

When an Employee Tests Positive ...What's Next?

Information for Employers
regarding the
Return-to-Duty Process and
Substance Abuse Professional
(SAP)

requirements under
D.O.T. 49CFR part 40



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OUTLINE OF THE PROCESS

What is the DOT return-to-duty process? A positive test is a violation. So also is a refusal to be tested. So are a number of other things that are prohibited by DOT.

When an employee has a positive test or refuses to be tested or has one of the other violations, DOT requires the employer to immediately remove that employee from safety-sensitive functions. An employer who allows an employee with a violation to continue performing safety-sensitive functions is subject to fines, up to \$10,000 per day.

An employee who has a violation has two options.

1) He/she can find another job, outside of the transportation industry.

-OR-

2) He/she can be considered for returning to safety-sensitive functions in the transportation industry, but only after successfully completing DOT's return-to-duty process, and then providing a negative result on a return-to-duty drug and/or alcohol testing.

The return-to-duty process requires involvement of a qualified and trained Substance Abuse Professional (SAP).

The SAP must conduct a face-to-face clinical evaluation of the employee. DOT's rule then **requires** the SAP to recommend treatment and/or education for the employee.

The SAP must send a report to the employer, specifying the SAP's recommendation for treatment and/or education.

The SAP must then monitor the employee's progress in the recommended program of treatment and/or education.

When the SAP feels that the employee has made sufficient progress, the SAP will schedule a Follow-Up evaluation for the employee.

Based on that evaluation, the SAP will report to the employer that the employee has successfully complied with the SAP's recommendation (or that the employee has not complied.)

If the SAP reports that the employee has successfully complied with the recommendation, the employer will decide whether to arrange for a return-to-duty test for the employee (the employer is not obligated to take the employee back; this

will depend on your policy statement).

If the SAP reports that the employee has not successfully complied with the recommendation, the employer cannot return to the employee to safety-sensitive functions.

An employee who has not successfully complied with the SAP's recommendation may not return to safety-sensitive functions for **any** DOT employer until the SAP's recommendations have been fully met, and the employee is able to provide a negative return-to-duty test.

What is a SAP?

Certain employees in the transportation industry are subject to federal drug and alcohol use and testing regulations, under the federal Department of Transportation (DOT). An employee who violates these regulations must be immediately removed from safety-sensitive functions, and he/she may not be returned to any safety-sensitive functions in the transportation industry until and unless he/she successfully completes a DOT return-to-duty process.

The service agent who is responsible for overseeing this process is a Substance Abuse Professional or an SAP. DOT requires a SAP:

- (1) to have specific credentials
- (2) to have basic knowledge in specified areas
- (3) to successfully complete a comprehensive SAP training **and**
- (4) to satisfactorily complete a SAP exam.

(1) SAP Credentials

An SAP must have one of the following credentials:

1. A licensed physician [Doctor of Medicine or Osteopathy];
2. A licensed or certified social worker;
3. A licensed or certified psychologist;
4. A licensed or certified employee assistance professional (CEAP); or
5. A drug and alcohol counselor certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission (NAADAC) or by the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse (ICRC).

(2) Basic knowledge

An SAP must be knowledgeable in the following areas:

1. Knowledgeable about and have clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders.
2. Knowledgeable about the SAP function as it relates to employer interests in safety-sensitive duties.

3. Knowledgeable about 49CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, and about the DOT modal rules that apply to the employers for whom you evaluate employees, and about the DOT SAP Guidelines
4. Knowledgeable and current on any changes to these rules and regulations.

(3) Training

1. An SAP must complete an SAP Qualification Training
2. An SAP must actively participate in Continuing Education Training (12 professional development hours every 3 years)

(4) SAP Exam

An SAP must satisfactorily complete an SAP exam.

FAQs for Employers

#1 If I am terminating an employee, do I still have to provide the names of SAPs?

Yes, DOT requires the employer to provide SAP names regardless of whether the employee is returning to safety-sensitive functions for you. If you are terminating the employee, but the employee intends to apply for another job in the transportation industry, successful completion of the DOT return-to-duty process is still required, and the employee must receive SAP information from you, the employer that he/she was working for when the violation occurred.

#2 Do I have to pay for SAP services?

