

# XYZ CONSTRUCTION GROUP

## Substance Abuse Testing Policy (Iowa Operations)

Applies to: All Employees

Date: May     , 2009

### I. Statement of Policy:

Employees are a most valued part of XYZ CONSTRUCTION GROUP (the "Employer"). Their health and safety are serious Employer concerns. Drug use and alcohol misuse may pose a serious threat to employee health and safety. It is, therefore, the goal of XYZ to prevent substance use or abuse from having an adverse effect on our employees. XYZ maintains that the work environment is safer and more productive without the presence of illicit or inappropriate drugs or alcohol (herein referred to as "prohibited substances") in the body or on company property. Furthermore, all employees have a right to work in a drug-free environment and to work with individuals free from the effects of prohibited substances. Employees who use or abuse prohibited substances are a danger to themselves, their co-workers, the public and XYZ's assets.

Specifically, it is the policy of XYZ that the use, sale, purchase, transfer, possession or presence in one's system of any prohibited substance (except medications prescribed by a licensed physician), including alcohol, by any employee while on company premises, while engaged in company business, while operating company equipment, or while under the authority of XYZ is strictly prohibited. XYZ will notify and cooperate with law enforcement agencies in the investigation of any Employee suspected of trafficking in illicit or inappropriate drugs. Any Employee arrested for on-the-job possession of or trafficking in illicit or inappropriate drugs will be terminated.

As permitted by law, XYZ will conduct pre-employment testing of all applicants ("Employee-Applicants"). All Employees may be subject to testing where circumstances establish that reasonable suspicion of prohibited substance use exists, following on-the-job accidents or injuries and for safety-sensitive workers, on a random basis. Employees returning to duty following an alcohol positive test must test negative before returning and must submit to follow-up tests as recommended by their treating healthcare professional.

Any Employee who tests positive will be subject to discipline up to and including termination. Any Employee who refuses to comply with a proper request to submit to testing or who fails to cooperate in the test process *will be terminated*. These procedures are designed not only to detect violations of this policy but also to ensure fairness to each Employee. Every effort will be made to maintain the dignity of Employees or Employee-Applicants involved. Disciplinary action will, however, be taken as necessary.

*Neither this policy nor any of its terms are intended to create a contract of employment, or to alter the existing employment or contractual relationship in any way.* Unless otherwise limited, XYZ retains the sole right to change, amend or modify any term or provision of this policy without notice. This policy is effective **May 20, 2009** and supersedes all prior policies and statements relating to prohibited substances.

### II. Applicability:<sup>1</sup>

This policy applies to all employees except those tested pursuant to federal mandate. Those

*Policy  
Statement*

*At-will  
Start Date*

*Who's  
covered by  
this policy?*

<sup>1</sup> Any space in yellow indicates the need to identify the person/office in charge.

employees in a Union retain their rights in the current collective bargaining agreement.

**III. Definitions:**

When interpreting or implementing these procedures unless otherwise specified in this policy the definitions under state law section 730.5 shall apply. Those definitions can be found in APPENDIX "A".

*APPENDIX*

**ALL MATERIAL IN THE ATTACHED APPENDIXES  
ARE INCORPORATED IN AND MADE A PART OF  
THIS POLICY**

**IV. Notice to Applicants and Employees:**

Every Applicant and current employee will be provided a copy of this policy and a copy of this policy will be available in the office of [redacted] for review or copying during regular business hours. Every Applicant and current employee will be required to sign an acknowledgment indicating a copy of this policy was provided to him/her.

*Notice  
of  
Policy*

For anyone under the age of 18 years their parent or guardian will also be provided a copy of this policy BEFORE the individual begins work. The copy of the policy will be sent by registered mail, return receipt requested.

*Minor  
Workers*

**V. Prohibited Substances/Prescription Medications:**

*What's  
Prohibited*

1. Prohibited Drugs: In accordance with this policy and unless limited by applicable state law testing will be conducted for the presence of the following substances or their metabolites:

*drugs*

**ALCOHOL                      AMPHETAMINES  
COCAINE                      MARIJUANA  
OPIATE METABOLITES  
PHENCYCLIDINE (PCP)**

Detection levels requiring a determination of a positive result shall, where applicable, be in accordance with the guidelines adopted by the federal DOT (49 CFR part 40) in accordance with the recommendations established by the Substance Abuse and Mental Health Services Administration (DHHS; formerly "NIDA") or as the laboratory may determine. All other substances shall be tested in accordance with appropriate scientific standards.

Alcohol: Those Employees suspected of consuming alcohol at any time prohibited under this policy, while on Employer premises or while operating Employer equipment, will be required to submit to alcohol testing conducted in accordance with the rules adopted (or amended) by this policy.

*alcohol*

A positive alcohol test is any result reported at, or above **0.04**. Anyone found positive for alcohol will not be allowed to perform any assigned task and will be subject to discipline, up to and including termination.

2. Prescription Medications: Employees in safety-sensitive positions taking medications which are legally prescribed by a licensed physician familiar with the Employee's work-related responsibilities must report such use to [redacted] and may be required to present written evidence from the physician which describes the effects such medications may have on the Employee's ability to perform his/her tasks.

*Prescriptions*

\_\_\_\_\_ will, when possible, confer with the medical review officer, and in the sole discretion of \_\_\_\_\_ in consultation with the medical review officer, should the effect of these medications adversely affect an employee in a safety-sensitive position, that Employee may be temporarily removed or reassigned from the safety-sensitive position if deemed appropriate.

**Possession of a prohibited substance:** Anyone found in possession of a prohibited substance or suspected prohibited substance will be subject to discipline up to and including termination. A drug or alcohol test may or may not be conducted depending on the circumstances.

*Possession*

*When tested*

## VI. Pre-employment and Current Employee Testing:

### 1. Pre-Employment/Pre-Access:

All Applicants who have been offered employment will be required to submit to and pass a test for the presence of a controlled substance (not alcohol) as a condition of employment. All applicants shall be provided both written and verbal notice of the test requirement and a copy of any positive test results. All test results shall be maintained confidentially.

*Preemployment*

Offers of employment are made contingent upon passing XYZ's medical review, including the drug tests. Employee-Applicants who have received firm employment offers are to be cautioned against giving notice at their current place of employment or incurring any costs related to accepting employment with XYZ until after medical clearance has been received.

Employee-Applicants will be specifically notified in writing of the test results including the name and address of the medical review officer. Applicants will be provided copies of any/all records related to the test provided a request for those records are made within 15 days of the written notice of the test result.

### 2. Current Employees:

As required by state law, costs associated with required tests and/or the time required for performing a test shall be borne by XYZ. Cost associated with non-required tests (e.g. independent confirmation - split sample test) shall be the responsibility of the employee.

#### a. For Cause/Suspicion-Based Testing:

Any employee may be tested for drugs and/or alcohol when there is reasonable suspicion to believe that employee may have used a prohibited substance defined as follows:

*Reasonable Suspicion (For Cause)*

"Reasonable suspicion drug or alcohol testing" means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of XYZ's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to, any of the following:

- (1) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or of the physical symptoms or manifestations of being impaired due to alcohol or other drug use.
- (2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
- (3) A report of alcohol or other drug use provided by a reliable and credible source.
- (4) Evidence that an individual has tampered with any drug or alcohol test during the individual's

employment with the current employer.

(5) Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88 , or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

(6) Evidence that an employee has manufactured, sold, distributed, solicited, possessed, used, or transferred drugs while working or while on XYZ's premises or while operating XYZ's vehicle, machinery, or equipment.

A Supervisor must take action if he/she recognizes current, articulable facts that indicate there is more than a hunch to believe that this policy has been violated. A Supervisor observing such facts will take the following actions immediately:

- (1) Secure the **Safety Director's** concurrence to his/her observations; and
- (2) After discussing the circumstances with the Supervisor, and if the **Safety Director** believes that the conduct or performance problem could be due to prohibited substance use, the Employee will immediately be required to submit to testing. If the Employee refuses to submit to testing for any reason, he/she will be informed that continued refusal will result in immediate termination.
- (3) The Supervisor must confidentially notify the **Safety Director** of the date, time, employee name and social security number for all drug tests.

The Supervisor will, within 24 hours, document the particular facts related to the behavior or performance problems, and present such documentation to the **Safety Director**.

