# *Dear SAPlist.com, Vol. 1*
## *(revised January 2016)*

Over the years SAPlist has received numerous e-mails from SAPs seeking information, answers to questions, reassurance, guidance, support…you name it. We also receive an occasional e-mail from an employer, and even from an employee. These pages contain some of those e-mails. Each question is followed by my response. Each of these has been edited for clarity. References that might identify the SAP or the employer or the service agents have been deleted or changed. These e-mails are good examples of situations that some SAPs have encountered.

Some of my responses include references to the regulations where there is no room for debate. The answer is clear and definite.

Other responses are based on logical conclusions. If the regulation says A, then B and C should follow logically.

Some responses are simply my best opinion, or my best guess, because there is no easy answer. This is not an easy regulation. Sometimes, as a SAP, you may simply have to make guesses. However, I would hope you try to make "educated" guesses.

What should you learn from these e-mails? A few things come to my mind:

1) Don't assume an employee is always telling you the truth.

2) Communicate, communicate, communicate. With the DER, with the MRO, with the treatment provider. Communicate *directly*. Don't let someone communicate *for* you. Don't rely on what the EAP or the SAP broker tells you. They don't always know.

3) Your primary concern must be to protect the safety of the traveling public. Helping this employee get back to work should be only your secondary goal.

4) No one can usurp your responsibility. In revising this regulation in 2001, DOT intended to empower the SAP role. As the SAP, you are in charge! No one can change your recommendation or ask you to do something that is not permitted by the regulation.

## *Dear SAPlist . . .*

***1*** ***A DER asked me if DOT regulations require the employer to tell the employee the duration of the SAP's follow-up monitoring plan. I looked through Part 40, especially 40.309 regarding the employer's responsibilities with respect to the SAP's directions for follow-up tests, but DOT seems to be silent on this question. Should I be looking in a different place? Or does DOT not care if the employer tells the employee the length of follow-up testing, e.g., one year, two years, five years, etc.?***

An employee should NEVER know what his follow-up testing is, including how long he is to be tested.

This is covered in the SAP Guidelines and in a technical amendment that DOT made to the regulations. See SAP Guidelines, p. 13, paragraph 2. Also see Part 40.329(c). While those words are specific to the SAP, it should be assumed that this prohibition would also apply to the employer. An employer should NOT reveal the follow-up testing schedule to the employee.

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***2*** ***I have determined that my client does not have a substance abuse problem of any kind. I know that DOT requires a minimum number of hours for treatment and/or education. I believe that number to be four, but my co-worker says that it is eight.***

***Which is it: eight or four?***

Actually, DOT has never set a minimum number of hours for education. This is a DOT myth. Someone says it, and eventually everyone believes it. This is one of the problems in working under this regulation. When we aren't sure of ourselves, it doesn't take much for someone to make us think that they know more than we do. Our insecurities take over, and we give in to anyone who sounds credible.

This is akin to the myth that an employee has two hours to get tested after being notified of a random test. Regarding this supposed "two-hour requirement" DOT says, "We never said that. We simply expect the employee to 'proceed immediately.'" Similarly, someone made up the two-hour thing. And it gets perpetuated. ***A word of caution***: Don't assume that everyone knows what they are talking about.

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***3*** ***I have a SAP client who is an owner-operator who quit a contract job. Two days after he quit, the Project Manager notified him that he had been selected for a random test. He says he didn't go for the random, because he had quit the contract job. A few days later he applied to drive for another company. That company told him that they were unable to hire him because there is a refusal on his record. The previous employer had apparently documented a refusal to test instead of removing him from their random pool. Is this a violation?***

Frankly, I question the driver's story. An owner-operator is typically notified of a random selection by the C/TPA that he belongs to. I can't imagine that the employer would call him in for a random test two days after he quit. If that is true, he should file a complaint. However, it could be that his C/TPA notified him of a random selection, and if so, he should have gone in for a test, even if he was between driving assignments regardless of whether he is working or not, or whether he quit a job or not. As an owner-operator, he is technically in readiness to drive at all times. It is possible that when he didn't show up for his random test, the C/TPA entered a refusal in his record. When he applied for a new job, the C/TPA then reported that he had a refusal on his record.

As an owner-operator, he *must* belong to a C/TPA, and he is therefore in that C/TPA's random pool. As long as he owns his truck, he must be in a C/TPA's random pool.

However, without knowing the facts, it's impossible to know what really happened. Bottom line, there is a refusal on his record. He *must* complete a SAP return-to-duty process.

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***4*** ***A CDL driver has been removed from safety-sensitive function due to suspected alcohol abuse. His medical examiner sent a letter to the company's Medical Director stating that he abuses alcohol. The driver was then removed from work and told to see a SAP. However, he saw a regular clinical therapist with substance abuse background (not a SAP). Now his employer is telling him that he must see a SAP.***

I believe this is just a plain old vanilla chemical use evaluation. A SAP process is required ONLY for a violation. 49 CFR Part 382, Subpart B, is a list of FMCSA's violations. This driver wasn't drinking at work, he wasn't drinking 4 hours before performing safety-sensitive functions, he didn't drink during the 8 hours following an accident, he didn't have a positive alcohol test result and he did not refuse to be tested for alcohol. We simply have a Medical Director who claims that the driver "abuses alcohol."

40.311 requires the specific DOT violation to be written on the SAP report. Alcohol-related violations must be either 382.201, 205, 207, 209, or 215. But "abusing alcohol" is none of these.

This is not a violation of 382. Therefore, this is not a SAP case. If this were a violation, the SAP would have to set up a follow-up testing plan. But when there has been no DOT violation, there can be *no* DOT follow-up testing. This driver does not require a SAP return-to-duty process.

This employer could face serious fines if this were handled as a violation of 49 CFR Part 382, with SAP reports and follow-up testing.

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***5*** ***An EAP asked me to conduct a SAP evaluation. They tell me that they are the "acting DER" for Jones Trucking. They told me to send the SAP reports directly***

***to them (the EAP), and that they will "handle this". I remember that in our training you said that SAP reports must be sent directly to the employer, and that a copy could be sent to a third party at the same time.***

An EAP cannot be an employer's DER.

DOT's rules cover 1) employers, 2) employees and 3) service agents. A participant in the rule must be one of those three.

An EAP is a *service agent* because the EAP provides a service that the employer must have, in order for the employer to meet the requirements of the rule. A service agent is not a DOT-covered employer. See the following:

40.3, *Definitions*: Designated Employer Representative. Last sentence: "Service agents cannot act as DERs."

40.3, *Definitions*: Service Agent. Last sentence: "Service agents are not employers for purposes of this part."

40.15(d) "As an employer, you must not permit a service agent to act as your DER."

40.355(e) "...you must not act as an intermediary in the transmission of individual SAP reports to the actual employer. That is, the SAP may not send such reports to you, with you in turn sending them to the actual employer. However, you may maintain individual SAP summary reports and follow-up testing plans after they are sent to the DER, and the SAP may transmit such reports to you simultaneously with sending them to the DER."

(The exception at the beginning of 40.355(e) refers to owner-operators or other self-employed individuals in the trucking industry. It does not apply to a company that hires drivers as employees.)

So, bottom line, the EAP is not and cannot be the DER. You cannot send the SAP report only to the EAP. You need to call the company and find out who the DER really is. (And don't let the company tell you that their EAP is serving as their DER.)

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## 6 *Is the employer required to provide a "list" of SAP's for the employee to choose from, or can an employer name one SAP designated by the company to provide SAP services?*

First, start by reading: 1) 40.287 and 2) DOT's response to Question #4 in Section V of SAP Guidelines. Here DOT says "the employer needs only to provide the employee with the specifics of the SAP…". Also, however, when an employee is terminated, "that employer would be considered to be in compliance if they provide the list of a least two qualified SAPs." So, it's a mix. Two SAPs, and a "preferred SAP."

Specifying a "preferred SAP" is an employer's choice. I always encourage an employer to name a designated SAP. This should be a SAP that the employer feels most comfortable with. When a SAP works regularly with an employer, that SAP would be familiar with the employer's policies related to leaves of absence, as well as the employer's concerns for public safety. I recommend an employer should include a statement in the company's policy that says "If you go to a SAP of your own choosing, we reserve the right to not reinstate you."

My reason for suggesting that is simply because some SAPs don't understand DOT's regulations very well. Those SAPs are more concerned with getting an employee back to work than they are about protecting public safety. First and foremost, this rule is about public safety. Many employers would prefer to see a treatment recommendation that is too tough than one that is too lenient. For example, one employer told me that he was worried about an employee who tested positive for meth, but the SAP recommended only a 2-hour education session. That employer felt the SAP had put him in a difficult position, but the employer felt he *had* to take the employee back, against his better judgment. An employer who is serious about public safety should have the option of not returning this employee to the workplace.

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## 7 *Can an employer's policy require a non-DOT employee who has tested positive for a controlled substance to be evaluated by a DOT SAP?*

***I have heard mixed opinions about this: 1) DOT frowns upon this, and 2) DOT guidelines do not allow for a SAP to function in that capacity. I believe it is a matter of re-educating the company and sending the individual to a provider that has extensive chemical dependency experience (not necessarily a SAP).***

In writing this regulation, DOT coined the term "Substance Abuse Professional" or "SAP." The term applies to the service agent who conducts an assessment of a DOT employee. (See *Definition* in 40.3) Over the years since 1995, it has taken on broader meaning. It gradually has become a term that means the actual assessment process. As in: "I need you to do a SAP for me." Today it is a generic term that means "drug or alcohol assessment" for any individual, both DOT-covered and non-DOT employees. The only differentiation is usually "DOT SAP" and "non-DOT SAP." It is indeed confusing.