DOT doesn't specify who pays for SAP services. As an employer, you can decide to pay for these services. You can also tell your employees that you are not responsible for paying for SAP services. (It is advisable to include this in the policy that you write and distribute to your employees, so they understand this in advance.) This decision is up to you.

#3 I need this employee back as soon as possible. How long will this SAP process take?

Don't expect this process to be quick. The SAP must conduct an extensive evaluation, which will require several visits with the employee. The SAP must then develop a plan for treatment and/or education. After the SAP determines that the employee has successfully completed that plan, the SAP must conduct a second evaluation to determine whether the employee has successfully complied with that plan. In some cases this may take several weeks, or possibly even months.

#4 What happens if the employee doesn't need treatment?

This isn't possible. DOT rules do not permit a SAP to determine that an em-

ployee needs no treatment or education. The SAP must make a recommendation for treatment or education or both. The rules do not give the SAP a choice in this matter.

#5 How do I know that the SAP I am using knows the rules?

DOT required all SAPs to complete a SAP Qualification Training and an SAP exam by the end of December, 2003. Starting on January 1, 2004, only trained SAPs who have passed an exam can provide SAP services. Each SAP will enter information about his/her training and exam on the Profile. However, as an employer, you are ultimately responsible for ensuring that an SAP is properly credentialed, trained, and has passed an exam. The regulations give you the authority to request this information from each SAP that you use. You are encouraged to ask an SAP to fax or mail copies of his/her training documentation to you, for your files. If the documentation you receive is questionable, you may request additional information, or you may decide to look for a different SAP.

#6 I've been told that SAPs need case managers to oversee what they are doing. Is this required by the regulation?

The regulation does not mention the use of case managers. The practice of SAPs working under a case manager developed in the early days of this regulation, when some SAPs didn't understand the rules and there was no requirement that they had to be trained. The addition of a case manager was important for quality assurance. The revised regulations required SAPs to be trained by the end of 2003. After January 1, 2004, all current SAPs have been trained, and all new SAPs must be trained before they can begin providing SAP services. Assuming an SAP's training met DOT's requirements, and the SAP has the requisite professional skills and qualifications, the SAP should be able to work independently. However, you may find that you feel more comfortable using a SAP who provides services under a case manager. You may be enjoying a long-term working relationship with a system that includes case management. By all means, you may certainly continue that arrangement. This is entirely your decision.

#7 What if I think a SAP's recommendation is too harsh or will take too long?

DOT gives full authority to an SAP to make whatever decisions the SAP feels are therapeutically appropriate. DOT also has made it very clear that a SAP's primary responsibility is not that of getting an employee's job back, but rather to protect safety of the traveling public. The SAP's recommendation stands. No one can change it. And an employer (or an employee) is not permitted to seek another assessment from a second SAP.(this is called "SAP shopping;" and is specifically prohibited by the regulation. [40.295])

#8 What if I can't wait for this employee any longer? Can I terminate?

As the employer you can take whatever job action you want to take, considering, of course, any agreements or contracts that are relevant. If you terminate the employee, the employee will be free to seek employment with another DOT-covered employer, but only if he/she successfully completes the SAP's recommended plan.

#9 I plan to take this employee back. When can I conduct a return-to-duty test?

The return-to-duty test cannot be conducted until you have received the SAP's Follow-Up evaluation report that this employee has complied with the recommendation. The return-to-duty test cannot be conducted in advance. [40.305(a)] If you do conduct the test in advance, DOT will require that the test must be conducted again, just before the employee returns to safety-sensitive duty.

#10 I'm not sure I want to take this employee back. Can I ask the SAP for his/her opinion?

No, you can't ask the SAP to help you with this. As the employer, the decision about taking an employee back is yours alone. The SAP is required to report to you only that the employee has or has not complied with the recommendation. At that point it is entirely up to you. [40.305(c)]

#11 The reports that I received from the SAP don't give me much information. Can I get more?

No, you can't. The regulations specify exactly what a SAP must put into a report. [40.311] Most of the information relates to the employee and where he/she works. But the Initial Evaluation must include the SAP's recommended plan for treatment, and the Follow-Up Evaluation must include the SAP's clinical determinations related to compliance or non-compliance. If the employee complied, the SAP's report must also include a required follow-up testing plan. You may be putting the SAP in a position of liability if you ask the SAP to provide more information than is permitted by the regulations.