If the observed conduct could endanger the Employee, co-workers or others and, where otherwise appropriate, the **Safety Director** will remove or cause the removal of the Employee from the workplace and ensure that the Employee is transported to an appropriate collection site and thereafter to the Employee's residence or, where appropriate, to a place of lodging. Under no circumstances, when the capacity of the Employee's ability to perform is in question, will that Employee be allowed to continue to work until otherwise safe to do so.

All Supervisors will receive training to assist them in identifying behavioral characteristics of the use of prohibited substances.

A reasonable suspicion test must be based on facts made during, just preceding, or just after the period of the workday when the employee is to be in compliance with this policy.

An employee may be tested based on reasonable suspicion **only** just before, during or just after the performance of assigned tasks.

All reasonable suspicion tests must be conducted within eight hours of the decision to test. If not completed within that time, a record of the delay will be maintained; Once the determination that reasonable suspicion exists, under no circumstances will an employee be allowed back to work until s/he has a negative drug and/or alcohol test.

**b. Post-Accident Testing:**

The Company will conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88 , or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one

*Post-Accident*

thousand dollars (\$1,000).

Post-accident/injury drug testing will occur not later than 32 hours after the occurrence of an incident meeting the above criteria. Alcohol testing must occur as soon after the incident as is practical, but no later than eight (8) hours after the accident/injury has occurred. Employees are prohibited from using alcohol for at least eight hours after the accident/injury or until tested.

Any Employee suspected of unnecessarily delaying the test process, attempting to adulterate or substitute a sample or refusing to fully cooperate in the test process will be considered to have refused to submit to testing.

**c. Unannounced (Random) drug or alcohol testing:**

XYZ will conduct on a periodic basis, without advance notice of the test to employees, other than employees whose duties include responsibility for administration of XYZ's drug or alcohol testing program, subject to testing prior to the day of testing, and without individualized suspicion. The selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from XYZ and shall be made by a computer-based random number generator that is matched with employees' social security numbers, payroll identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number.

The entire employee population except for employees who are not scheduled to be at work at the time the testing is conducted because of the status of the employees or who have been excused from work pursuant to XYZ's work policy prior to the time the testing is announced to employees shall be subject to testing.

**d. Return to duty/Follow-Up Testing:**

XYZ may conduct drug or alcohol testing of employees during, and after completion of, drug or alcohol rehabilitation as recommended by the treating healthcare professional.

**VI. Collection of Samples/Lab Analysis**

**1. Specimen Collection:** Specimen collection will be conducted in accordance with applicable state or federal law. The collection procedures will be designed to ensure the security and integrity of the specimen provided by each Employee, and those procedures will strictly follow federal chain-of-custody guidelines. Moreover, every reasonable effort will be made to maintain the dignity of each Employee submitting a specimen for analysis in accordance with these procedures.

**2. Specimen Analysis:** Test methods permitted by state law shall be utilized. For confirmation purposes of any test screened "non-negative", only a laboratory certified by the Substance Abuse and Mental Health Service Administration (SAMHSA) will be retained by XYZ. The laboratory will be required to maintain strict compliance with federally approved chain-of-custody procedures, quality control, maintenance and scientific analytical methodologies.

**VII. Alcohol Testing Procedures**

All alcohol tests will be conducted in strict compliance with the rules adopted by federal or state

*Random*

*Return  
to  
Duty*

*Follow-Up*

*Collection*

*Lab*

*Alcohol  
Testing*

guidelines. Copies of the procedures are attached as **APPENDIX “B”** and incorporated herein.

### VIII. Employee Assistance

Any employee in need of assistance in dealing with a drug or alcohol issue is encouraged to contact [REDACTED]. Local available professional resources will be made available to anyone in need. All inquiries will be treated as confidential and no disciplinary action will be taken for seeking assistance. Anyone seeking assistance is nonetheless expected to comply with all work rules including this policy.

*EAP*

### IX. Discipline/Appeal of Test Results

1. Except for certain alcohol positives as set forth below, any violation of this policy shall result in immediate termination. Discipline under this policy shall be based **ONLY** upon confirmed test results or a refusal to test.

*Discipline*

**Refusal:** Any refusal to submit to testing, failure to cooperate with the test process or any attempt to adulterate a sample may result in termination of employment and may affect eligibility for compensation and benefits under the state’s workers compensation laws.

2. Alcohol Positives: Provided there are no previous violations of this policy and provided the employee agrees to abide by recommended treatment and successfully completes such treatment, anyone who has been employed for at least 12 of the previous 18 months before testing positive in excess of **0.04**-alcohol shall be offered an opportunity at treatment and will not be disciplined.

Any refusal to participate in or complete the recommended treatment, or any further violation of this policy will result in immediate termination.

### X. Review and notice of Rights:

XYZ’s Medical Review Officer will contact any Employee testing positive for the presence of a prohibited substance. The Employee will be allowed to present medical documentation to explain any permissible use of a drug. All such discussions between the Employee and the MRO will be confidential. XYZ will not be a party to or have access to matters discussed between the Employee and the MRO. Until the employee contacts the MRO or a reasonable time has lapsed after the employee was asked to contact the MRO XYZ will not be advised of the test result.

*Medical Review*

*Employee Rights*

If legitimate, medically supportable reasons exist to explain the positive result, the MRO will report the test result to XYZ as a negative. If there is no legitimate medically supportable reason for the positive test result, the MRO will report the test result as positive. XYZ will then notify the Employee of the positive result of a periodic, random, post-accident or suspicion-based test and the substances detected.

If, during the course of an interview with an employee who has tested positive, the MRO learns of a medical condition, which could, in the MRO's reasonable medical judgment, pose a risk to safety, the MRO may report that information to the Department of Transportation or to XYZ.

If the result is reported to XYZ as positive by the MRO XYZ will notify the employee in writing, sent certified mail, return receipt requested of the following:

*Notice of Positive*

1. The result of the test;
2. The employee’s right to have the split sample analyzed;
3. The employee’s right to choose the laboratory to analyze the split sample;

4. The employee' right to take up to 7 days after the date of written notice to decide whether to have the split analyzed;
5. The right to pay no more than the equivalent cost for the split sample that XYZ paid for the original confirmed test;
6. The right to be reimbursed by XYZ if the split sample is not confirmed.

**(If minors are employed, notice of a positive will also be sent via certified mail,  
return receipt requested to parent of guardian)**

The employee may request that the split sample be analyzed either in writing or orally. If the split specimen is reported as "not found" (meaning the drug detected by the initial lab is not detected) then both tests are canceled and the employee will be reimbursed any costs paid for the split sample analysis. Depending on the purpose for the initial test, (i.e. pre-access), the Employee may be required to submit to testing as soon as possible but before continuing to perform a safety sensitive function for the Company or a Company customer.

*No medical review of an alcohol positive or split specimen procedure will occur.*

***NO MEDICAL EXPLANATION FOR ALCOHOL  
IN YOUR SYSTEM WILL BE ACCEPTED***

#### **XI. Employee Education:**

XYZ will establish an awareness program to inform all employees of the dangers of drug and alcohol use in the workplace and to advise each employee of our employee assistance referral information.

*Employee  
Awareness*

#### **XII. Supervisory Training:**

XYZ will require supervisory personnel of XYZ involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training. The training shall include, but is not limited to, information concerning the recognition of evidence of employee alcohol and other drug abuse, the documentation and corroboration of employee alcohol and other drug abuse, and the referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by XYZ

*Supervisory  
Training*

#### **XIII. Confidentiality**

All communications received by an employer relevant to employee or prospective employee drug or alcohol test results, or otherwise received through XYZ's drug or alcohol testing program, are confidential communications and shall not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding, except as otherwise provided or authorized by this section.

