

Look inside for details!

Do You Need to Update Your Drug Testing Program?

THE PARTNERSHIP FOR A DRUG-FREE NEW JERSEY
 155 Millburn Avenue
 Millburn, NJ 07041

FIRST CLASS
 U.S. POSTAGE
PAID
 PERMIT NO. 715
 UNION,
 NJ 07083

Recipient's Name
 Street Address
 Town, State Zip

15 Minute Child Break

A free Substance Abuse Prevention Parent Education Program for Schools, Community Organizations & Businesses.

Parents who talk to their children about their activities an average of 15 minutes per day have children who are 67% less likely to try marijuana.

15 Minute Child Break

The "15 Minute Child Break" is a one-hour, interactive, multimedia presentation that informs, encourages and empowers parents to effectively communicate with their children about the dangers of drugs and alcohol.

Call 973-467-2100 for more information.

UPDATE

DRUGS DON'T WORK IN NJ!

Partnership for a Drug-Free New Jersey

Update No. 55

Fall 2010

DOT Adopts New Drug & Alcohol Testing Rules – Do You Need to Update Your Drug Testing Program?

The U.S. Department of Transportation (DOT)'s final rule amending certain drug testing procedures goes into effect October 1, and regulated employers are moving to update their written testing plans and practices to reflect the changes. Employers who do not have to comply with the DOT regulations are also being approached by drug testing providers and third-party administrators and asked to decide whether they will amend their drug testing programs to adopt the DOT's new cutoff levels for certain drugs of abuse. How will the changes to 49 C.F.R. Part 40 affect your testing program? Should you amend your testing program?

the presence of two additional metabolites in determining whether MDMA is present in the sample. Finally, testing for the heroin metabolite 6-acetylmorphine will be accelerated and conducted as part of the initial, rather than confirmatory testing process. No other cutoff levels are amended or additional tests are required, and no changes are made to the alcohol testing process.

For some reason that I suspect has a lot to do with marketing, certain testing industry representatives have la-



Changes to the Test Panel

The regulatory changes getting the most attention are changes to the test panel. At present, and until September 30, 2010, the DOT program requires employers to test for five classes of drugs, plus alcohol. The drugs include: amphetamines, cocaine, marijuana, opiates, and phencyclidine (PCP). The test for amphetamines includes tests for metabolites of certain amphetamines, including methamphetamine and amphetamine, and the test for opiates includes confirmatory testing for opiate metabolites codeine, morphine, and 6-acetylmorphine. As of October 1, the revised rule lowers the cutoff level for cocaine detection from 300 ng/ml for an initial positive result to 150 ng/ml, and from 150 ng/ml for a confirmatory result to 100 ng/ml. In addition, for the first time the rule requires testing for an additional amphetamine, MDMA, which is a synthetic drug commonly known by its "street" name as "Ecstasy." Tests will seek

beled the amended panel a "7-panel test." However, the only new illegal drug that can be detected under the new system is MDMA. The additional tests necessary to screen a test as either positive or negative may, however, affect the cost of the regulated testing process. How this in turn will affect current test providers' definitions of non-regulated 8- and 9-panel tests is anyone's guess, so

(Continued on next page)

employer representatives responsible for purchasing tests should closely review the drugs to be detected in any panel rather than rely upon a numerical designation as shorthand for the tests purchased.

Definitions Amended

The revised regulations amend some of the definitions relevant to the Part 40 regulations, most of which are more relevant to laboratory obligations than to employer compliance. If your organization has adopted a DOT drug and alcohol testing policy that includes a lengthy recitation of the definitions included in the regulations, however, you may want to review your policy to determine if those definitions should be updated.

Creation of Initial Testing Facilities Proposal Rejected

Part of the DOT's initial regulatory proposal included draft regulations that would create a new category of initial testing to be performed by Instrumented Initial Testing Facilities. This proposal was not adopted, after regulators concluded that the federal law creating the DOT testing program (the Omnibus Transportation Employee Testing Act) requires testing laboratories to be capable of conducting both initial and confirmatory testing, and the proposed IITFs would not be authorized to conduct confirmatory tests.