I don't understand why an employer requires an evaluation for non-DOT cases to be conducted only by a "DOT-qualified SAP". That employer probably assumes that a DOT-qualified SAP is a more skilled assessor than an addictions counselor who is not a DOT "SAP". However, there are many very qualified addictions counselors who are very good at assessments, but they simply have not chosen to be SAPs. On the other hand, there are SAPs who do not do good work. An employer who requires a "SAP" for his non-DOT employees is not necessarily guaranteeing quality assessments. The only difference between a good addictions counselor and a good SAP is that the SAP has been trained on federal regulations related to DOT. Those DOT regulations don't translate at all to non-DOT employees. A SAP who assesses a non-DOT employee can't apply any of those federal DOT laws to the case. So for the non-DOT assessment, the SAP "designation" means nothing. A SAP's

level of expertise in the area of addictions is by no means higher or more valid or more reliable, just because he/she is working under this federal regulation.

One problem with requiring only a "SAP" is that there are vast stretches of the U.S. where SAPs are not easy to find. SAPs have told me that an employee just drove 500 miles to their office. This is especially true in some of the western states. Yet, many small towns do have addictions professionals who can provide a quality drug and alcohol assessment. But when an employer requires the non-DOT employee to be assessed ***only*** by a SAP, that employee may be faced with driving a considerable distance, and in some cases I have even heard of employees buying a plane ticket to reach the closest SAP.

An employer who accepts assessments only from "SAPs" (or even an employer who "prefers" SAPs) may not realize that he is placing a severe limitation on his program. He is also creating a hardship for his employees.

Sometimes I wonder what employers are *really* asking for with this request. Do they think it will allow them to receive written reports, as they do under DOT? Some employers have started to expect written reports related to ALL drug and alcohol cases. In actuality, the employer receives SAP reports under DOT regulations because it is required by the law, and because SAPs and other service agents are prohibited from having an employee sign a release of information (40.355(a)). However, in a non-DOT situation, a SAP would certainly have to obtain a release from an employee for the exchange of any information, including sending any reports to an employer. And what will the employer do if a non-DOT employee won't sign that release?

I also believe that this request puts a SAP at risk. It requires the SAP to remember to use a release with non-DOT employees, and not to use a release with DOT employees, and somewhere along the way something will get miscommunicated or confused, and there could be a messy lawsuit. Or the SAP mistakenly sets up 5 years of follow-up testing for a non-DOT employee when the law in that state permits follow-up testing for only one year, or two years. SAPs should not be expected to know the various state drug testing laws that would govern these non-DOT cases.

It's short-sighted of an employer to require a DOT SAP to assess DOT and non-DOT employees. I suggest that the EAP should ask the employer what he is hoping to accomplish or obtain by using a SAP. Based on the employer's response, they could then create a "SAP look-alike" process. But if I had my way, I would like to take it a step further and suggest it be called something else, to avoid confusion. A non-DOT employee could be given a "chemical use evaluation" (CUE), or something similar. Save the word "SAP" for the world of DOT, and avoid loads of confusion.

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***8 An employee is terminated. He is assessed by a SAP. When he has satisfactorily completed the SAP's recommendations, he starts looking for a job. Who oversees his follow-up testing program while he is job-hunting and until he finally gets a new job?***

If he doesn't have a job, he isn't driving a big truck. If he isn't driving a big truck, he isn't a threat to public safety. While he isn't a threat to public safety, he isn't subject to testing. There is no reason for him to be tested. Another way to look at it is that DOT testing applies to an employee who has an employer. If he isn't employed, he has no employer, and he is also not an employee. Test results can be reported only to an employer, and he would have no employer.

When he has a job offer, he takes a pre-employment test. (And in this case, the pre-employment test is also the return-to-duty test…same thing). If the pre-employment test is negative, he is hired, and at that moment his follow-up testing plan starts. The new employer now implements the follow-up testing plan that was set up by the SAP.

The same applies to an employee who is either on leave or on seasonal layoff. When that employee is not working, there is no follow-up testing. The plan must be extended for the length of time the employee was not working.

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***9 A collection site has asked an employer to send employees for random testing only on a particular day of the week when they have higher levels of staffing. This employer informs employees of their random selection, but the employees are actually tested several days later, because of the collection site's schedule. Part 382.403 (i)(3) states "Each driver selected for testing shall be tested during the selection period," but doesn't make clear what this means. Any clarification would be greatly appreciated, as always.***

FMCSA really doesn't care *when* someone is tested. What FMCSA *does* care about is that as soon as employees are notified they must proceed to the collection site immediately. Random draws are often conducted every quarter. What 382.403(i)(3) means is that the employee must be notified and tested ***sometime in that quarter***. Precisely "when" the employee is notified is not an issue, just so there is no advance notice.

The situation you present is exactly what FMCSA wants to avoid. FMCSA would like employers to understand two things: 1) that the driver who was originally selected *must* be tested—eventually. (Unless he is on a 3-month medical leave). 2) that there should be no advance notice.

A selected driver might be sick all week. When he eventually returns to work, or at anytime in the following two months, the employer can notify him to be tested. He would still be "tested during the selection period", which is often 3 months.

But I have a greater concern. This collection site should not make this request of an employer. A collection site should never say something like "we conduct random tests only on Tuesday". If that information gets out (and employees will eventually figure it out), the employee who uses cocaine or any of the drugs that clear his system in 2-3 days would then

know that it is safe to use cocaine on Wednesday, because it would clear his system in 6 days. For those employees, "randomness" is gone. This employer should inform the collection site that this request is unacceptable, and the collection site must either accommodate random testing at any time, or the employer will find a new collection site.

If DOT knew about this, they might fine the employer. (Not the collection site). 40.15(c) makes the employer ultimately responsible for all activities of a service agent. When DOT conducts an audit, the auditors often ask about times for random collections. Auditors may fine an employer who always conducts random tests on a specific day, or only first thing in the morning, or only at the end of the work day. DOT would like random tests to be conducted at all possible hours, on all possible days, so employees can never "figure it out".

If this employer decides to stay with this collection site under this condition, the employer should at least be aware that it is subject to sanction by DOT in an audit. I am certain that DOT would not approve of this arrangement.

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***10*** ***We are a large EAP. We contract with SAPs to provide the initial and follow-up evaluations, including monitoring of the employee's primary care. If a SAP recommends ongoing aftercare, is it OK for one of our Case Managers to monitor that aftercare?***

Most certainly. 40.303(b) states that a SAP's aftercare recommendations can be monitored by the employer, ***or*** by the SAP, ***or*** by the employer's EAP. It would be appropriate for you to have a conversation with the DER to find out how the employer would like aftercare monitoring to be handled. You may want to suggest that the employer requires a return-to-duty agreement, signed by the employee and the employer that would allow you to report to the employer if the employee drops out of the SAP's recommended aftercare. That agreement should clearly identify what the employer's action will be when the employee ceases involvement in the SAP's aftercare recommendation. 40.303(c) states that the employee is obligated to comply with the SAP's aftercare recommendations, and that if he/she doesn't, the employer could terminate him/her. (That, however, would be the employer's decision, not a DOT action.)

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***11*** ***A truck driver was assessed by an "evaluator" who recommended that he attend AA meetings. The "evaluator" faxed paperwork to the DER. Upon receiving the paperwork, the DER realized the "evaluator" was not a SAP, and that they had to start over. The case has now been given to me. After conducting my own assessment, I recommended IOP for the employee. He has now completed week #1 of a 4-week program. Since he has been off work 5 weeks, what are your thoughts related to putting him back to work before he has completed IOP?***

First, the employer was correct in having this employee start over. If this employee did not initially go to a qualified SAP, any "treatment" he completed would not be recognized by DOT.

Now, to your question. Read 40.301(c)(2) As the SAP, you can conduct the follow-up evaluation when you feel he is making sufficient progress. It's totally your call. But it seems to me that you'd want to be sure he's going to stay with his program. Here is the problem: Once he returns to work, he may lose the incentive to complete his IOP. I'd suggest working out a return-to-work agreement between the employee and the employer that says that you, as the SAP, will monitor treatment, and if he drops out, you will report it to his employer, and he will be terminated. Put some screws into it.

On the other hand, he has completed only one week of a four-week program. Attending a few AA meetings prior to IOP doesn't give him much of a head start on treatment. It also doesn't really give you a reliable indicator of his level of "success" and "participation". It may be important for you to talk with the treatment provider, and find out how the treatment provider feels about his returning to work at the end of only one week of treatment. You might learn that they have a strong opinion about it. And if they don't think it's a good idea, you should probably think twice about overriding them. While it's true that 5 weeks is a long time to be out of work, that shouldn't be a reason to try to speed up this process. Remember…the priority is not getting this guy back to work as soon as possible. The priority is public safety.

