineweber

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Attachment pages of 1998 CFR in Overnight Mail