Changes to MRO Continuing Education Requirements

A few changes were made with respect to MRO certification requirements. In particular, MROs are no longer required to take 12 hours of continuing education every three years. Instead, an MRO must take and pass a re-

The regulatory changes getting the most attention are changes to the test panel. At present, and until September 30, 2010, the DOT program requires employers to test for five classes of drugs, plus alcohol.

qualification examination administered by an MRO training organization every five years. The MRO training organization need not be approved by the U.S. Department of Health and Human Services; it is sufficient for the organization to meet the qualification and re-qualification requirements imposed by the DOT.



Should You Amend Your Non-Regulated Testing Policy?

As noted above, testing cutoff levels will change for DOT-regulated employees, and a few definitions will change. Employers who have DOT-regulated employees need to review their policies and practices to make sure that they are up-to-date for October 1. But what about non-regulated employees? Should your company amend its drug-testing program to use the new DOT test panel and cut-off levels?

In this case, the decision to amend your policy for non-regulated workers is entirely a matter of administrative convenience, at least within New Jersey. If your organization has regulated workers subject to testing, and has previously treated non-regulated workers alike, these changes should be relatively easy to implement. However, as always, you must be aware of state laws, which apply to non-regulated workers (federal law will preempt, or "trump" state law as to regulated workers). For this reason, for example, I have warned against employers adopting DOT "observed collection" standards for their non-regulated workers.

As far as I am aware, no state law or regulation limits an employer with respect to what amphetamine metabolites it tests for; each state that specifies what classes of drugs may be tested for includes "amphetamines" as a general category. Some states, however, have set cutoff levels that may not match the DOT's new rules. For ex-

§ 40.87 What are the cutoff concentrations for drug tests?

Initial test analyte	Initial test cutoff concentration	Confirmatory test analyte	Confirmatory test cutoff concentration
Marijuana metabolites	50 ng/mL	THCA ¹	15 ng/mL.
Cocaine metabolites	150 ng/mL	Benzoylcegonine	100 ng/mL.
Opiate metabolites		Codeine	2000 ng/mL.
Codeine/Morphine ²	2000 ng/mL	Morphine	2000 ng/mL.
6-Acetylmorphine	10 ng/mL	6-Acetylmorphine	10 ng/mL.
Phencyclidine	25 ng/mL	Phencyclidine	25 ng/mL.
Amphetamines ³		Amphetamine	250 ng/mL.
AMP/MAMP ⁴	500 ng/mL	Methamphetamine ⁵	250 ng/mL.
MDMA ⁶	500 ng/mL	MDMA	250 ng/mL.
		MDA ⁷	250 ng/mL.
		MDEA ⁸	250 ng/mL.

DOT 49 CFR, Part 40.87.

¹ Delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA).

² Morphine is the target analyte for codeine/morphine testing.

³ Either a single initial test kit or multiple initial test kits may be used provided the single test kit detects each target analyte independently at the specified cutoff.

⁴ Methamphetamine is the target analyte for amphetamine/methamphetamine testing.

⁵ To be reported positive for methamphetamine, a specimen must also contain amphetamine at a concentration equal to or greater than 100 ng/mL.

⁶ Methylenedioxymethamphetamine (MDMA).

⁷ Methylenedioxyamphetamine (MDA).

⁸ Methylenedioxyethylamphetamine (MDEA).

If your organization has regulated workers subject to testing, and has previously treated non-regulated workers alike, these changes should be relatively easy to implement...

ample, Hawaii law has pegged the cutoff levels for initial and confirmatory testing for cocaine metabolites at the level of the pre-October 2010 DOT cut-offs. Maine and Oklahoma have similar regulations setting cutoff levels for testing, and there may be others. If you wish to adopt the DOT cutoffs for testing for your non-regulated workers in a variety of states, you should consult with your testing laboratory or third-party administrator regarding



which states may have requirements that differ from the DOT Part 40 regulations.

Other considerations may involve cost, customer requirements, and collective bargaining agreements with labor unions representing your workers. If you have a collective bargaining agreement that states you will test non-regulated workers according to the DOT procedures, you may be obligated to adopt the new testing rules. If you have a collective bargaining agreement that lists the cutoff levels you will use, however, you most likely cannot unilaterally change your testing processes. Consult your Labor Relations counsel for guidance.

Nancy Delogu is a shareholder in the Washington, D.C. office of Littler Mendelson, P.C., a law firm practicing exclusively in the areas of employment and labor law. She has over twenty years experience in the area of drug-free workplace issues, and is a frequent speaker and writer for the Partnership for a Drug-Free New Jersey. If you have questions or comments, please send them to ndelogu@littler.com