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***12*** ***I'm assessing an employee who is required to have a CDL for his job, but he rarely drives a truck. (I'm not sure yet if he's ever driven a truck for his employer, but I'll get more information.) He was operating a forklift at work, got into an accident and was then given a non-DOT drug test. His drug test result was positive. Let's assume this guy has driven just once this last year. Is he is under DOT regulations? What must happen, if anything, under DOT's regulation? Can this employer follow its own company rules, or is this a DOT violation? Does the issue of "actual knowledge" come into play?***

Here is a critical underlying principal: **If it wasn't a DOT test, it isn't a DOT violation.**

A DOT FMCSA accident must occur with a 26,001 (or above) pound truck, traveling on a public highway. (An accident in the employer's yard or parking lot would not meet the definition of a DOT accident). Since a forklift isn't a commercial motor vehicle (you don't ever see them tooling down the freeway!), this accident was appropriately handled as a non-DOT test. And a non-DOT positive test is a non-DOT violation, so it falls under the employer's policy. The definition of actual knowledge (382.107) doesn't include "a non-DOT positive test". This employer must follow his non-DOT policy. Hopefully the policy will require that he is removed from safety-sensitive functions until he addresses the problem. (However, in this case, when you conduct the assessment on this employee, you definitely WOULD use a

Release of Information. Under DOT, however, you would NOT be permitted to use a release [40.355[a]].)

And one final comment to keep in mind: The "actual knowledge" issue that you asked about applies ONLY to FMCSA. None of the other transportation modes have a definition of "actual knowledge" in their regulations.

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***13*** ***A client tested positive for marijuana on a DOT pre-employment test. I recommended a 6-week drug education program.***

***At the beginning of the 6th and final session all participants were told they would be drug tested. At the end of that session (which lasted 90 minutes) the employee said that he was unable to produce a urine specimen for testing. He was given water and told to remain until he could produce a urine specimen. After one hour the employee left the premises, saying that he could not provide a specimen.***

***The program informed me of this and said that because he was unable to provide a urine sample he was considered to be positive and/or non-compliant.***

***As a SAP, how should I respond to this situation? He has completed the educational counseling that I recommended. Should I schedule him for a follow-up evaluation? Or should I consider him non-compliant and revise his recommendations?***

This is your decision. The education program may consider him non-compliant, but as the SAP, you have the authority to ignore that. Similarly, when a treatment center says that an employee complied with their treatment program, and you, as the SAP, feel that he didn't really get it, you could report to the employer that he had not "successfully complied." It's not the treatment program's decision. It's the SAP's decision.

(However, doesn't it seem strange to you that he could not produce a sample, even after sitting there for two and a half hours, and even after drinking more water? It's just a little odd. Maybe he was concerned about testing positive, which is certainly a possibility.)

Tests conducted by a treatment program are not DOT tests, and they mean nothing to DOT. Only DOT tests, under DOT standards, on DOT forms, have any bearing on this regulation. A SAP can consider treatment program testing as merely a "tool" in determining the employee's progress.

You could certainly conduct the follow-up evaluation now, write a report of compliance and set up a follow-up testing plan. (But only if you feel that he actually "successfully" completed the program.)

He tested positive for marijuana. Did you obtain the quantitation from the MRO? If you didn't, you should. If the quantitation was very high, this guy runs the danger of still having THC in his system, and testing positive again (this time on his return-to-duty test), and having ANOTHER violation, which will require an entirely new SAP process. (It is possible that he was afraid that he would have tested positive at the education class.) If his quantitations are unusually high, he may be better off waiting a while before he takes his return-to-duty test. In that case, you might want to hold off on scheduling his follow-up evaluation, because once you conduct his follow-up evaluation, the employer will automatically assume he is ready for his return-to-duty test.

As a SAP, you should try to help him avoid another positive result. I suggest to SAPs that they should require the individual to get some independent results, perhaps at the education program. And just to be safe, I suggest that a SAP should require 3 negative screens (they aren't really tests, just immunoassay screens), 3 days apart. And don't schedule his follow-up evaluation until he can bring in those 3 negative test results. If one of those tests is positive, require him to start all over again, to get 3 negative test results, 3 days apart. Yes, he'll probably have to pay for these tests, but this is his "insurance" against another DOT positive test result. (And even then, there is no guarantee that his DOT test will be negative. But it's better than doing nothing at all.)

There's a lot at stake if he doesn't understand that the THC in his system may not have flushed out. (Never mind that he may have sneaked a joint sometime in the last few weeks).

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***14*** ***A driver tested positive for cocaine last April. I recommended intensive outpatient. He tested positive for cocaine again in July. I recommended intensive outpatient again. The DER at his company called last week and told me that he tested positive AGAIN, this time for alcohol while hauling a load to Texas. The DER called him to remove him from duty, but he didn't return the call until he reached his destination at the end of the day. At my suggestion, the DER told him to return, but without a load. At this point I am thinking that this guy should not be driving anything anywhere ever again. What would be your suggestion?***

He actually can't drive that truck **at all**. Load or no load. In an audit, this employer could be fined $10,000 for every day he drove that truck after he had been told he had a positive test result. And the driver himself could be fined $5,000 under this regulation. (You should **not** have told the DER he could drive the truck back empty.) In an accident, an empty truck can do as much damage as a full one. Someone should have flown to Texas to drive the truck back, but the employee couldn't even have ridden back in the truck. He would have had to fly back. (He can't be **in** or **on** the truck, regardless of whether or not he is driving.) 49 CFR Part 382.107, Definition: safety-sensitive function.

I don't often comment on cases like this. But this guy seems to have a serious problem. And yes, if he doesn't understand this regulation, he should get out of the industry. This is another difficult part of a SAP's job...to determine that he has "successfully" complied with treatment. Does this driver understand he can never use drugs? And now he's driving his truck, with alcohol in his system. It doesn't sound like he understands this regulation.

Wow. Two cocaine positives, April and July. That's serious. Get tough. Very tough. You might have to be the one to tell him that he is in the wrong occupation. You would do that by simply reporting that "he has not successfully complied with your recommendations." If drugs are that much a part of his life, he might need to find a new job, but not in transportation. If he remains in the transportation industry, and he continues using drugs and misusing alcohol, he will be in a world of trouble from this time forward. This is one of those situations where the definition of addict is "the employee who continues to use drugs that he knows his employer tests for." (Thanks to Tamara Cagney for that definition.)

But I have another concern. You say he tested positive for alcohol and that the DER tried calling him while he was driving to Texas. In 40.253 and 40.255 you will find the procedures for the alcohol confirmation test. Since an alcohol test is conducted as a breath test, the results are known immediately, not a few hours or a few days later. The BAT is required to call the DER to report any test result above 0.02, because at that point the driver is not permitted to drive a vehicle. I'm confused as to why the DER wouldn't have taken steps at that time to prevent him from getting in a truck and driving to Texas. This story is very strange. It makes me wonder if this was possibly a non-DOT alcohol test, maybe conducted on a blood sample which had been sent to a lab. And if it was a non-DOT test, then this isn't a SAP case. I suggest that you go back to the DER and get more information.

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***15*** ***As an EAP, I know that we can't require releases for DOT/SAP cases. However, the question has come up about whether we need releases to do case management once the SAP has recommended that the employee return to work and has been returned to work. Specifically, if we're the ones doing the case management, do we need to have a release in order to report on aftercare compliance recommendations to the company? I know we would need one with a treatment center, but I wasn't sure if we need one to report to the employer.***

First, you do NOT need a release in order to talk to the treatment center. A HIPAA statement related to this part of the regulation was published in May 2003, and updated in 2006. Every SAP should have a copy of this statement. You'll find that statement on the back page of this document.

The treatment center will probably want the employee to sign a release to talk with you, but as a service agent, YOU should not be requiring a release to talk to the treatment center. And under the HIPAA statement, you don't need a release.

Under this rule, a service agent cannot use a release. (40.355[a]) ODAPC considers an EAP to be a service agent. The problem is this: The employee complies with the SAP's treatment recommendation. You (the EAP) are monitoring aftercare. The employee drops out of aftercare. You need to be able to tell the employer that the employee has dropped out of aftercare. The employee could be terminated. This should be addressed in an employer's written return-to-duty agreement. If that agreement gives you the authority to report non-compliance (and it *should* give you that authority), there would be no need for a release of information. However, if you "played safe" and used a release anyway, and the employee revokes the release, the two documents are in conflict. What do you do if the employee revokes the release? Nothing? After all, the main reason you are monitoring the aftercare is so that you can tell the employer whether the employee is following the aftercare recommendation. If the employee signs a release, the employee is in control of what you can (or can't) tell the employer.

One further comment. You said "…once the SAP has recommended that the employee return to work…" Here is a technical, but important point. The SAP should limit the SAP report to stating ONLY that the employee has complied (or not complied) with the recommendation. A SAP should not say more than that. It is entirely the employer's decision as to whether or not to take the employee back. You may find that an employer might even ask you to make a statement about this. A SAP should not recommend that an employee should be returned to work. That's too close to a fitness for duty determination, which a SAP cannot do under this rule. (40.305[c]). There could be liability in making that statement, especially if the employee returns to using and is involved in a serious accident. 40.311(d) lists the items that must appear on a SAP's report of compliance. Nowhere does the regulation say that the SAP report should include a statement that the employee should be returned to work. And my advice is: if it doesn't ask for it, don't give it. Be concise. Avoid liability.