*Confidentiality*

# Appendixes

**ALL MATERIAL IN THE APPENDIXES  
ARE INCORPORATED IN AND MADE A PART OF  
THE POLICY**

SAMPLE

# Appendix A

## DEFINITIONS PER Iowa Code Sec. 730.5(1)

1. *Definitions.* As used in this section, unless the context otherwise requires:

a. "*Alcohol*" means ethanol, isopropanol, or methanol.

b. "*Confirmed positive test result*" means, except for alcohol testing conducted pursuant to subsection 7, paragraph "f", subparagraph (2), the results of a blood, urine, or oral fluid test in which the level of controlled substances or metabolites in the specimen analyzed meets or exceeds nationally accepted standards for determining detectable levels of controlled substances as adopted by the federal substance abuse and health services administration. If nationally accepted standards for oral fluid tests have not been adopted by the federal substance abuse and health services administration, the standards for determining detectable levels of controlled substances for purposes of determining a confirmed positive test result shall be the same standard that has been established by the federal food and drug administration for the measuring instrument used to perform the oral fluid test.

c. "*Drug*" means a substance considered a controlled substance and included in schedule I, II, III, IV, or V under the federal Controlled Substances Act, 21 U.S.C. § 801 et seq.

d. "*Employee*" means a person in the service of an employer in this state and includes XYZ, and any chief executive officer, president, vice president, supervisor, manager, and officer of XYZ who is actively involved in the day-to-day operations of the business.

e. "*Employer*" means a person, firm, company, corporation, labor organization, or employment agency, which has one or more full-time employees employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, in this state. "*Employer*" does not include the state, a political subdivision of the state, including a city, county, or school district, the United States, the United States postal service, or a Native American tribe.

f. "*Good faith*" means reasonable reliance on facts, or that which is held out to be factual, without the intent to be deceived, and without reckless, malicious, or negligent disregard for the truth.

g. "*Medical review officer*" means a licensed physician, osteopathic physician, chiropractor, nurse practitioner, or physician assistant authorized to practice in any state of the United States, who is responsible for receiving laboratory results generated by an employer's drug or alcohol testing program, and who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with the individual's medical history and any other relevant biomedical information.

h. "*Prospective employee*" means a person who has made application, whether written or oral, to an employer to become an employee.

i. "*Reasonable suspicion drug or alcohol testing*" means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of XYZ's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to, any of the following:

(1) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or of the physical symptoms or manifestations of being impaired due to alcohol or other drug use.

(2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

(3) A report of alcohol or other drug use provided by a reliable and credible source.

(4) Evidence that an individual has tampered with any drug or alcohol test during the individual's employment with the current employer.

(5) Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88 , or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

(6) Evidence that an employee has manufactured, sold, distributed, solicited, possessed, used, or transferred drugs while working or while on XYZ's premises or while operating XYZ's vehicle, machinery, or equipment.

*j. "Safety-sensitive position"* means a job wherein an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage, including a job with duties that include immediate supervision of a person in a job that meets the requirement of this paragraph.

*k. "Sample"* means such sample from the human body capable of revealing the presence of alcohol or other drugs, or their metabolites, which shall include only urine, saliva, breath, and blood. However, "*sample*" does not mean blood except as authorized pursuant to subsection 7, paragraph "*l*".

*l. "Unannounced drug or alcohol testing"* means testing for the purposes of detecting drugs or alcohol which is conducted on a periodic basis, without advance notice of the test to employees, other than employees whose duties include responsibility for administration of XYZ's drug or alcohol testing program, subject to testing prior to the day of testing, and without individualized suspicion. The selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from XYZ and shall be made by a computer-based random number generator that is matched with employees' social security numbers, payroll identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number.

# APPENDIX "B"

## Alcohol Testing Procedures United States Department of Transportation 49 CFR Part 40

### Subpart J - Alcohol Testing Personnel

- § 40.211 Who conducts DOT alcohol tests?
- § 40.213 What training requirements must STTs and BATs meet?
- § 40.215 What information about the DER do employers have to provide to BATs and STTs?
- § 40.217 Where is other information on the role of STTs and BATs found in this regulation?

### Subpart K - Testing Sites, Forms, Equipment and Supplies Used in Alcohol Testing

- § 40.221 Where does an alcohol test take place?
- § 40.223 What steps must be taken to protect the security of alcohol testing sites?
- § 40.225 What form is used for an alcohol test?
- § 40.227 May employers use the ATF for non-DOT tests, or non-DOT forms for DOT tests?
- § 40.229 What devices are used to conduct alcohol screening tests?
- § 40.231 What devices are used to conduct alcohol confirmation tests?
- § 40.233 What are the requirements for proper use and care of EBTs?
- § 40.235 What are the requirements for proper use and care of ASDs?

### Subpart L - Alcohol Screening Tests

- § 40.241 What are the first steps in any alcohol screening test?
- § 40.243 What is the procedure for an alcohol screening test using an EBT or non-evidential breath ASD?
- § 40.245 What is the procedure for an alcohol screening test using a saliva ASD or a breath tube ASD?
- § 40.247 What procedures does the BAT or STT follow after a screening test result?

### Subpart M - Alcohol Confirmation Tests

- § 40.251 What are the first steps in an alcohol confirmation test?
- § 40.253 What are the procedures for conducting an alcohol confirmation test?
- § 40.255 What happens next after the alcohol confirmation test result?

### Subpart N - Problems in Alcohol Testing

- § 40.261 What is a refusal to take an alcohol test, and what are the consequences?
- § 40.263 What happens when an employee is unable to provide a sufficient amount of saliva for an alcohol screening test?
- § 40.265 What happens when an employee is unable to provide a sufficient amount of breath for an alcohol test?
- § 40.267 What problems always cause an alcohol test to be cancelled?
- § 40.269 What problems cause an alcohol test to be cancelled unless they are corrected?

- § 40.271 How are alcohol testing problems corrected?
- § 40.273 What is the effect of a cancelled alcohol test?
- § 40.275 What is the effect of procedural problems that are not sufficient to cancel an alcohol test?
- § 40.277 Are alcohol tests other than saliva or breath permitted under these regulations?

## Subpart J - Alcohol Testing Personnel

### § 40.211 Who conducts DOT alcohol tests?

- (a) Screening test technicians (STTs) and breath alcohol technicians (BATs) meeting their respective requirements of this subpart are the only people authorized to conduct DOT alcohol tests.
- (b) An STT can conduct only alcohol screening tests, but a BAT can conduct alcohol screening and confirmation tests.
- (c) As a BAT- or STT-qualified immediate supervisor of a particular employee, you may not act as the STT or BAT when that employee is tested, unless no other STT or BAT is available and DOT agency regulations do not prohibit you from doing so.

### § 40.213 What training requirements must STTs and BATs meet?

To be permitted to act as a BAT or STT in the DOT alcohol testing program, you must meet each of the requirements of this section:

(a) **Basic information.** You must be knowledgeable about the alcohol testing procedures in this part and the current DOT guidance. These documents and information are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue, SE, Washington DC, 20590, 202-366-3784, or on the ODAPC web site (<http://www.dot.gov/ost/dapc>)).

(b) **Qualification training.** You must receive qualification training meeting the requirements of this paragraph (b).

(1) Qualification training must be in accordance with the DOT Model BAT or STT Course, as applicable. The DOT Model Courses are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue, SE, Washington DC, 20590, 202-366-3784, or on the ODAPC web site (<http://www.dot.gov/ost/dapc>)). The training can also be provided using a course of instruction equivalent to the DOT Model Courses. On request, ODAPC will review BAT and STT instruction courses for equivalency.

(2) Qualification training must include training to proficiency in using the alcohol testing procedures of this part and in the operation of the particular alcohol testing device(s) (i.e., the ASD(s) or EBT(s)) you will be using.

(3) The training must emphasize that you are responsible for maintaining the integrity of the testing process, ensuring the privacy of employees being tested, and avoiding conduct or statements that could be viewed as offensive or inappropriate.

(4) The instructor must be an individual who has demonstrated necessary knowledge, skills, and abilities by regularly conducting DOT alcohol tests as an STT or BAT, as applicable, for a period of at least a year, who has conducted STT or BAT training, as applicable, under this part for a year, or who has successfully completed a "train the trainer" course.

(c) **Initial Proficiency Demonstration.** Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in alcohol testing under this part by completing seven consecutive error-free mock tests (BATs) or five consecutive error-free tests (STTs).

(1) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between the instructor and trainee, and attest in writing that the mock collections are “error-free.” This person must be an individual who meets the requirements of paragraph (b)(4) of this section.

(2) These tests must use the alcohol testing devices (e.g., EBT(s) or ASD(s)) that you will use as a BAT or STT.

