

Oral Fluid Testing of DOT Regulated Employees – Still a Waiting Game

Labor & Employment Law Update

By Anne Fishbeck and Suzannah Wilson Overholt on June 19, 2023

Effective June 1, 2023, the U.S. Department of Transportation (DOT) allows regulated employers to use oral fluid testing as part of their drug testing programs. The change is pursuant to a final rule that was published on May 2, 2023. However, practically speaking, oral fluid testing cannot yet be implemented because, as of June 1, 2023, the Department of Health and Human Services (DHHS) had not yet certified any laboratories to perform the testing – and two must be certified for any testing to be performed.

Once oral fluid testing can actually be implemented, regulated employers may choose which collection method to use in various situations. The DOT encourages employers to have an alternate testing method ready in the event of contingencies (e.g., an employee's inability to produce a sufficient specimen as a permanent, long-term, or short-term condition; direct observation urine collections that could be handled easily by switching to oral fluid testing; reasonable accommodation requests; etc.). Oral fluid collection may be done by any oral fluid collector qualified under the regulations – either an external contractor or an employee the employer dispatches to the scene.

According to the DOT, offering both oral fluid and urine testing affords employers with flexibility related to their testing program. Under the new rule, when an employer determines that a DOT post-accident or a reasonable cause/suspicion test is needed, an oral fluid collection could be done at the scene of the accident or the workplace without the need to provide access to a bathroom. In addition, offering both urine and oral fluid testing would permit an employer to deal with situations when an employee cannot provide a sufficient specimen. Finally, having both options allows an employer to perform a directly observed collection as an oral fluid test when there is not a same gender observer present. (For direct observation collections involving transgender or nonbinary individuals, an oral fluid collection *must* be conducted.)

The DOT cautions that oral fluid windows of detection are likely shorter than for urine. Although the DOT's proposed rule contained a chart with specific windows of detection, that chart was omitted from the final rule due to concerns that the periods of detection would change with changes in technology.

The DOT's rule also made permanent certain of the COVID-19 modifications allowing evaluations with a substance abuse professional (SAP) to be either in-person or remote, as long as certain criteria are met.

The rule flows from an earlier DHHS rule allowing oral fluid testing for federal agencies that was effective January 1, 2020. The DHHS rule only applied to certain federal agencies and laboratories involved in collecting samples used in drug testing the employees of those agencies.

The DOT regulated employers are advised to familiarize themselves with oral fluid testing so that when labs are certified by the DHHS to perform such testing, existing testing programs may be expanded to include that option.

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