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***16*** ***We have been trying to find the FTA reasonable suspicion training video on FTA's website, but we can't seem to find it. Help!***

For the on FTA reasonable suspicion video, go to www.fta.dot.gov, click on Safety & Security Oversight. Click on Drug & Alcohol Program. Scroll to the bottom, and click on Technical Assistance. Scroll down to Reasonable Suspicion. That's it.

Some trainers are using this video for FMCSA supervisor trainings. Understand, however, that this is a video produced by and for FTA…subways and buses, not trucks. Not all the regulations between these two modes are the same. You should make a point of explaining the differences during the training. Don't substitute FTA's training video without making clarifications. Definitions are not the same, consequences for 0.02-0.039 alcohol are not the same and various other parts of the law are not the same.

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***17*** ***I have a client who was kicked out of his home because of his drug use. He became suicidal. He also has what I believe to be a depressive disorder as well as an***

***Axis II personality disorder. He was hospitalized in a psych ward, he completed a dual-diagnosed IOP and he is now in outpatient therapy. He has done well in treatment; he is compliant (I think he likes the attention) and he is currently in a recovery home. His employer assigned him to non-safety-sensitive functions, but the employer is anxious to have him return to driving. It has been almost two months since he has been behind the wheel. I have been delaying his follow-up evaluation for obvious reasons, but I am starting to get pressure from all corners.***

***Here is my dilemma: I think he has demonstrated compliance and commitment regarding his substance abuse issue. He has been tested regularly at the recovery home and there have been no positive test results. My concern is his mental state. He is easily thrown into a depressive state and I surely don't want him behind the wheel if he decides to kill himself, and ends up taking out a family. My question is, Where is the boundary here? Can I defer the "return to duty" to a psychologist or psychiatrist? (He does see a psychiatrist.) Or should I refer this decision to the MRO?***

I would say that you have handled this very well.

Here's what I suggest. I think you should probably have a conversation with the psychiatrist (maybe you have done so already), and tell him your concern. Exactly as you state it here. Talk about the public safety issue and responsibility. Ask his opinion. Does he think there should be a fitness-for-duty evaluation? Could he conduct that evaluation? If he won't do it, tell the DER that you recommend a fitness-for-duty evaluation in addition to a return-to-duty test. Document all of this. But remember, SAPs are not allowed to make a "fitness for duty" determination. (40.305[c])

Don't involve the MRO. The MRO really doesn't have a role here (unless this is a really big truck company with its own internal MRO). The MRO who verified his test result is involved with drug issues, and not with return-to-duty issues, fitness for duty, etc., (except under US Coast Guard regulations.) If this guy were taking some medications that you were concerned about, it might be appropriate to talk to the MRO about whether he should be driving a truck while taking meds. But it sounds like your concern is psychiatric, exclusive of meds.

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## 18 *I referred an employee to treatment. He dropped out. He failed to contact his counselor or me and he did not return my phone calls. I gave him 2 months—too long, I know—but the truth is, I forgot about him. So I prepared a notice of non-compliance and sent it to his DER. The DER called me and said that they had fired him and they just recently re-hired him after he had been working for another employer. Apparently he had gone to another SAP, who then recommended only education. After he completed the education program, the new SAP reported he had successfully complied with the recommendation. Which means he now has a report of compliance and non-compliance—for the same violation. He has been re-hired by the same company where he had the violation. That company should have known that he needed a compliance notice from me, because they have my initial evaluation and recommendation on my letterhead. He is currently on the road, driving a truck. What is my responsibility? Can I evaluate him for compliance? Can I require him do a whole new SAP evaluation with me?*

Tell the current employer that they are in violation because they accepted a SAP report from a second SAP, and that they could face a fine for using him. Give the employer the following quote from 40.295(b) "If the employee, contrary to paragraph (a) of this section, has obtained a second SAP evaluation, as an employer you may not rely on it for any purpose under this part." Under DOT regulations, this employer is using a disqualified driver.

You should also contact the driver and inform him that he himself is subject to criminal and civil penalties. (382.507)

The employee needs to complete your recommendation and not another SAP's recommendation. You could tell him that he must see you for another evaluation, and that you will take into consideration what he has already completed, but your records (and the employer's records) must show that he completed a SAP process conducted by you, the original SAP. The SAP reports written by the second SAP should be ignored and marked as invalid. Once you explain this to the employer, document that you have done so.

You could certainly decide that this driver needs to complete your original recommendation for treatment. In addition, the employer must remove him from safety-sensitive functions immediately, as they will have been notified of his non-compliance. If they balk at this, tell the employer you will report them to the federal DOT office in your state. If this employer gets away with it this time, they may try doing it again in the future.

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## 19 *An employee has been terminated from the company because of a positive THC test. (This employer's policy is to terminate immediately, but to re-hire the individual if he successfully completes the SAP return-to-duty process and then has a negative return-to-duty test.)*

***The EAP is telling me that because he is not employed, I must send my SAP reports to them (the EAP), rather than to the employer. I told the Case Manager that I don't think this is correct. Is it?***

Here's what 40.311(f) says "As a SAP, you must provide these written reports directly to the employee if the employee has no current employer, and to the gained DOT-regulated employer in the event the employee obtains another transportation industry safety-sensitive position."

I suggest that you NOT provide copies of the SAP reports "directly to the employee". I have heard too many stories of SAP reports that have been "changed" and "re-created" by a desperate employee. I suggest that you avoid potential problems of forgery, and give the employee a "To Whom It May Concern" letter that identifies you as the SAP, and

invites the new employer to contact you for copies of the SAP reports and the follow-up testing plan.

In setting up this part of the regulation, I believe ODAPC underestimated the temptation that employees face, in "revising" SAP reports, creating simple follow-up testing plans, and forging SAP signatures. It has happened quite often. Unless an employee actually requests copies of your SAP reports, I suggest you maintain a distance between the employee and the reports. Whenever possible, deal directly with the new employer. When the employee has been terminated and finds a new DOT position, send the Initial Report, and the Follow-up Evaluation Report, and your follow-up testing plan, directly to that new employer.

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***20*** ***This is an EAP case, and not a SAP case. But I want to get your opinion. A railroad employee —whose job it is to move and connect cars at night in preparation for the next day's run—was referred to us because of attendance problems.***

***During our assessment, he disclosed a serious long-term addiction for ephedrine. His company is unaware of this problem. This was described by the client as taking 2 – 5 packets (48 tabs each) per day for almost 10 years. The client is 35 years old.***

***At our recommendation the client is seeing an AODA counselor weekly. The counselor reports that he is self-disclosing a decrease in his use.***

***Here are my questions: Should we have him taken off duty until he can give us a clean test? Will ephedrine show up as an opiate on a DOT drug test? I am wondering if we should call FRA and ask about our reporting obligations to his company? Is this a nightmare waiting for the dawn?***

Boy, this is a tough one. I'm not sure how to answer it. But let me try.

Regarding the question of ephedrine…I think you should ask an MRO if ephedrine would yield a positive opiate result. The problem with opiates is that the burden of proof is on the MRO, and if the employee denies using, the MRO has no choice but to verify it as a negative test. (Read 40.139)

I think you are correct in calling FRA about this. You could call Gerald Powers directly at FRA. (202) 493-6313. But you could also call ODAPC (202) 366-3784 and talk with Bohdan Baczara.

This is an example of why I suggest that EAPs should consider adding a statement to their EAP Statement of Understanding (SOU) that allows you to report back to the employer when you learn things that cause you to have concerns for safety. If you have done this, by all means go directly to the railroad employer with this information. Let the employer decide what to do. But without writing this into your SOU, you're left holding the bag. What can you disclose to the employer about this safety concern? Probably nothing.

**AND THEN A FEW DAYS LATER THE EAP SENT THE FOLLOWING E-MAIL TO SAPLIST:**

***We did consult with the MRO, who downloaded and sent information of the risks of ephedrine, which are serious and many.***

***I consulted with ODAPC, and they said we might have leeway under certain parts of the regulation to act towards protecting safety. ODAPC referred me to the head of the FRA's testing program, as you recommended.***

***The Program Manager said he was, just earlier that day, investigating an accident where a switchman was cut in half (!), and was found to have a problem with a prescription medication. He said that as a drug abatement professional, I am obligated to take action on safety concerns on behalf of the FRA. He recommended that we contact the railroad's medical director, who is the only one that can determine fitness for duty.***

***I then talked at length with that doctor who advised us to put the employee on a 30-day medical leave, have the employee stay in treatment, and have the employee tracked by an internist who is familiar with the situation. The doctor mentioned several measures that the internist would want to track during this 30-day period. After 30 days, the medical director would then medically re-qualify the employee, and would want reports from both the internist and the treatment provider as a part of the re-qualification. Part of my assumption, which no one came out and stated, was that the employee would need to be ephedrine-clean and abstinent.***

***We have notified the railroad's DER that we recommend removing the employee (for EAP and medical concerns.) We met with the employee today, and he was a bit shocked by all of this, but he did say he was worried about having a stroke or heart attack. He has committed to cooperate with the process.***

***Always defer to a higher authority…***

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***21*** **A *truck driver had a random drug test in October. He said he was taking a codeine product prescribed by his dentist after some dental surgery. When the MRO asked him to provide documentation, he requested it from Walgreen's and his dentist. He went on the road and apparently this never got completed, so the MRO finally reported the drug result as "positive". The employee now has a copy of the prescription and a letter from his dentist. He has been trying to resolve this with the lab with no success. He was terminated by the company he was working for and now is trying to get another job. However, with this positive on his record, he has been told he needs a SAP evaluation, etc. There is always a chance that his story is bogus or incomplete and that there is no recourse, even if he has the documentation, because he didn't meet the deadline. But I wanted to give him a contact to call to see if this could be sorted out. He is a "friend of Bill W" since 1994 and denies using alcohol or any illegal drugs. Any suggestions?***

The employee should not be dealing with lab on this. The lab can't do anything about it. He needs to go back to the MRO. The rule allows him to provide new information to the MRO

within 60 days, and the MRO could reconsider his case. This is found in 40.149(a)(3).