(3) If you are an STT who will be using an ASD that indicates readings by changes, contrasts, or other readings in color, you must demonstrate as part of the mock test that you are able to discern changes, contrasts, or readings correctly.

(d) Schedule for qualification training and initial proficiency demonstration. The following is the schedule for qualification training and the initial proficiency demonstration you must meet:

(1) If you became a BAT or STT before August 1, 2001, you were required to have met the requirements set forth in paragraphs (b) and (c) of this section, and you do not have to meet them again.

(2) If you become a BAT or STT on or after August 1, 2001, you must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform BAT or STT functions.

(e) Refresher training. No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c) of this section. If you are a BAT or STT who completed qualification training before January 1, 1998, you are not required to complete refresher training until January 1, 2003.

(f) Error Correction Training. If you make a mistake in the alcohol testing process that causes a test to be cancelled (i.e., a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining.

(1) Error correction training must be provided and your proficiency documented in writing by a person who meets the requirements of paragraph (b)(4) of this section.

(2) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(3) As part of the error correction training, you must demonstrate your proficiency in the alcohol testing procedures of this part by completing three consecutive error-free mock tests. The mock tests must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in writing that the mock tests were error-free.

(g) Documentation. You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are negotiating to use your services.

(h) Other persons who may serve as BATs or STTs. (1) Anyone meeting the requirements of this section to be a BAT may act as an STT, provided that the individual has demonstrated initial proficiency in the operation of the ASD that he or she is using, as provided in paragraph (c) of this section.

(2) Law enforcement officers who have been certified by state or local governments to conduct breath alcohol testing are deemed to be qualified as BATs. They are not required to also complete the training requirements of this section in order to act as BATs. In order for a test conducted by such an officer to be accepted under DOT alcohol testing requirements, the officer must have been certified by a state or local government to use the EBT or ASD that was used for the test.

**§ 40.215 What information about the DER do employers have to provide to BATs and STTs?**

As an employer, you must provide to the STTs and BATs the name and telephone number of the appropriate DER (and C/TPA, where applicable) to contact about any problems or issues that may arise during the testing process.

**§ 40.217 Where is other information on the role of STTs and BATs found in this regulation?**

You can find other information on the role and functions of STTs and BATs in the following sections of this part:

§40.3—Definitions.

§40.223—Responsibility for supervising employees being tested.

§§40.225–40.227—Use of the alcohol testing form.

§§40.241–40.245—Screening test procedures with ASDs and EBTs.

§§40.251–40.255—Confirmation test procedures.

§40.261—Refusals to test.

§§40.263–40.265—Insufficient saliva or breath.

§40.267—Problems requiring cancellation of tests.

§§40.269–40.271—Correcting problems in tests.

**Subpart K - Testing Sites, Forms, Equipment and Supplies Used in Alcohol Testing**

**§ 40.221 Where does an alcohol test take place?**

- (a) A DOT alcohol test must take place at an alcohol testing site meeting the requirements of this section.
- (b) If you are operating an alcohol testing site, you must ensure that it meets the security requirements of §40.223.
- (c) If you are operating an alcohol testing site, you must ensure that it provides visual and aural privacy to the employee being tested, sufficient to prevent unauthorized persons from seeing or hearing test results.
- (d) If you are operating an alcohol testing site, you must ensure that it has all needed personnel, materials, equipment, and facilities to provide for the collection and analysis of breath and/or saliva samples, and a suitable clean surface for writing.
- (e) If an alcohol testing site fully meeting all the visual and aural privacy requirements of paragraph (c) is not readily available, this part allows a reasonable suspicion or post-accident test to be conducted at a site that partially meets these requirements. In this case, the site must afford visual and aural privacy to the employee to the greatest extent practicable.

(f) An alcohol testing site can be in a medical facility, a mobile facility (e.g., a van), a dedicated collection facility, or any other location meeting the requirements of this section.

#### **§ 40.223 What steps must be taken to protect the security of alcohol testing sites?**

(a) If you are a BAT, STT, or other person operating an alcohol testing site, you must prevent unauthorized personnel from entering the testing site.

(1) The only people you are to treat as authorized persons are employees being tested, BATs, STTs, and other alcohol testing site workers, DERs, employee representatives authorized by XYZ (e.g., on the basis of employer policy or labor-management agreement), and DOT agency representatives.

(2) You must ensure that all persons are under the supervision of a BAT or STT at all times when permitted into the site.

(3) You may remove any person who obstructs, interferes with, or causes unnecessary delay in the testing process.

(b) As the BAT or STT, you must not allow any person other than you, the employee, or a DOT agency representative to actually witness the testing process (see §§40.241–40.255).

(c) If you are operating an alcohol testing site, you must ensure that when an EBT or ASD is not being used for testing, you store it in a secure place.

(d) If you are operating an alcohol testing site, you must ensure that no one other than BATs or other employees of the site have access to the site when an EBT is unsecured.

(e) As a BAT or STT, to avoid distraction that could compromise security, you are limited to conducting an alcohol test for only one employee at a time.

(1) When an EBT screening test on an employee indicates an alcohol concentration of 0.02 or higher, and the same EBT will be used for the confirmation test, you are not allowed to use the EBT for a test on another employee before completing the confirmation test on the first employee.

(2) As a BAT who will conduct both the screening and the confirmation test, you are to complete the entire screening and confirmation process on one employee before starting the screening process on another employee.

(3) You are not allowed to leave the alcohol testing site while the testing process for a given employee is in progress, except to notify a supervisor or contact a DER for assistance in the case an employee or other person who obstructs, interferes with, or unnecessarily delays the testing process.

#### **§ 40.225 What form is used for an alcohol test?**

(a) The DOT Alcohol Testing Form (ATF) must be used for every DOT alcohol test beginning February 1, 2002. The ATF must be a three-part carbonless manifold form. The ATF is found in Appendix G to this part. You may view this form on the ODAPC web site (<http://www.dot.gov/ost/dapc>).

(b) As an employer in the DOT alcohol testing program, you are not permitted to modify or revise the ATF except as follows:

(1) You may include other information needed for billing purposes, outside the boundaries of the form.

(2) You may use a ATF directly generated by an EBT which omits the space for affixing a separate printed result to the ATF, provided the EBT prints the result directly on the ATF.

(3) You may use an ATF that has XYZ's name, address, and telephone number preprinted. In addition, a C/TPA's name, address, and telephone number may be included, to assist with negative results.

(4) You may use an ATF in which all pages are printed on white paper. You may modify the ATF by using colored paper, or have clearly discernable borders or designation statements on Copy 2 and Copy 3. When colors are used, they must be green for Copy 2 and blue for Copy 3.

(5) As a BAT or STT, you may add, on the "Remarks" line of the ATF, the name of the DOT agency under whose authority the test occurred.

(6) As a BAT or STT, you may use a ATF that has your name, address, and telephone number preprinted, but under no circumstances can your signature be preprinted.

(c) As an employer, you may use an equivalent foreign-language version of the ATF approved by ODAPC. You may use such a non-English language form only in a situation where both the employee and BAT/STT understand and can use the form in that language.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

#### **§ 40.227 May employers use the ATF for non-DOT tests, or non-DOT forms for DOT tests?**

(a) No, as an employer, BAT, or STT, you are prohibited from using the ATF for non-DOT alcohol tests. You are also prohibited from using non-DOT forms for DOT alcohol tests. Doing either subjects you to enforcement action under DOT agency regulations.

(b) If the STT or BAT, either by mistake, or as the only means to conduct a test under difficult circumstances (e.g., post-accident test with insufficient time to obtain the ATF), uses a non-DOT form for a DOT test, the use of a non-DOT form does not, in and of itself, require XYZ or service agent to cancel the test. However, in order for the test to be considered valid, a signed statement must be obtained from the STT or BAT in accordance with §40.271(b).

#### **§ 40.229 What devices are used to conduct alcohol screening tests?**

EBTs and ASDs on the NHTSA conforming products lists (CPL) for evidential and non-evidential devices are the only devices you are allowed to use to conduct alcohol screening tests under this part. You may use an ASD that is on the NHTSA CPL for DOT alcohol tests only if there are instructions for its use in this part. An ASD can be used only for screening tests for alcohol, and may not be used for confirmation tests.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

#### **§ 40.231 What devices are used to conduct alcohol confirmation tests?**

(a) EBTs on the NHTSA CPL for evidential devices that meet the requirements of paragraph (b) of this section are the only devices you may use to conduct alcohol confirmation tests under this part. Note that, among devices on the CPL for EBTs, only those devices listed without an asterisk (\*) are authorized for use in confirmation testing in the DOT alcohol testing program.

