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Aspects of MRO Practice

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The U.S. Department of Transportation's Office of Drug and Alcohol Policy and Compliance issued notice on October 22, 2008 that its proposed requirement to make direct observation collections mandatory for return-to-work and all follow-up tests would go into effect on November 1. The new requirements change 49 CFR §40.67(b), which gave employers discretion to require direct observation during an individual return-to-duty or follow-up test. The requirement to make direct observation mandatory was part of DOT's Final Rule, published on June 25, 2008. The original effective date for all the provisions was August 25. DOT then delayed the implementation of direct observation on return-to-duty and follow-up tests until November 1.

The delay was in response to broad objections from employers, unions, service providers and employees, and specifically petitions filed by the Association of American Railroads (AAR), joined by the American Short Line and Regional Railroad Association, the Transportation Trades Department (TTD) of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the International Brotherhood of Teamsters, and the Air Transport Association (ATA), joined by the Regional Airline Association (RAA). The petitions asked DOT to delay the effective date of these two provisions, seek further comment on them, and reconsider (rescind) them.

The petitions and objections to the new procedures were not merely that they were not included in the proposed rule, but that DOT also felt compelled to add a requirement that collectors must require donors to raise and lower their garments and turn around in front of the collectors to assure they are not wearing any devices to substitute urine. This new direct observation procedure was not addressed by DOT, but rather DOT extended the comment period to cure this defect in the regulatory process in respect to mandating observation for the additional tests.

In addition to petitions, railroads and unions filed a joint legal challenge in the U.S. Court of Appeals for the District of Columbia.¹ On October 31, the last day before the rules were to go into effect, the court ordered that the portion of the rule making 49 CFR §40.67(b) mandatory rather than optional be stayed pending further order of the court. Technically, however, the requirement to raise and lower garments and turn around is still in effect. ✚

NOTE: At press time, MROALERT has learned that many of the large laboratories have instructed their collectors not to perform observed collections. The employer must provide the observer. A major concern is that collectors will perform DOT observed collection procedures on non-regulated workplace drug tests, which may be found to be in violation of state privacy laws.

¹ BNSF Railway Company, et al., Petitioners v. Department of Transportation, Respondent, USCA DC No 08-1264 (10/31/08)