It says that the MRO can change a verified positive if:

(i) You [the MRO] receive information that could not reasonably have been provided to you at the time of the decision demonstrating that there is a legitimate medical explanation for the presence of drug(s)/metabolite(s) in the employee's specimen;

It seems this might be the case. If the 60 days haven't passed, he can go back to the MRO and plead his case… that the prescription information wasn't available at the time. If the 60 days have passed, the MRO would have to notify ODAPC if he were to downgrade the test to negative.

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***22*** ***I am assessing a pilot who tested positive for marijuana on a pre-employment test. In the assessment he told me that he had been assessed in 1997 after getting a DUI, but he did not remember who conducted the assessment.***

***It rang a bell with me and I dug in my old files and learned that I had done the assessment. I found his file and reviewed it. I realized that he had a past treatment that he did not tell me about. This "new" information significantly influences what I will recommend for him.***

***I have talked to him about this. While he claims that he forgot about that "other" treatment, he is willing to cooperate with my more intensive recommendation. My approach with him was to say that there is more to this than initially thought.***

***My question is whether it is OK for me to refer back to my old records?***

You are absolutely right in using whatever information you have. (This is one case where it's probably good that you didn't destroy your records.)

It would be hard for you to ignore those past records. Especially since he appears to be more than a little forgetful. I can't imagine he didn't remember you. I can't understand how he could forget that he went through treatment. He's either lying or he has serious memory lapse. (He might even smoke more pot than he tells you about!) Remember…this is about public safety. Ignoring all this information could have a disastrous result.

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***23*** ***If a SAP diagnoses alcoholism for a driver under FMCSA regulations, and the company does not know about the diagnosis, is the SAP permitted and/or obligated to inform the company of the diagnosis so that a DOT medical examiner can conduct a medical exam for medical re-qualification of the driver?***

First of all, the regulation for medical disqualification for a diagnosis of "alcoholism" applies only to FMCSA. Secondly, does he drive a school bus or work for a municipality or other governmental agency? If he does, keep in mind that school buses and municipalities are exempt from this part of the law, because they are exempted from medical exams and medical disqualifications.

If this is a private employer, you should ask the DER who their "DOT medical examiner" is. Then I suggest that you call that individual, and explain that you have diagnosed "alcoholism" on this driver, and that he has completed treatment. Explain that he now needs to be cleared by a DOT medical examiner in order for him to be medically re-qualified to return to work.

It would probably be easiest for you to do this. The employer then wouldn't even be aware of it, although there would be nothing preventing you from telling the DER. And remember, you don't need a release to do so.

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***24*** ***Does a SAP (or even EAP) have any liability in the following situation? A client is identified by the employer as a DOT employee. We conduct an evaluation without a release of information, per 40.355(a). Later we learn that the client was actually not a DOT employee, and that this should have been conducted as a non-DOT case? (I am surprised by how many employers and clients do not seem to know who is and who is not a DOT-covered employee.) We understand that we can't use a release with a DOT employee, but this is a case where the employer gave us wrong information.***

This is not the first time I have heard this. I often hear from a SAP who wonders whether a referral is really a DOT case.

It is important to keep in mind that it is the Custody-Control Form (CCF) that is the final determiner of whether a case is DOT or non-DOT. For that reason, I encourage SAPs to request from the DER, a copy of the CCF. It can be faxed, and it can be scanned and e-mailed. If that CCF is a federal form, with a box checked to indicate the transportation mode, it is a DOT case. If it is a non-DOT form, with no reference to a DOT mode, the case is non-DOT. As a SAP, you have no authority to deviate from what is required from that form…even if you are **convinced** differently. The form dictates the process. If the form is a federal form, you cannot use a release of information. If the form is a non-federal form, you must use a release, and you will not follow the DOT SAP return-to-duty process. No SAP reports, and no follow-up testing plan.

Ultimately you must do what the employer is asking you to do, based on the information that the employer gives you or gives to the employee that you are evaluating. In the final analysis, if you conduct a DOT evaluation on an employee that isn't actually covered under DOT regulations, I believe liability will fall to the employer for making wrong decisions or for providing you with inaccurate or wrong information. To be absolutely certain, request a copy of the CCF.

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***25*** ***I have a DOT client who was assessed by someone who was not a qualified SAP. Because we are***

***his EAP, the treatment center contacted our office regarding his benefits. As his EAP we monitored his treatment, because we follow all substance abuse referrals regardless of whether they are subject to DOT rules and regulations, self referral, etc.***

***At the end of approximately 8 weeks the client had completed his treatment and was ready to return to work. His Human Resources Department suddenly realized that he was a DOT employee and should have been evaluated by a SAP. The client contacted me and explained that he was a DOT-covered employee. I set up an appointment to see him. Had I conducted his evaluation 8 weeks ago, I probably would have recommended the same treatment he had just completed. The problem is that the client lives about 2 hours away from me. Can I do both his initial and final evaluation on the same day? For instance, could I meet with him in the morning for his initial evaluation and then again in the afternoon for his follow-up evaluation? As I stated earlier I was getting updates from the treatment center the whole time because that is what we do anyway. The client successfully completed treatment and I have the documentation.***

It would not be OK for you to manipulate dates and process. It's unfortunate that the employee lives two hours away. But that's not your problem.

Your records need to show that you conducted an assessment, you made a referral and that employee complied with your recommendation. And you really can't backdate your records.

I suggest that you conduct a complete assessment, including required assessment instruments. You may find that his treatment was effective, and he doesn't need more treatment. But because 40.293(b) requires a SAP to recommend education and/or treatment, you must make a recommendation. You would be meeting the regulation by recommending an education program. Even if only for two hours. And after the employee has met that requirement, you would conduct the follow-up evaluation, and submit a report of compliance. Your records would then show that you provided SAP services exactly as required by the regulation.

(It would also be appropriate, with proper authorization from the employee, for you to talk to his treatment provider, and to obtain paperwork from that provider, to be sure that he actually cooperated and was successful in treatment, just for your own SAP records.)

Here's another option: DOT's definition of "treatment" includes "aftercare." (40.293[d]). In your conversation with the treatment provider, ask the provider if they have a recommendation for aftercare. If their recommendation sounds appropriate, you could recommend aftercare. The treatment provider might even offer aftercare, and you could refer into their own aftercare program. Once he starts aftercare, you could conduct a follow-up evaluation and send a report of compliance to his employer.

It's truly unfortunate that this employee was given bad information by his employer. I suggest that you have a conversation with the DER, and point out the enormous inconvenience that they created for this employee. He is a victim of his employer's sloppy handling of the regulation. 40.287 requires that the employer must provide names, addresses and phone numbers of SAPs. The employer can provide this list through a "service agent", which would be the EAP. But even when going through an EAP, the employer must clearly identify that an employee is covered under DOT regulations and requires a SAP evaluation.

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### 26 *I would like to avoid having an employee test positive on his return-to-duty test and ending up with another violation. His employer's policy is that he will be terminated if his return-to-duty test is positive. I called the MRO, to get the quantitation on his positive marijuana test, because I would like to have a better idea of when to schedule his follow-up evaluation. The MRO told me that he doesn't have the quantitations for this test, and that the lab charges him for this request. Also, he has a policy to not release any lab results information, even to a SAP, without the employee's written authorization. He says that he charges $35 for this information. Is this allowed? Must I send a release and a check for $35?*

This is ridiculous.

40.97(e)(1): "You [the laboratory] must provide quantitative values for confirmed positive drug test results to the MRO when the MRO requests you to do so in writing."

40.293(g) "In the course of gathering information for purposes of your evaluation in the case of a drug-related violation, you [SAP] may consult with the MRO. As the MRO, you are required to cooperate with the SAP and provide available information the SAP requests. It is not necessary to obtain the consent of the employee to provide this information."

Notice the words "must" and "required". There is no reason that the MRO cannot provide you with the information you are requesting.

I have an e-mail that was sent to me by Bob Ashby, ODAPC. In it he states that an MRO who "stonewalls" a SAP in obtaining this information is in violation. And he goes on to state that if the MRO remains "recalcitrant", it would be grounds for issuing a PIE.

Let me know if you would like me to forward that e-mail to you. It should bring immediate results.