(b) To conduct a confirmation test, you must use an EBT that has the following capabilities:

(1) Provides a printed triplicate result (or three consecutive identical copies of a result) of each breath test;

(2) Assigns a unique number to each completed test, which the BAT and employee can read before each test and which is printed on each copy of the result;

- (3) Prints, on each copy of the result, the manufacturer's name for the device, its serial number, and the time of the test;
- (4) Distinguishes alcohol from acetone at the 0.02 alcohol concentration level;
- (5) Tests an air blank; and
- (6) Performs an external calibration check.

#### **§ 40.233 What are the requirements for proper use and care of EBTs?**

(a) As an EBT manufacturer, you must submit, for NHTSA approval, a quality assurance plan (QAP) for your EBT before NHTSA places the EBT on the CPL.

(1) Your QAP must specify the methods used to perform external calibration checks on the EBT, the tolerances within which the EBT is regarded as being in proper calibration, and the intervals at which these checks must be performed. In designating these intervals, your QAP must take into account factors like frequency of use, environmental conditions (e.g., temperature, humidity, altitude) and type of operation (e.g., stationary or mobile).

(2) Your QAP must also specify the inspection, maintenance, and calibration requirements and intervals for the EBT.

(b) As the manufacturer, you must include, with each EBT, instructions for its use and care consistent with the QAP.

(c) As the user of the EBT (e.g., employer, service agent), you must do the following:

(1) You must follow the manufacturer's instructions (see paragraph (b) of this section), including performance of external calibration checks at the intervals the instructions specify.

(2) In conducting external calibration checks, you must use only calibration devices appearing on NHTSA's CPL for "Calibrating Units for Breath Alcohol Tests."

(3) If an EBT fails an external check of calibration, you must take the EBT out of service. You may not use the EBT again for DOT alcohol testing until it is repaired and passes an external calibration check.

(4) You must maintain records of the inspection, maintenance, and calibration of EBTs as provided in §40.333(a)(2).

(5) You must ensure that inspection, maintenance, and calibration of the EBT are performed by its manufacturer or a maintenance representative certified either by the manufacturer or by a state health agency or other appropriate state agency.

#### **§ 40.235 What are the requirements for proper use and care of ASDs?**

(a) As an ASD manufacturer, you must submit, for NHTSA approval, a QAP for your ASD before NHTSA places the ASD on the CPL. Your QAP must specify the methods used for quality control checks, temperatures at which the ASD must be stored and used, the shelf life of the device, and environmental conditions (e.g., temperature, altitude, humidity) that may affect the ASD's performance.

(b) As a manufacturer, you must include with each ASD instructions for its use and care consistent with the QAP. The instructions must include directions on the proper use of the ASD, and, where applicable the time within which the device must be read, and the manner in which the reading is made.

(c) As the user of the ADS (e.g., employer, STT), you must follow the QAP instructions.

(d) You are not permitted to use an ASD that does not pass the specified quality control checks or that has passed its expiration date.

(e) As an employer, with respect to breath ASDs, you must also follow the device use and care requirements of §40.233.

## **Subpart L—Alcohol Screening Tests**

### **§ 40.241 What are the first steps in any alcohol screening test?**

As the BAT or STT you will take the following steps to begin all alcohol screening tests, regardless of the type of testing device you are using:

(a) When a specific time for an employee's test has been scheduled, or the collection site is at the employee's worksite, and the employee does not appear at the collection site at the scheduled time, contact the DER to determine the appropriate interval within which the DER has determined the employee is authorized to arrive. If the employee's arrival is delayed beyond that time, you must notify the DER that the employee has not reported for testing. In a situation where a C/TPA has notified an owner/operator or other individual employee to report for testing and the employee does not appear, the C/TPA must notify the employee that he or she has refused to test.

(b) Ensure that, when the employee enters the alcohol testing site, you begin the alcohol testing process without undue delay. For example, you must not wait because the employee says he or she is not ready or because an authorized employer or employee representative is delayed in arriving.

(1) If the employee is also going to take a DOT drug test, you must, to the greatest extent practicable, ensure that the alcohol test is completed before the urine collection process begins.

(2) If the employee needs medical attention (e.g., an injured employee in an emergency medical facility who is required to have a post-accident test), do not delay this treatment to conduct a test.

(c) Require the employee to provide positive identification. You must see a photo ID issued by XYZ (other than in the case of an owner-operator or other self-employer individual) or a Federal, state, or local government (e.g., a driver's license). You may not accept faxes or photocopies of identification. Positive identification by an employer representative (not a co-worker or another employee being tested) is also acceptable. If the employee cannot produce positive identification, you must contact a DER to verify the identity of the employee.

(d) If the employee asks, provide your identification to the employee. Your identification must include your name and your employer's name but is not required to include your picture, address, or telephone number.

(e) Explain the testing procedure to the employee, including showing the employee the instructions on the back of the ATF.

(f) Complete Step 1 of the ATF.

(g) Direct the employee to complete Step 2 on the ATF and sign the certification. If the employee refuses to sign this certification, you must document this refusal on the "Remarks" line of the ATF and immediately notify the DER. This is a refusal to test.

### **§ 40.243 What is the procedure for an alcohol screening test using an EBT or non-evidential breath ASD?**

As the BAT or STT, you must take the following steps:

(a) Select, or allow the employee to select, an individually wrapped or sealed mouthpiece from the testing materials.

(b) Open the individually wrapped or sealed mouthpiece in view of the employee and insert it into the device in accordance with the manufacturer's instructions.

(c) Instruct the employee to blow steadily and forcefully into the mouthpiece for at least six seconds or until the device indicates that an adequate amount of breath has been obtained.

(d) Show the employee the displayed test result.

(e) If the device is one that prints the test number, testing device name and serial number, time, and result directly onto the ATF, you must check to ensure that the information has been printed correctly onto the ATF.

(f) If the device is one that prints the test number, testing device name and serial number, time and result, but on a separate printout rather than directly onto the ATF, you must affix the printout of the information to the designated space on the ATF with tamper-evident tape or use a self-adhesive label that is tamper-evident.

(g) If the device is one that does not print the test number, testing device name and serial number, time, and result, or it is a device not being used with a printer, you must record this information in Step 3 of the ATF.

**§ 40.245 What is the procedure for an alcohol screening test using a saliva ASD or a breath tube ASD?**

(a) As the STT or BAT, you must take the following steps when using the saliva ASD:

(1) Check the expiration date on the device or on the package containing the device and show it to the employee. You may not use the device after its expiration date.

(2) Open an individually wrapped or sealed package containing the device in the presence of the employee.

(3) Offer the employee the opportunity to use the device. If the employee uses it, you must instruct the employee to insert it into his or her mouth and use it in a manner described by the device's manufacturer.

(4) If the employee chooses not to use the device, or in all cases in which a new test is necessary because the device did not activate (see paragraph (a)(7) of this section), you must insert the device into the employee's mouth and gather saliva in the manner described by the device's manufacturer. You must wear single-use examination or similar gloves while doing so and change them following each test.

(5) When the device is removed from the employee's mouth, you must follow the manufacturer's instructions regarding necessary next steps in ensuring that the device has activated.

(6)(i) If you were unable to successfully follow the procedures of paragraphs (a)(3) through (a)(5) of this section (e.g., the device breaks, you drop the device on the floor), you must discard the device and conduct a new test using a new device.

(ii) The new device you use must be one that has been under your control or that of the employee before the test.

(iii) You must note on the "Remarks" line of the ATF the reason for the new test. (Note: You may continue using the same ATF with which you began the test.)

(iv) You must offer the employee the choice of using the device or having you use it unless the employee, in the opinion of the STT or BAT, was responsible (e.g., the employee dropped the device) for the new test needing to be conducted.

(v) If you are unable to successfully follow the procedures of paragraphs (a)(3) through (a)(5) of this section on the new test, you must end the collection and put an explanation on the "Remarks" line of the ATF.

