



A bold voice for transportation workers

April 29, 2022

U.S. Department of Transportation
Patrice M. Kelly
Office of Drug and Alcohol Policy and Compliance
1200 New Jersey Avenue, SE
Washington, DC 20590

**RE: Addition of Oral Fluid Specimen Testing for Drugs
Docket DOT-OST-2021-0093**

Dear Ms. Kelly,

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I am pleased to respond to the U.S. Department of Transportation's (DOT) proposed rule regarding the Addition of Oral Fluid Specimen Testing for Drugs. TTD consists of 37 affiliate unions representing workers across all modes of transportation.¹

The proposed rule would allow the use of oral fluid specimens to be used for drug testing programs. In 2019, the Department of Health and Human Services (HHS) approved the use of oral fluid drug testing, and this proposed rule would align DOT's regulations with the new Mandatory Guidelines for Federal Workplace Drug Testing Programs using Oral Fluid already finalized by HHS. In addition to the establishment of oral fluids as an accepted specimen, DOT also proposes to make a number of changes to its drug testing regulations beyond the scope of the addition of a new specimen.

TTD does not oppose the option to use oral fluids as an accepted specimen, though we would strongly oppose DOT specifically mandating or prohibiting the use of oral fluids tests in any particular situation. We feel that the use of oral fluids tests should remain optional and be determined by the employer. We acknowledge that the addition of oral fluids tests will offer flexibility that may benefit employees who may not have convenient access to appropriate facilities to provide a urine sample or who may be unable to provide a urine sample due to a shy bladder. However, some of the other changes to existing drug testing program regulations are unwarranted or require further consideration.

¹ Attached is a list of TTD's 37 affiliated unions.

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Greg Regan, President / Shari Semelsberger, Secretary-Treasurer



49 CFR 40.3 - Definitions

The proposed rule would add and amend several definitions to allow the use of employee ID numbers or CDL numbers in place of social security numbers to identify employees. We support the use of employee identification numbers instead of social security numbers as an important level of protection for the employee's privacy. Given the risk of identity theft and other concerns that DOT has acknowledged, it is necessary for DOT to encourage the use of employee ID numbers instead of social security numbers whenever possible.

49 CFR 40.35 - Training Requirements

TTD expresses our concerns regarding the training of oral fluids collectors. It is critical that collectors are adequately trained, especially during the transition process, to ensure that the adoption of oral fluids testing does not result in mishandled tests due to poor collection practices. Since there will not be collectors with the requisite experience with oral fluids collection, we believe that there must be additional guidance given to ensure that collectors have as much expertise as possible. For instance, breathalyzer collectors will likely have the most relevant knowledge of this type of test before there are enough qualified personnel to reliably collect oral fluid specimens, and it may be appropriate to prioritize the use of those collectors in early stages of the use of oral fluids testing. We do not believe it is appropriate to allow supervisors to serve as collectors during the transition period. Supervisors initially were not allowed to serve as collectors for urine testing, and we feel that this is an important safeguard to ensure the accuracy and integrity of the chain of custody. We believe that prohibiting supervisors from being collectors during the transition period will provide a much-needed measure of confidence in the oral fluids testing program, particularly as there are not currently any qualified collectors who could oversee the mock collections that the supervisors would need. DOT should consider allowing supervisors to serve as collectors only after the oral fluids testing program is more mature and when protections are in place to ensure that an employee's own supervisor is not the one performing their collection.

49 CFR 40.67 - Observed Urine Collection

This proposed rule would allow direct observations by any licensed or certified medical professional legally authorized to take part in a medical examination in the jurisdiction where the collection takes place. We believe that this proposal is a step backwards on gender self-identification policies during observed urine collection. It is an unnecessary invasion of employees' privacy to allow observers to be of a different gender.

The policy adopted by HHS regarding direct observation of urine collections explicitly does not allow an observer's status as a medical professional to override the donor's right to determine their own gender identity and be provided with an observer of the same gender.² We believe that DOT should adopt HHS's policy without modification or abbreviation.

² HHS Mandatory Guidelines for Federal Workplace Testing 4.4 and 8.12

49 CFR 40.84 - Specimen Storage Requirements

The proposed rule states that laboratories would be required to keep non-negative specimens for only 90 days, rather than the present one-year requirement. Given the infancy of oral fluid testing for DOT safety sensitive employees, reducing the length of storing non-negative tests from one year to 90 days, could foreseeably deny a donor their due process. Access to those samples would be particularly important if the cut off levels need further refinement as has been the history with urine testing. Further, a shortened storage period of 90 days would require that litigation holds be processed within 90 days, which is a drastic reduction from the current one-year period. We do not believe that DOT has provided sufficient justification to show that 90 days is a reasonable time frame to process litigation holds without infringing on an employee's rights to due process. We strongly urge DOT to maintain the one-year specimen storage requirement for oral fluid samples.

49 CFR 40.207 - Canceled Drug Tests

DOT also proposes to allow once-canceled tests to be "un-canceled" if circumstances allow, such as the discovery of previously misplaced paperwork. TTD opposes this provision. We believe that un-canceling tests could in effect increase the frequency of drug testing beyond what is reasonable and justified. We are also concerned that it would create administrative burdens to the employees being tested who would not have the same finality they currently have if a test is canceled. As drug tests are intrusive procedures, it is unreasonable to deprive employees of surety and confidence in the system.