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### 27 *I am working with an employee who is not complying with my SAP recommendations. I would like to report his non-compliance to the company in a way that makes it clear that I have reached the 'end of my rope' with this employee, i.e. irrevocable noncompliance. What section of the regulations addresses this in a way to guide the SAP in writing that letter to the DER? I can't seem to find it, and I need to refer to it. Also, are there any sections in the regulations that comment on the company's obligations once they have received such a letter?*

By “irrevocable non-compliance” it sounds like you are trying to say that you are done with this individual, and he will never be able to get into compliance. If a SAP were to say that, the SAP would actually be preventing this employee from ever returning to work in the transportation industry. However, that's simply not possible. A SAP can’t really make that determination.

I can appreciate that you are frustrated with this employee. But, under this regulation, there is no way that a SAP can say that someone is in "irrevocable noncompliance." That employee might be non-compliant now. But if he/she decided in the next few months (or even years) to follow through with your recommendation, the employee has every right to do so. And you would then have to determine if the employee was in compliance, or not. If the employee eventually did successfully comply with your recommendation, you would write another Follow-up Evaluation Report, mark it "Revised", and the employee then would be able to return to safety-sensitive functions in the transportation industry. The regulation places no time limits on this process.

40.295 says that this employee cannot seek another opinion from a second SAP. Therefore, the employee is tied into the original SAP. He can't start over with a different SAP.

If this employee were to go to a new SAP and start over, the employer's file would have two SAP reports for the same violation. 40.295(b) says that if an employee has obtained a second SAP evaluation, "as an employer you may not rely on it for any purpose."

At some point in the future, when this individual decides he wants to get into compliance so he can go back to a transportation job, he would have to contact you, the original SAP. You could then, depending on how much time has lapsed, ask the individual to come in for a review to determine if your original recommendation is still valid. You might decide to change the original recommendation. (40.297 says no one can change the original recommendation, except the original SAP, based on "new or additional information".) So only you, the original SAP, could change the recommendation. If you changed the recommendation, you would complete a second Initial Evaluation Report, mark it “revised”, with a new date, and send it to the employer the individual was working for when he had the violation. (This is the employer that will be getting inquiries from future prospective employers when that individual applies for another job.)

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### 28 *We are an EAP. We refer employees to a large network of SAPs. Once the SAP has made a recommendation, is it OK for one of our EAP staff (they’ve all been trained as SAPs) to monitor the employee’s the treatment? We would then contact the original SAP when it is time to conduct the follow-up evaluation.*

40.301(b) says that the SAP who will be conducting the follow-up evaluation must be the SAP that monitors the employee’s treatment plan. Monitoring treatment and conducting the follow-up evaluation go hand-in-hand. These functions should not be carried out by two different parties, even if both of them are trained as SAPs. If there are concerns in treatment, the original SAP is the only one who can change treatment recommendations, etc. (40.297) Also, information learned by a SAP during the treatment phase is important in that SAP's decisions related to aftercare and follow-up testing determinations. The original SAP must always be on top of the situation. When an EAP assumes the role of monitoring, the original SAP is left out of the loop.

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### 29 *I sent a report of compliance to an employer. The employer called this morning and asked me to redo the report, removing his company’s name. Can I do this? Part of the issue is that this is a family-run trucking business, and while two brothers want nothing further to do with the employee, one brother paid for his SAP evaluation and treatment. The employer went on to mention that though he did not re-employ the employee, he did help him find another job as a truck driver. Since this new employer will get a copy of the evaluation, can we remove the name of the employer?*

You have no authority to do that. 40.311 requires that the SAP reports (initial and follow-up) must carry the name and address of the employer that the driver was working for when he received the violation. The same information is on MRO records and the laboratory records. In the event of an audit, those items must match up. This employer could be in trouble if a different name appeared on here.

This employee was not working for the new employer at the time of the violation. The new employer’s name cannot be on the report.

You must tell the previous employer that the format of the report is required by federal law, and it can’t be changed.

A new employer must now request this information, including the SAP reports, from the old employer, and the old employer must send it. (I am wondering if they found a new job for him without saying he had a positive drug test. And now he is embarrassed, and wants you to fix it. Well, you can’t.)

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### 30 *A driver passed out while he was visiting a client company. (He wasn’t driving). He had a couple of seizures in the ambulance on the way to the hospital. They did a BA, and he then was admitted to the hospital’s detox unit. He was in detox for 9 days. The employer wanted him to come into our EAP office for a SAP evaluation, but someone at the hospital wanted him to go to another treatment place. The hospital contacted the driver’s parents, but there was no contact with the DER. Apparently the driver has a history of drinking. The question is: Is this a SAP, because it occurred at work?. We doubt that the hospital has a SAP on staff. So how should we proceed?*

Based on the information that you gave me, this is not a DOT violation, and does not require a SAP. Let me explain.

Alcohol violations are only around safety-sensitive functions, (just before, during or just after). He wasn't driving. But you say that he was "visiting a client company." What was he doing there? Safety-sensitive functions are: waiting to be dispatched, driving a 26,000 pound truck, loading, unloading, supervising loading or unloading, being in or on a 26,001 or more pound truck, repairing or conditioning a Commercial Motor Vehicle. Something tells me that if he was "at a company" it's not likely that he was doing any of these safety-sensitive functions. This means he couldn't have been tested under FMCSA's rule, 49 CFR Part 382.

There also appears to be no other reason for him to have been tested under 49 CFR Part 382. This was not post-accident. (Accident involves the 26,000 pound truck, on a public road, with either a death or a ticket for a moving violation.)

This was not reasonable suspicion. DOT's reasonable suspicion testing must be observed by a trained supervisor, and is based on appearance, behavior, speech and body odor. No supervisor or company official would have observed him, since he was visiting another company. Only a trained supervisor or company official can require a reasonable suspicion test. A test conducted by a hospital is not a DOT reasonable suspicion test conducted under 382.

You say the hospital conducted a "BA test". I'm not sure what BA means...was this a breath alcohol test, or a blood alcohol test? Actually, this doesn't make any difference at this point, but in the future, be sure to clarify this, because DOT doesn't accept blood results for alcohol unless—under FRA—there was an accident and a blood test was conducted in the hospital because no other test could be conducted. But when an alcohol test is required, it must be conducted within 8 hours of the accident.

So, in my opinion, this is not a SAP. It falls back on the employer, based on the employer's policy for non-DOT situations. It has no basis in the FMCSA rules in 49 CFR Part 382. The employer's policy might provide for an EAP referral and assessment.

Keep in mind that not everything that happens "at work" or "on work time" falls under DOT regulations.

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***31*** ***A couple years ago, I conducted a SAP evaluation for an airline mechanic who tested positive for drugs. He completed his treatment program. I recommended he return to safety sensitive duties, continue in 1 year of outpatient aftercare at the treatment program and the random testing for both alcohol and drugs schedule over 60 months. I set up a testing schedule (12 random tests over 60 months).***

***Last week, I received a telephone call from the DER, stating that they were being audited by the FAA, this case was being reviewed and she wanted to clarify that I recommended both alcohol and drug testing, as stated in my Follow-Up Evaluation report.***

***Apparently they conducted follow-up drug tests, but they did not do any follow-up alcohol testing.***

***She also asked that I fax a copy of the initial evaluation (as she misplaced it). I faxed another copy and left a message clarifying that both alcohol and drug testing were recommended, in the event the employee crossed his addiction to alcohol.***

***Yesterday I received a fax from her asking me to send a letter, confirming that my recommendations for testing were still valid. I telephoned her stating that it would not be necessary. Isn't my Follow-Up Evaluation report sufficient? She has that and I didn't amend anything. I also referenced the DOT regulations (40.307[c]) where she could verify that a SAP can require follow-up testing for both drugs and alcohol. She later elaborated that my sending a letter would constitute a yearly confirmation of the follow-up testing plan. (I think she wants me to cover for her, which I won't do.)***

***Today, she left me a very nasty message saying that the FAA auditor suggested that "a good SAP doesn't project follow-up tests so far in advance and that the employee should be re-evaluated yearly because the employee's "situation may change"."***

***She accused me of not being a good SAP. I believe I did everything "by the book."***

***If this employer wants a yearly update, then maybe they should send the employee for a re-evaluation. I can't change my recommendations without seeing or evaluating the client, especially, 2 years later.***

You have done everything correctly.

I doubt that an FAA auditor told the DER that "good" SAPs don't project follow-up testing for 5 years and that a SAP should evaluate an employee annually. If that was the case, why would DOT have written that 5 year option into the law? I actually believe that FAA would have appreciated your recommendations.

Follow-up testing is a deterrent. It is what I call a SAP's "regulatory insurance policy." The regulations allow for 5 years of follow-up testing, and it's no longer unusual for a SAP to set up testing for the full five years.

The fact that you required follow-up tests for both drug and alcohol is perfectly solid practice, specifically for the reason you pointed out.

Point of clarification: What did you mean when you said you required 12 random tests over 60 months?, I hope you didn't mean only 12 tests in 60 months. Did you? If you did, you need to fix that. The first year must be at least 6, and subsequent years can be fewer. Be specific. ***Also***…these are not "random" tests. Yes, they are conducted randomly. But they are "follow-up" tests. This DER sounds confused already. I wouldn't want her to get random tests and follow-up tests confused in her mind.

You did very well. I was glad to hear that you didn't give in to the DER's requests. Stand your ground. If you were to back down, that DER will make those same requests of you

in the future, or of other SAPs. You have no obligation to cover up for a DER's mistake.