(vi) You must then direct the employee to take a new test immediately, using an EBT for the screening test.

(7) If you are able to successfully follow the procedures of paragraphs (a)(3)—(a)(5) of this section, but the device does not activate, you must discard the device and conduct a new test, in the same manner as provided in paragraph (a)(6) of this section. In this case, you must place the device into the employee's mouth to collect saliva for the new test.

(8) You must read the result displayed on the device no sooner than the device's manufacturer instructs. In all cases the result displayed must be read within 15 minutes of the test. You must then show the device and its reading to the employee and enter the result on the ATF.

(9) You must never re-use devices, swabs, gloves or other materials used in saliva testing.

(10) You must note the fact that you used a saliva ASD in Step 3 of the ATF.

(b) As the STT or BAT, you must take the following steps when using the breath tube ASD:

(1) Check the expiration date on the detector device and the electronic analyzer or on the package containing the device and the analyzer and show it to the employee. You must not use the device or the analyzer after their expiration date. You must not use an analyzer which is not specifically pre-calibrated for the device being used in the collection.

(2) Remove the device from the package and secure an inflation bag onto the appropriate end of the device, as directed by the manufacturer on the device's instructions.

(3) Break the tube's ampoule in the presence of the employee.

(4) Offer the employee the opportunity to use the device. If the employee chooses to use (e.g. hold) the device, instruct the employee to blow forcefully and steadily into the blowing end of device until the inflation bag fills with air (approximately 12 seconds).

(5) If the employee chooses not to hold the device, you must hold it and provide the use instructions in paragraph (b)(4) of this section.

(6) When the employee completes the breath process, take the device from the employee (or if you were holding it, remove it from the employee's mouth), remove the inflation bag, and prepare the device to be read by the analyzer in accordance with the manufacturer's directions.

(7)(i) If you were unable to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section (e.g., the device breaks apart, the employee did not fill the inflation bag), you must discard the device and conduct a new test using a new one.

(ii) The new device you use must be one that has been under your control or that of XYZ before the test.

(iii) You must note on the "Remarks" line of the ATF the reason for the new test. (Note: You may continue using the same ATF with which you began the test.)

(iv) You must offer the employee the choice of holding the device or having you hold it unless the employee, in your opinion, was responsible (e.g., the employee failed to fill the inflation bag) for the new test needing to be conducted.

(v) If you are unable to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section on the new test, you must end the collection and put an explanation on the "Remarks" line of the ATF.

(vi) You must then direct the employee to take a new test immediately, using another type of ASD (e.g., saliva device) or an EBT.

(8) If you were able to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section and after having waited the required amount of time directed by the manufacturer for the detector device to incubate, you must place the device in the analyzer in accordance with the manufacturer's directions. The result must be read from the analyzer no earlier than the required incubation time of the device. In all cases, the result must be read within 15 minutes of the test.

(9) You must follow the manufacturer's instructions for determining the result of the test. You must show the analyzer result to the employee and record the result on Step 3 of the ATF.

(10) You must never re-use detector devices or any gloves used in breath tube testing. The inflation bag must be voided of air following removal from a device. Inflation bags and electronic analyzers may be re-used but only in accordance with the manufacturer's directions.

(11) You must note the fact that you used a breath tube device in Step 3 of the ATF.

[67 FR 61522, Oct. 1, 2002, as amended at 72 FR 1299, Jan. 11, 2007]

#### **§ 40.247 What procedures does the BAT or STT follow after a screening test result?**

(a) If the test result is an alcohol concentration of less than 0.02, as the BAT or STT, you must do the following:

(1) Sign and date Step 3 of the ATF; and

(2) Transmit the result to the DER in a confidential manner, as provided in §40.255 .

(b) If the test result is an alcohol concentration of 0.02 or higher, as the BAT or STT, you must direct the employee to take a confirmation test.

(1) If you are the BAT who will conduct the confirmation test, you must then conduct the test using the procedures beginning at §40.251 .

(2) If you are not the BAT who will conduct the confirmation test, direct the employee to take a confirmation test, sign and date Step 3 of the ATF, and give the employee Copy 2 of the ATF.

(3) If the confirmation test will be performed at a different site from the screening test, you must take the following additional steps:

(i) Advise the employee not to eat, drink, put anything (e.g., cigarette, chewing gum) into his or her mouth, or belch;

(ii) Tell the employee the reason for the waiting period required by §40.251(a) (i.e., to prevent an accumulation of mouth alcohol from leading to an artificially high reading);

- (iii) Explain that following your instructions concerning the waiting period is to the employee's benefit;
  - (iv) Explain that the confirmation test will be conducted at the end of the waiting period, even if the instructions have not been followed;
  - (v) Note on the "Remarks" line of the ATF that the waiting period instructions were provided;
  - (vi) Instruct the person accompanying the employee to carry a copy of the ATF to the BAT who will perform the confirmation test; and
  - (vii) Ensure that you or another BAT, STT, or employer representative observe the employee as he or she is transported to the confirmation testing site. You must direct the employee not to attempt to drive a motor vehicle to the confirmation testing site.
- (c) If the screening test is invalid, you must, as the BAT or STT, tell the employee the test is cancelled and note the problem on the "Remarks" line of the ATF. If practicable, repeat the testing process (see §40. 271).

## **Subpart M - Alcohol Confirmation Tests**

### **§ 40.251 What are the first steps in an alcohol confirmation test?**

As the BAT for an alcohol confirmation test, you must follow these steps to begin the confirmation test process:

(a) You must carry out a requirement for a waiting period before the confirmation test, by taking the following steps:

(1) You must ensure that the waiting period lasts at least 15 minutes, starting with the completion of the screening test. After the waiting period has elapsed, you should begin the confirmation test as soon as possible, but not more than 30 minutes after the completion of the screening test.

(i) If the confirmation test is taking place at a different location from the screening test (see §40.247(b)(3)) the time of transit between sites counts toward the waiting period if the STT or BAT who conducted the screening test provided the waiting period instructions.

(ii) If you cannot verify, through review of the ATF, that waiting period instructions were provided, then you must carry out the waiting period requirement.

(iii) You or another BAT or STT, or an employer representative, must observe the employee during the waiting period.

(2) Concerning the waiting period, you must tell the employee:

(i) Not to eat, drink, put anything (e.g., cigarette, chewing gum) into his or her mouth, or belch;

(ii) The reason for the waiting period (i.e., to prevent an accumulation of mouth alcohol from leading to an artificially high reading);

(iii) That following your instructions concerning the waiting period is to the employee's benefit; and

(iv) That the confirmation test will be conducted at the end of the waiting period, even if the instructions have not been followed.

(3) If you become aware that the employee has not followed the instructions, you must note this on the "Remarks" line of the ATF.

(b) If you did not conduct the screening test for the employee, you must require positive identification of the employee, explain the confirmation procedures, and use a new ATF. You must note on the "Remarks" line of the ATF that a different BAT or STT conducted the screening test.

(c) Complete Step 1 of the ATF.

(d) Direct the employee to complete Step 2 on the ATF and sign the certification. If the employee refuses to sign this certification, you must document this refusal on the "Remarks" line of the ATF and immediately notify the DER. This is a refusal to test.

(e) Even if more than 30 minutes have passed since the screening test result was obtained, you must begin the confirmation test procedures in §40.253, not another screening test.

(f) You must note on the "Remarks" line of the ATF the time that elapsed between the two events, and if the confirmation test could not begin within 30 minutes of the screening test, the reason why.

(g) Beginning the confirmation test procedures after the 30 minutes have elapsed does not invalidate the screening or confirmation tests, but it may constitute a regulatory violation subject to DOT agency sanction.

#### **§ 40.253 What are the procedures for conducting an alcohol confirmation test?**

As the BAT conducting an alcohol confirmation test, you must follow these steps in order to complete the confirmation test process:

(a) In the presence of the employee, you must conduct an air blank on the EBT you are using before beginning the confirmation test and show the reading to the employee.

(1) If the reading is 0.00, the test may proceed. If the reading is greater than 0.00, you must conduct another air blank.

(2) If the reading on the second air blank is 0.00, the test may proceed. If the reading is greater than 0.00, you must take the EBT out of service.