49 CFR 40.291 - SAP Evaluations

DOT proposes to allow Substance Abuse Professionals (SAPs) to conduct evaluations through videoconference technology. TTD does not object to the use of technology, but we have serious concerns that use of virtual meeting technology could enable the recording of evaluation sessions. The recording of such sessions would be a serious overstep of employee privacy and confidentiality and is completely unnecessary. DOT should include a specific prohibition against recording SAP sessions and a method to enforce the provision. The proposed rule also provides criteria for state-licensed professionals to perform SAP services but does not provide equivalent criteria for peer-certified professionals. Both Certified Employee Assistance Professionals and Nationally Certified Addiction Counselors are permitted to perform SAP services but are not licensed by state agencies. We ask that DOT create criteria for these non-licensed SAPs that provide an equivalent level of protections to employees.

TTD appreciates the provisions that DOT has included in this rule regarding video and connection quality during virtual SAP evaluations. There are many non-verbal aspects to communication and evaluation, and we urge DOT to take steps to ensure that virtual sessions adequately allow for non-verbal communication. The quality of SAP sessions should not be compromised for the sake of convenience.

Additional Comments

Prior to implementing oral fluid testing, each employer should be required to submit to DOT their specific plan for integrating oral fluid testing into their overall drug testing program. We believe

it is important to be consistent with the requirement for employers who are initiating urine testing to submit their plan to DOT. Additionally, all existing and future employees subject to oral fluid testing should be notified and educated on the specifics of the plan including when, where and by whom oral fluid testing will occur prior to its implementation.

Regarding DOT's question concerning who should be able to decide whether to collect an alternative specimen, we believe that an alternative specimen should only be collected if the employer has previously established this condition in their written policy and trained all employees on that written policy. Under no circumstances should a collector make the initial determination of which sample will be used to conduct a test. DOT should also require that one or the other - urine or oral fluid testing - should be conducted (i.e., not both simultaneously). The policy for selecting the type of test should be communicated to all employees and included in the employer's written policy.

While unaddressed in this rulemaking, we reiterate our call to increase oversight and review of medical review officer (MRO) decisions. Currently, the regulations in §40.167(e) give exclusive and unreviewable authority to MROs to make substantive determinations. This includes but is not limited to the sole authority to determine the legitimacy of a medical explanation for a reported positive test. See §40.149(c). This prohibits anyone, including an arbitrator, from overturning a faulty MRO decision. Given the ramifications to an employee for a failed drug test, there must be some fair and balanced recourse for an employee who has a valid medical explanation for a positive test. We urge DOT to amend its regulations to allow employees to request a review of a MRO determination, including due process requirement procedures for such a review.

TTD does not object to the option to allow oral fluids to be used in drug testing but calls on the Department to reconsider several of its additional proposals on Part 40 requirements. We appreciate the opportunity to comment on this proposed rule and look forward to working with the department in the future.

Sincerely,

A handwritten signature in black ink, appearing to read 'Greg Regan', written over a circular stamp or mark.

Greg Regan
President



Transportation Trades Department, AFL-CIO
A bold voice for transportation workers

TTD MEMBER UNIONS

Air Line Pilots Association (**ALPA**)
Amalgamated Transit Union (**ATU**)
American Federation of Government Employees (**AFGE**)
American Federation of State, County and Municipal Employees (**AFSCME**)
American Federation of Teachers (**AFT**)
Association of Flight Attendants-CWA (**AFA-CWA**)
American Train Dispatchers Association (**ATDA**)
Brotherhood of Locomotive Engineers and Trainmen-IBT (**BLET**)
Brotherhood of Maintenance of Way Employees Division-IBT (**BMWED**)
Brotherhood of Railroad Signalmen (**BRS**)
Communications Workers of America (**CWA**)
International Association of Fire Fighters (**IAFF**)
International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (**IW**)
International Association of Machinists and Aerospace Workers (**IAM**)
International Brotherhood of Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers (**IBB**)
International Brotherhood of Electrical Workers (**IBEW**)
International Longshoremen's Association (**ILA**)
International Organization of Masters, Mates & Pilots (**MM&P**)
International Union of Operating Engineers (**IUOE**)
International Union of Painters and Allied Trades (**IUPAT**)
Laborers' International Union of North America (**LIUNA**)
Marine Engineers' Beneficial Association (**MEBA**)
National Air Traffic Controllers Association (**NATCA**)
National Association of Letter Carriers (**NALC**)
National Conference of Firemen and Oilers, SEIU (**NCFO, SEIU**)
National Federation of Public and Private Employees (**NFOPAPE**)
Office and Professional Employees International Union (**OPEIU**)
Professional Aviation Safety Specialists (**PASS**)
Sailors' Union of the Pacific (**SUP**)
Sheet Metal, Air, Rail and Transportation Workers (**SMART**)
SMART-Transportation Division
Transportation Communications Union/ IAM (**TCU**)
Transport Workers Union of America (**TWU**)
UNITE HERE!
United Automobile, Aerospace and Agricultural Implement Workers of America (**UAW**)
United Mine Workers of America (**UMWA**)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service
Workers International Union (**USW**)

These 37 labor organizations are members of and represented by the TTD