**SAPLIST NOTE:**

In the above case, it was very appropriate that the SAP did not respond to the DER's request to change the original follow-up testing plan by removing alcohol testing.

But here's a situation with a somewhat different twist:

I received a phone call from a SAP who works with a major airline. An airline employee had been on leave for six months, and was now returning. The airline's DER was asking the SAP to submit a revised follow-up testing plan, extending the employee's follow-up testing plan by six months. The SAP explained that the "break in service" provision of 40.307(e) did not require a SAP to submit new paperwork, and that this was an internal administrative matter that is left to the DER to figure out.

The DER told the SAP that an FAA auditor had "dinged" the airline a year ago for this very same situation, and the auditor said that the SAP should have submitted a revised plan.

I felt that when a rule is so clearly stated, an auditor should not make up his own rules, and then assign a penalty to an employer and blame the SAP. I took the issue to ODAPC.

ODAPC said the following: Auditors sometimes have their own quirky requirements. A DER whose company is regularly audited (some are audited quite often, major air carriers among them) will get to know what an auditor expects and requires.

In this case, the DER is not requesting a "content" change. Instead, this is an administrative paperwork matter. ODAPC said that a SAP should never accommodate a request to change the "content" of a follow-up testing plan. (As was the DER's request at the beginning of this question, to drop alcohol testing altogether because she forgot to require it.)

But ODAPC went on to say that they would have no objection to a SAP accommodating this request in order to help a DER meet the expectations of an auditor, as long as the request didn't involve a change to the plan's "content".

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***32*** ***Our EAP has a company whose employees are covered under Pipeline regulations (formerly Special Projects?). I set up a fairly rigorous follow-up testing plan for an employee. I was concerned about future accountability, because of clinical impressions and because I usually am rigorous. I included alcohol as part of the testing plan during that first year. I always include alcohol because, as a clinician, I know that illicit drug users are prone to crossing over to a legal drug and during the evaluation it's not unusual for me to find out about alcohol misuse.***

***The DER left the company. The new DER discovered that the follow-up testing schedule was never implemented. Ever. 14 months have passed! When they called me, I told them that I couldn't help them much and that the schedule was the schedule. I told them that they should start the schedule immediately, and document that they were acting in good faith from the time the error was discovered. I sent a letter confirming that conversation.***

***The employee suddenly realized that he was being tested after a l4-month lapse. To make things worse, the company informed the employee that he must have follow-up tests. He is not happy. They sent him to me to re-visit the testing schedule. I told him and the employer that I cannot and will not adjust the schedule at this time because I would be adjusting the schedule to assist them in their error…not for clinical reasons. I also discovered that, in fact, the employee has had only 5 drug tests since January of 2005 and no alcohol tests. So he has not even completed the mandatory minimum of tests anyway.***

***Now the DER is concerned about my requiring follow-up alcohol testing. She said that under pipeline rules, alcohol is not a part of the testing requirements. She is concerned about the logistics of random alcohol testing. I consulted the regulations and I don't see where she is finding that. I've never heard of a DOT mode that doesn't test for alcohol but I don't work with a lot of pipeline employers.***

***Here are my questions:***

***Was I wrong to include alcohol testing in this individual's testing schedule?***

***Is the DER correct in saying that alcohol isn't part of the testing program in pipeline contracts?***

***Am I justified in not changing my testing schedule? I realize that I have the discretion to adjust the schedule at a later time, but I have never been in the practice of doing that. I feel it minimizes the importance of the schedule. I hesitate to adjust a testing schedule on a case where there have been so many mistakes.***

***I do feel that the new DER is doing her best. She has had no training and very little organizational support for this very important part of her job. I think she will respect whatever answer I give her, but I would like to have my ducks in a row before I get back to her. What are your thoughts?***

First, RSPA (Research and Special Projects Administration) changed its name in March 2005 to PHMSA (Pipeline and Hazardous Materials Safety Administration). It is no longer RSPA.

You have good justification for not changing the testing schedule. It's their mistake, and they are responsible for it if it is discovered in an audit. One thing I suggest to SAPs, though, is that they may want to call a DER about six months into a program and ask how things are going with an employee's follow-up testing plan. It could be a wake-up call to that DER who has "forgotten" about the plan.

This DER is confused about alcohol testing under PHMSA. It is true that PHMSA employees are not subject to random alcohol testing. (The other mode that doesn't conduct random alcohol tests is USCG, Coast Guard). But these are follow-up tests. True, they are conducted randomly, but they are follow-up tests. The box that must be checked on the CCF is "follow-up" testing. That's an entirely different category of

testing. 49 CFR Part 199.255(d) is the reference for PHMSA follow-up alcohol testing. It definitely is permitted.

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### 33 *A manager of PHMSA-regulated employees is not doing "hands on" DOT work: Questions:*

***1. If he is not doing hands on safety sensitive work but he is physically going on site to manage safety-sensitive employees, is he DOT/PHMSA or non-DOT?***

***2. Does the company need two separate random pools—a DOT pool and non-DOT pool? Or should there be a third pool for pipeline employees who are onsite, but not doing "hands on" work?***

If the manager does not perform safety-sensitive functions, then he would not be subject to testing. Similarly, under FMCSA, a supervisor of drivers who never drives a truck is also not under this regulation.

If the employer wants to test this manager, the tests must be conducted as non-DOT tests. If the employer conducts non-DOT random tests, the employer must have a completely separate non-DOT random pool. Having him in the DOT random pool would "muddy" the DOT pool; he would throw off the random percentages.

And if that employer is doing non-DOT testing under independent authority, he would have to provide those non-DOT employees with a separate testing policy. And, if that state has drug testing laws, the employer's non-DOT testing program would have to comply with those laws. (Not all states have drug testing laws.)

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### 34 *An employer pays for SAP services. He fired an employee after I had conducted the initial evaluation and made treatment recommendations. I charge on a per case basis. The employer now says that he does not wish to pay for my SAP services. I will try to collect from the employee. But since he has no job, he probably won't be able to pay. Am I obligated to continue with the case, send reports, etc. if the employee refuses to pay?*

This happens a lot. I advise SAPs that when an employer pays for SAP services, the payment details should be spelled out in an agreement. The employer should either pay in advance or guarantee payment regardless of what happens to the employee. Unfortunately this is one of those times when the SAP is left holding the bag.

First, you've started the process. You've made a treatment recommendation. 40.297 says that the employee can't go to a different SAP. The employee needs to continue with you.

40.355(n) says that a service agent (a SAP is a service agent) "must not intentionally delay the transmission of drug or alcohol testing-related documents concerning actions you have performed, because of a payment dispute or other reasons." If you stop providing service in the middle of this process, the argument could be made that you are withholding documents.

One way around this in the future would be to have the employee pay you directly, and have the employer agree to reimburse the employee. Then, if the employee is terminated, the issue would be between the employer and that employee, but at least you would have your money.

This is one of the reasons that I encourage SAPs to require payment in advance, in cash or with a cashier's check, before the assessment process even begins. As long as the assessment has not begun, nothing prevents the employee from "shopping" for a different SAP.

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### 35 *I have a client who is in a 3-week drivers' training school for Class 7 and 8 trucks. The school insisted he do a drug test, which came back positive. Now the school is insisting that I send them everything, including the follow-up program even though he won't be there beyond the 3-week training period. He has a new employer lined up that he will drive for. That employer knows about the test. I will send my SAP reports to that new employer. The client is OK with me sending the whole package to the school also (I have a release). But my question is: Should I send the follow-up testing plan to the school, even with an ROI from the client?*

In this case, the school is the employer. (An employer is anyone who directs a driver to drive a truck. [See definition of "employer" in 40.3 and 382.107.] The school obviously is directing him to drive a truck.) So the school MUST get the SAP reports, and there should not be a ROI for you to send the reports to the school. The school was correct in "insisting" that he take a drug test. That was a pre-employment test which is required by DOT before he can test drive a truck on the highway. The school is also correct in "insisting" that they receive your SAP reports, including his follow-up testing plan. The school will probably conduct a few follow-up tests while he is still a student. Then they will pass the paperwork on to his new employer.

Anytime he looks for a job in the next three years, his prospective employer will have to contact the school (and any other employers) to obtain testing information, SAP reports and his follow-up testing plan.

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### 36 *I am providing SAP services for a large SAP network. A current client dropped out of treatment at an IOP and had several negative dilutes.*

***I sent a letter of non-compliance to the DER. Now the network's case manager is telling me I need to correct the letter by specifying what the client needs to do in order to become compliant and have a follow-up evaluation. I didn't conduct a follow-up evaluation because the client wouldn't return my phone calls after he dropped out of treatment. This does not make sense to me. Is this a reasonable request on the network's part?***

You don't have to correct anything. Your initial report stated clearly what he needs to do. Until he completes that, he is out-of-compliance. He knows what he needs to do. The

network also has a copy of your Initial Report, and they can read it for themselves. It says exactly what he must do. You could have a conversation with the client to make sure he understands that. (That is, **if** he returns your phone calls.)

The rule says nothing about a SAP writing up what someone needs to do to get into compliance. It's already been stated in the initial report. Why would you have to restate it? This may just be one of the network's own requirements. But if I were you, I wouldn't put any more in writing than the regulation requires.