(3) If you take an EBT out of service for this reason, no one may use it for testing until the EBT is found to be within tolerance limits on an external check of calibration.

(4) You must proceed with the test of the employee using another EBT, if one is available.

(b) You must open a new individually wrapped or sealed mouthpiece in view of the employee and insert it into the device in accordance with the manufacturer's instructions.

(c) You must ensure that you and the employee read the unique test number displayed on the EBT.

(d) You must instruct the employee to blow steadily and forcefully into the mouthpiece for at least six seconds or until the device indicates that an adequate amount of breath has been obtained.

(e) You must show the employee the result displayed on the EBT.

(f) You must show the employee the result and unique test number that the EBT prints out either directly onto the ATF or onto a separate printout.

(g) If the EBT provides a separate printout of the result, you must attach the printout to the designated space on the ATF with tamper-evident tape, or use a self-adhesive label that is tamper-evident.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

#### **§ 40.255 What happens next after the alcohol confirmation test result?**

(a) After the EBT has printed the result of an alcohol confirmation test, you must, as the BAT, take the following additional steps:

(1) Sign and date Step 3 of the ATF.

(2) If the alcohol confirmation test result is lower than 0.02, nothing further is required of the employee. As the BAT, you must sign and date Step 3 of the ATF.

(3) If the alcohol confirmation test result is 0.02 or higher, direct the employee to sign and date Step 4 of the ATF. If the employee does not do so, you must note this on the "Remarks" line of the ATF. However, this is not considered a refusal to test.

(4) If the test is invalid, tell the employee the test is cancelled and note the problem on the "Remarks" line of the ATF. If practicable, conduct a re-test. (see §40.271).

(5) Immediately transmit the result directly to the DER in a confidential manner.

(i) You may transmit the results using Copy 1 of the ATF, in person, by telephone, or by electronic means. In any case, you must immediately notify the DER of any result of 0.02 or greater by any means (e.g., telephone or secure fax machine) that ensures the result is immediately received by the DER. You must not transmit these results through C/TPAs or other service agents.

(ii) If you do not make the initial transmission in writing, you must follow up the initial transmission with Copy 1 of the ATF.

(b) As an employer, you must take the following steps with respect to the receipt and storage of alcohol test result information:

(1) If you receive any test results that are not in writing (e.g., by telephone or electronic means), you must establish a mechanism to establish the identity of the BAT sending you the results.

(2) You must store all test result information in a way that protects confidentiality.

#### **Subpart N - Problems in Alcohol Testing**

##### **§ 40.261 What is a refusal to take an alcohol test, and what are the consequences?**

(a) As an employee, you are considered to have refused to take an alcohol test if you:

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by XYZ, consistent with applicable DOT agency regulations, after being directed to do so by XYZ. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see §40.241(a));

(2) Fail to remain at the testing site until the testing process is complete; Provided, That an employee who leaves the testing site before the testing process commences (see §40.243(a)) for a pre-employment test is not deemed to have refused to test;

(3) Fail to provide an adequate amount of saliva or breath for any alcohol test required by this part or DOT agency regulations; Provided, That an employee who does not provide an adequate amount of breath or saliva because he or she has left the testing site before the testing process commences (see §40.243(a)) for a pre-employment test is not deemed to have refused to test;

(4) Fail to provide a sufficient breath specimen, and the physician has determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see §40.265(c));

(5) Fail to undergo a medical examination or evaluation, as directed by XYZ as part of the insufficient breath procedures outlined at §40.265(c);

(6) Fail to sign the certification at Step 2 of the ATF (see §§40.241(g) and 40.251(d)); or

(7) Fail to cooperate with any part of the testing process.

(b) As an employee, if you refuse to take an alcohol test, you incur the same consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

(c) As a BAT or an STT, or as the physician evaluating a “shy lung” situation, when an employee refuses to test as provided in paragraph (a) of this section, you must terminate the portion of the testing process in which you are involved, document the refusal on the ATF (or in a separate document which you cause to be attached to the form), immediately notify the DER by any means (e.g., telephone or secure fax machine) that ensures the refusal notification is immediately received. You must make this notification directly to the DER (not using a C/TPA as an intermediary).

(d) As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have not refused to take a DOT test. There are no consequences under DOT agency regulations for such a refusal.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

#### **§ 40.263 What happens when an employee is unable to provide a sufficient amount of saliva for an alcohol screening test?**

(a) As the STT, you must take the following steps if an employee is unable to provide sufficient saliva to complete a test on a saliva screening device (e.g., the employee does not provide sufficient saliva to activate the device).

(1) You must conduct a new screening test using a new screening device.

(2) If the employee refuses to make the attempt to complete the new test, you must discontinue testing, note the fact on the “Remarks” line of the ATF, and immediately notify the DER. This is a refusal to test.

(3) If the employee has not provided a sufficient amount of saliva to complete the new test, you must note the fact on the “Remarks” line of the ATF and immediately notify the DER.

(b) As the DER, when the STT informs you that the employee has not provided a sufficient amount of saliva (see paragraph (a)(3) of this section), you must immediately arrange to administer an alcohol test to the employee using an EBT or other breath testing device.

#### **§ 40.265 What happens when an employee is unable to provide a sufficient amount of breath for an alcohol test?**

(a) If an employee does not provide a sufficient amount of breath to permit a valid breath test, you must take the steps listed in this section.

(b) As the BAT or STT, you must instruct the employee to attempt again to provide a sufficient amount of breath and about the proper way to do so.

(1) If the employee refuses to make the attempt, you must discontinue the test, note the fact on the "Remarks" line of the ATF, and immediately notify the DER. This is a refusal to test.

(2) If the employee again attempts and fails to provide a sufficient amount of breath, you may provide another opportunity to the employee to do so if you believe that there is a strong likelihood that it could result in providing a sufficient amount of breath.

(3) When the employee's attempts under paragraph (b)(2) of this section have failed to produce a sufficient amount of breath, you must note the fact on the "Remarks" line of the ATF and immediately notify the DER.

(4) If you are using an EBT that has the capability of operating manually, you may attempt to conduct the test in manual mode.

(5) If you are qualified to use a saliva ASD and you are in the screening test stage, you may change to a saliva ASD only to complete the screening test.

(c) As XYZ, when the BAT or STT informs you that the employee has not provided a sufficient amount of breath, you must direct the employee to obtain, within five days, an evaluation from a licensed physician who is acceptable to you and who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen.

(1) You are required to provide the physician who will conduct the evaluation with the following information and instructions:

(i) That the employee was required to take a DOT breath alcohol test, but was unable to provide a sufficient amount of breath to complete the test;

(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required alcohol test;

(iii) That the physician must provide you with a signed statement of his or her conclusions; and

(iv) That the physician, in his or her reasonable medical judgment, must base those conclusions on one of the following determinations:

(A) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of breath. The physician must not include in the signed statement detailed information on the employee's medical condition. In this case, the test is cancelled.

(B) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of breath. This constitutes a refusal to test.

(C) For purposes of paragraphs (c)(1)(iv)(A) and (B) of this section, a medical condition includes an ascertainable physiological condition (e.g., a respiratory system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or hyperventilation.

(2) As the physician making the evaluation, after making your determination, you must provide a written statement of your conclusions and the basis for them to the DER directly (and not through a C/TPA acting as an

intermediary). You must not include in this statement detailed information on the employee's medical condition beyond what is necessary to explain your conclusion.

(3) Upon receipt of the report from the examining physician, as the DER you must immediately inform the employee and take appropriate action based upon your DOT agency regulations.

#### **§ 40.267 What problems always cause an alcohol test to be cancelled?**

As an employer, a BAT, or an STT, you must cancel an alcohol test if any of the following problems occur. These are "fatal flaws." You must inform the DER that the test was cancelled and must be treated as if the test never occurred. These problems are:

(a) In the case of a screening test conducted on a saliva ASD or a breath tube ASD:

(1) The STT or BAT reads the result either sooner than or later than the time allotted by the manufacturer and this Part (see §40.245(a)(8) for the saliva ASD and §40.245(b)(8) for the breath tube ASD).

(2) The saliva ASD does not activate (see §40.245(a)(7)); or

(3) The device is used for a test after the expiration date printed on the device or on its package (see §40.245(a)(1) for the saliva ASD and §40.245(b)(1) for the breath tube ASD).