#12 Who pays for the follow-up tests?

DOT doesn't specify who pays for these tests. As an employer, this is a decision that you can make. It could also be affected by labor agreements that you may have. You can decide to pay for all of the follow-up tests, or you may split the cost with the employee, or you may pass the entire cost along to the employee. Whatever you decide to do, it would be well for you to include this information in the policy that you have distributed to your employees.

#13 Can I ask the SAP to give me the specific dates that the follow-up tests should be conducted?

No. The regulations state that the SAP cannot make those determinations. [40.307(d)(3)] As the employer, you know your employee's work schedule, and you are in the best position to decide when to notify the employee of a required follow-up test.

#14 Can I tell the employee what his entire follow-up testing plan will be?

No. DOT considers the follow-up testing plan to be confidential. Neither the SAP nor the employer can share that information with the employee. [40.329, Technical Amendment, 8-1-2001]

#15 I require my employees to pay for their follow-up tests. If I notify someone of a follow-up test, and he says that he doesn't have the money, can I postpone the test until he does have the money?

No. Reimbursement for follow-up tests (and for an employee's requested retest of a split specimen) cannot interfere with the tests being conducted. If you notify an employee of a follow-up test, the employee must immediately proceed to a collection site. Reimbursement is a separate issue, and you will have to address that later. If an employee tries to avoid a follow-up test by saying he has no money to pay for it, you can call this a refusal to be tested, which is a violation and now requires a new SAP assessment and return-to-duty process.

#16 A SAP recommended 10 follow-up tests in the first year, and 5 in the second year. As an employer who is concerned for public safety, I am not comfortable with that, and would like to increase it. Can I do that, for safety reasons?

No. The regulations give the SAP complete authority over the follow-up testing plan. An employer cannot increase (or decrease) the SAP's recommended number of tests. [40.307(d)(4)]

#17 I need some suggestions about how to track follow-up testing for an employee, so I can be certain that all the tests get conducted.

If you only have one (or a few) employees who are subject to follow-up testing, you might consider using a 12-month calendar. When you receive a SAP's report that specifies follow-up testing, go through the calendar and randomly select days, equal to the number of required tests. Code the marks somehow so that you know which marks pertain to which employee. Look at the calendar regularly, and notify the employee on the marked day. If the employee is absent, or if it just isn't convenient, simply move the mark to a later day. As long as the employee hasn't been notified, you can change the days whenever you want to (you could accomplish the same thing with small sticky notes.) But whatever you decide to do, keep the system con-

fidential and don't put the information on the calendar that could be easily identified by others.

#18 If an SAP submits a follow-up testing plan that I feel is too frequent, what recourse do I have? Can I omit some of the tests, as long as I do most of them?

DOT requires the employer to conduct all the tests that the SAP has required [40.309]. Auditors may decide to compare an SAP's report with the requested plan, to the number of tests that were actually conducted. As the employer, you will be responsible for tests not conducted, as well as for overtesting.

#19 How do I handle the follow-up testing plan for an employee who was on medical leave for five months?

This is called a break in service. In this case, you will extend the follow-up testing timeframe by five months, equal to the length of time the employee was out of service [40.307].

#20 I am hiring an employee who had a violation where he previously worked. He is under a follow-up testing plan. What is my responsibility?

You must first obtain, with the employee's written authorization, the SAP reports related to the violation. [40.25(a)(5)] The Follow-Up Evaluation will include the SAP's follow-up testing plan. You should call the DER at the previous place of employment, and find out how many follow-up tests have been conducted. You are now responsible for conducting all remaining follow-up tests.

#21 I am looking for a SAP who is certified/approved by DOT. How do I find one?

Some SAPs say that they are certified or approved. However, that is a false claim. DOT does not have a certification or approval process. [40.365(b)(10)] DOT's requirement is that the SAP is first of all qualified, then that the SAP has completed a Qualification Training and a SAP exam. That's it. There is no certification or designation of approval by DOT.

If you have any other questions, please feel free to give us a call. We are a full-service Employee Assistance Program as well as a group which includes qualified Substance Abuse Professionals ready to serve you, the employer.



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