(4) The breath tube ASD is tested with an analyzer which has not been pre-calibrated for that device's specific lot (see §40.245(b)(1)).

(b) In the case of a screening or confirmation test conducted on an EBT, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result (see §40.253(c), (e) and (f)).

(c) In the case of a confirmation test:

(1) The BAT conducts the confirmation test before the end of the minimum 15-minute waiting period (see §40.251(a)(1));

(2) The BAT does not conduct an air blank before the confirmation test (see §40.253(a));

(3) There is not a 0.00 result on the air blank conducted before the confirmation test (see §40.253(a)(1) and (2));

(4) The EBT does not print the result (see §40.253(f)); or

(5) The next external calibration check of the EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this case, every result of 0.02 or above obtained on the EBT since the last valid external calibration check is cancelled (see §40.233(a)(1) and (c)(3)).

[65 FR 79526, Dec. 19, 2000, as amended at 67 FR 61522, Oct. 1, 2002; 71 FR 49384, Aug. 23, 2006; 72 FR 1299, Jan. 11, 2007]

#### **§ 40.269 What problems cause an alcohol test to be cancelled unless they are corrected?**

As a BAT or STT, or employer, you must cancel an alcohol test if any of the following problems occur, unless they are corrected. These are "correctable flaws." These problems are:

(a) The BAT or STT does not sign the ATF (see §§40.247(a)(1) and 40.255(a)(1)).

(b) The BAT or STT fails to note on the “Remarks” line of the ATF that the employee has not signed the ATF after the result is obtained (see §40.255(a)(3)).

(c) The BAT or STT uses a non-DOT form for the test (see §40.225(a)).

[65 FR 79526, Dec. 19, 2000, amended at 71 FR 49384, Aug. 23, 2006]

### **§ 40.271 How are alcohol testing problems corrected?**

(a) As a BAT or STT, you have the responsibility of trying to complete successfully an alcohol test for each employee.

(1) If, during or shortly after the testing process, you become aware of any event that will cause the test to be cancelled (see §40.267 ), you must try to correct the problem promptly, if practicable. You may repeat the testing process as part of this effort.

(2) If repeating the testing process is necessary, you must begin a new test as soon as possible. You must use a new ATF, a new sequential test number, and, if needed, a new ASD and/or a new EBT. It is permissible to use additional technical capabilities of the EBT (e.g., manual operation) if you have been trained to do so in accordance with §40.213(c) .

(3) If repeating the testing process is necessary, you are not limited in the number of attempts to complete the test, provided that the employee is making a good faith effort to comply with the testing process.

(4) If another testing device is not available for the new test at the testing site, you must immediately notify the DER and advise the DER that the test could not be completed. As the DER who receives this information, you must make all reasonable efforts to ensure that the test is conducted at another testing site as soon as possible.

(b) If, as an STT, BAT, employer or other service agent administering the testing process, you become aware of a “correctable flaw” (see §40.269 ) that has not already been corrected, you must take all practicable action to correct the problem so that the test is not cancelled.

(1) If the problem resulted from the omission of required information, you must, as the person responsible for providing that information, supply in writing the missing information and a signed statement that it is true and accurate. For example, suppose you are a BAT and you forgot to make a notation on the “Remarks” line of the ATF that the employee did not sign the certification. You would, when the problem is called to your attention, supply a signed statement that the employee failed or refused to sign the certification after the result was obtained, and that your signed statement is true and accurate.

(2) If the problem is the use of a non-DOT form, you must, as the person responsible for the use of the incorrect form, certify in writing that the incorrect form contains all the information needed for a valid DOT alcohol test. You must also provide a signed statement that the incorrect form was used inadvertently or as the only means of conducting a test, in circumstances beyond your control, and the steps you have taken to prevent future use of non-DOT forms for DOT tests. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

(c) If you cannot correct the problem, you must cancel the test.

### **§ 40.273 What is the effect of a cancelled alcohol test?**

(a) A cancelled alcohol test is neither positive nor negative.

(1) As an employer, you must not attach to a cancelled test the consequences of a test result that is 0.02 or greater (e.g., removal from a safety-sensitive position).

(2) As an employer, you must not use a cancelled test in a situation where an employee needs a test result that is below 0.02 (e.g., in the case of a return-to-duty or follow-up test to authorize the employee to perform safety-sensitive functions).

(3) As an employer, you must not direct a recollection for an employee because a test has been cancelled, except in the situations cited in paragraph (a)(2) of this section or other provisions of this part.

(b) A cancelled test does not count toward compliance with DOT requirements, such as a minimum random testing rate.

(c) When a test must be cancelled, if you are the BAT, STT, or other person who determines that the cancellation is necessary, you must inform the affected DER within 48 hours of the cancellation.

(d) A cancelled DOT test does not provide a valid basis for an employer to conduct a non-DOT test (i.e., a test under company authority).

#### **§ 40.275 What is the effect of procedural problems that are not sufficient to cancel an alcohol test?**

(a) As an STT, BAT, employer, or a service agent administering the testing process, you must document any errors in the testing process of which you become aware, even if they are not “fatal flaws” or “correctable flaws” listed in this subpart. Decisions about the ultimate impact of these errors will be determined by administrative or legal proceedings, subject to the limitation of paragraph (b) of this section.

(b) No person concerned with the testing process may declare a test cancelled based on a mistake in the process that does not have a significant adverse effect on the right of the employee to a fair and accurate test. For example, it is inconsistent with this part to cancel a test based on a minor administrative mistake (e.g., the omission of the employee's middle initial) or an error that does not affect employee protections under this part. Nor does the failure of an employee to sign in Step 4 of the ATF result in the cancellation of the test. Nor is a test to be cancelled on the basis of a claim by an employee that he or she was improperly selected for testing.

(c) As an employer, these errors, even though not sufficient to cancel an alcohol test result, may subject you to enforcement action under DOT agency regulations.

#### **§ 40.277 Are alcohol tests other than saliva or breath permitted under these regulations?**

No, other types of alcohol tests (e.g., blood and urine) are not authorized for testing done under this part. Only saliva or breath for screening tests and breath for confirmation tests using approved devices are permitted.

# SAMPLE FOR POSTING

## PROGRAM SUMMARY

### *Substance Abuse Testing*

**Employer**

**Contact:**

All questions or concerns should be directed to the **Human Resource Director** or designee at **- - -**.

**Applies to:**

All employees are subject to testing under this policy and procedures.

**When Compliance is required:**

All those subject to this policy are expected to refrain from prohibited conduct prior to performing assigned tasks, while performing such tasks and in post accident cases for eight hours after the accident.

**Prohibited Conduct:**

The following conduct is prohibited:

1. controlled substance use at any time unless prescribed by a licensed physician;
2. having a breath test result that equals or exceeds applicable cut-off levels;
3. consuming alcohol within (4) hours prior to reporting for a safety sensitive task;
4. using alcohol on the job;
5. using alcohol within the (8) hours following an accident or until tested;
6. while behavior or ability to perform due to alcohol use are in question;
7. refusing to test;
8. failure to cooperate in the testing process;

**Test Events:**

Employees may be tested on SIX (6) occasions: (1) pre-employment/pre-access to work; (2) where there is reasonable suspicion of prohibited use; (3) following an accident or injury (4) on a random basis when returning to duty following a violation and as a follow-up to treatment.

**Test Procedures:**

The test procedures for alcohol testing can be found in the office of the **facility Human Resource Manager** or from the **Corporate Human Resource Director**.

**Condition of Employment:**

Submitting to testing as required by this policy is a condition of employment and continued employment with XYZ.

**Refusal:**

Any employee who refuses to submit to a request to test will be terminated. Refusal includes failure to timely report to a designated testing site (collection site) and the failure to execute all required test documents.

**Consequences of violation:**

Except for certain alcohol positives, any employee who is found to have violated this policy will be subject to discipline, up-to and including termination. An alcohol positive is any result in excess of **0.04**.

**Impact of drug/alcohol use:**

Information regarding the impact of drug or alcohol use on employee health and the workplace will be provided to employees.

**ANY VIOLATION OF THIS POLICY  
COULD RESULT IN A LOSS OF STATE BENEFITS  
SUCH AS WORKERS COMPENSATION OF UNEMPLOYMENT**