This is not brain surgery. Tell the network that if the client hasn't completed your recommendation, there is no reason for you to conduct a follow-up evaluation. If the employer receives a report of non-compliance from you, the employer can take whatever action he wants to take. Since the SAP network is so involved with this, you might suggest that they call the employee and ask him to call you.

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### 37 *I set up a follow-up plan of 8 tests in 12 months. The employer called me and said that the driver had been back for about a month and then went on FMLA leave for a hip replacement. He is about to return to work. The DER received an anonymous call saying that the driver had been using drugs while he was on leave. The DER wants to test the driver, even though he is on FMLA leave. I told him that I didn't think he could do that, but I would check – hence the question to you. Does it change anything that the driver had been back to work and then went on FMLA leave? Also, does it extend the length of time (the 12 months) in which the employer can conduct the required 8 tests?*

Here are a couple answers to share with the employer. First, this testing program applies to the driver only when the employee is working for the employer. If he's not currently on the highway, and if he's not on-duty, then the federal regulation has no jurisdiction over the driver. Once he returns to work, the employer could order a follow-up test without having to explain anything…it's just a follow-up test. (That's the benefit of follow-up testing.) If it is positive, it's a violation, and he must complete another SAP return-to-duty process.

Next. 40.307(e) says that the SAP's follow-up testing plan would "follow the employee" to subsequent employers or through "breaks in service". His FMLA leave is a break in service. If he is out for 3 months, his follow-up testing plan should be extended by 3 months. If it was previously March to March, it would then be March to March to June, or 15 months.

One other concern. An employer should ignore anonymous or third-party calls like the one he received. Can you imagine what would happen if someone figured out all they had to do is make a phone call to an employer and the employee will be drug tested, humiliated, labeled, etc.? That's why DOT's definition of reasonable suspicion is "contemporaneous" (you SEE it now), and it is based only on four things: appearance (how does he look right now?), behavior (how is he acting right now?), speech (are his words slurred?), and body odor (do you smell alcohol?). That's it. An employer cannot conduct a reasonable suspicion test for possession, third-party reports, attendance problems, etc. It is important that you make certain the employer understands that. This is critical to training supervisors under this regulation. DOT reasonable suspicion and non-DOT reasonable suspicion have two completely different definitions.

(If you feel the employer understands this, there is no need to have this conversation. But I sensed from your email that the employer would have done this not as a follow-up test, but as a reasonable suspicion test.)

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### 38 *I am a DER. I find that many SAPs indicate on the follow-up testing plan that this information should not be given to the employee. However, 40.311(f) says this report should be given to the employee if the employee was terminated. Our MRO office who also deals with SAP evaluations indicates we should be advising the driver of the follow-up testing requirements.*

***Should I as a DER release the follow-up testing program to the employee (driver) so he is aware of at least the duration and total number of tests, and not the timeframe of testing?***

The MRO's office is wrong. In the first draft of Part 40, ODAPC had not addressed this issue. I suspect they hadn't thought about it. So it doesn't appear in the original rule, published in the Federal Register in December, 2000. But on September 1, 2001, ODAPC made a few changes. This was one of those changes. DOT published the changes, but they couldn't actually go back into the Federal Register and change the original version. They added (c) in 40.329, that the SAP should "redact" the follow-up testing plan from any reports that are given to the employee. But unfortunately it did not get similarly added to 40.311(f), though it should have been.

So, two things. 1) Don't give follow-up testing information of any sort to an employee. Not even telling him how long he'll be tested. 2) Call the MRO's office and explain this. If they gave you this information, there's a good chance that they are probably also telling other employers the same thing, and those employers could be fined in an audit when an auditor asks a simple question like "What do you tell your employees about their follow-up testing plan?"

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### 39 *I just evaluated a driver who failed a drug test. He said that the technician at the collection site couldn't get a reading for temperature of his specimen. She got "another device" which registered the temperature at below 90 degrees. She told him he needed to provide another specimen. He agreed, but said he'd need to drink some water and wait a few minutes. He also told her he needed to tell his ride that he'd be longer. (Apparently his employer transports drivers to the collection site.) When*

***he returned he was told the test would be reported as a failed test because he left the facility.***

***He told me he hasn't had a positive test in 7 years. Since there was no drug test done on the sample he provided, and they would not allow him to provide a sample after he returned, what type of education should he be sent for? In the interview he did say he smokes pot 4-5 times a year, so I guess I'll recommend a drug education program that specifically addresses cannabis use.***

First, this is not a "failed test". It's a refusal, because he left the collection site before the test was completed.

This story is very strange. Maybe even bogus. A temperature strip is attached to the outside of the collection cup. There is no "special device" for taking the temperature. The collector wouldn't have an extra thermometer sitting around for something like this. I have trouble believing this part of his story.

A collector would not have permitted him to leave the facility. I doubt this part of his story as well. The regulations don't allow him to disappear. Assuming the collector has been trained, it's unlikely that she allowed him to leave the facility to give instructions "to his ride". Actually, I doubt that his employer provided a ride for him to the collection site, unless this was a reasonable suspicion test. This part of the story is also weird. (You might want to call the DER and ask if this employee had been transported to the collection site…you can ask the DER anything you want. If he wants to know why you are asking, just say you are checking stories.)

It was not appropriate for the collector to call this a refusal. The collector can only report the facts to the employer. The employer determines whether it is a refusal. This is called an "employer-determined refusal". ("Employer Guidelines", p. 25).

The employee left the collection site, and no one knows where he went. That's very suspicious, and it needs to be treated as such. (Think about it: if someone had chauffeured him to the collection site, and a collection could take an hour or more, wouldn't the person who drove him have also accompanied him inside? Would you want to sit in the car outside for an hour or more, not sure what was going on or how long you would have to wait there? It just doesn't make sense.)

I think you should be careful with this one. He may in fact be "using", and he's cooked up this story to get you on his side. And he says he hasn't had a positive test in 7 years? It's possible. But I think I'd check with the DER about that too.

He smokes pot 4-5 times a year? As a DOT employee, he is not permitted to EVER use drugs. Does he understand that? And if he says 4-5 times a year, it's probably more than that. There is a good chance he is minimizing, and he's trying to say that it's "no big deal." And he hopes you agree.

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## 40 *I evaluated a driver from a municipality. He operates a snow plow and a garbage truck. He's all in a twit about having to go through this. He has complained to his boss because the referral I made is not covered by his insurance.*

***His boss is talking to the City's lawyer to see if he can just pass a test and come back to work. He told me that he failed a test 8 years ago and that time his employer never sent him to a SAP. He just needed to have another negative, and he went back to work. (This may or may not be the truth.) He's pissed that firemen don't have to comply with this rule.***

He can line up all the lawyers he can find, but he can't return to DOT safety-sensitive functions until he completes a SAP's recommendation, and the employer receives a report of compliance from the SAP.

A SAP also cannot be required to make recommendations only to providers that are covered by an employee's insurance. One of the overheads in a DOT training that I attended said this: A SAP's plan takes precedence over: 1) an employer's inadequate or non-existent health plan; 2) an employee's inability to self-pay for treatment and/or education; 3) managed care's refusal to authorize treatment.

He is correct that firemen are exempt from the rule. (382.103[d][3][ii]. But why should he be upset by that? It sounds like he is angry at himself, but he won't take responsibility for his own stupid behavior. He's desperate. You should never assume he is being truthful about the past.

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## 41 *Where do I send my reports for a driver who failed a pre-employment test, but chooses to go through the SAP process even though he was told that he would not be hired by that employer because of the positive test?*

Well, it's good that he "chose" to go through the SAP process, because it is required before he can work for <u>any</u> DOT employer. (40.25) It really not a matter of choice. More appropriately, though, he "chose" to be honest about it.

You should hold on to the reports. Tell him that when he takes a job, he must sign an authorization for you to send the reports to his new employer. His pre-employment test for his new employer will be his return-to-duty test. And the new employer is then responsible for carrying out the follow-up testing plan that you set up in the Follow-up Evaluation Report.

You couldn't give the reports directly to him. DOT doesn't want an employee to know his follow-up testing plan, because the details about that plan must be confidential. (40.329[c]) So he would have only a partial SAP report. You would eventually have to send his follow-up testing plan directly to his new employer, so you might as well send the whole packet to the employer at that time. This is one situation where it's easier if you, the SAP, hold these papers, and forward them to a future employer whenever he asks you to (and signs a release for you to do so). As I explained in Question #19, I suggest that you prepare a "To Whom It May Concern" letter, identifying you as the SAP, and which the

employee can show to a prospective employer, who can then contact you to obtain copies of your SAP reports and follow-up testing plan. (And you will have to send these reports to every job he applies for in the next 2 years). (40.25[j])

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### 42 *Is a driver who drives a charter bus for a tour company covered under FTA or FMCSA?*

Charter buses are under FMCSA. They can travel on any highway, and they can go anywhere, all over the country.

FTA applies to transit systems. These are the buses, subways, trolley cars that operate on specified routes in a city, where people put tokens in a box, or use a pass. The transit bus goes on a schedule every day, but only in that particular municipality. Transit systems are subsidized by grants from the federal government.

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### 43 *A driver was notified of a random test. He states that he was on the road at the time of the call, about 300 miles from the designated lab, which he was told would close at 4:30 PM. He was leaving on vacation the following day. He didn't get to the lab by closing time, and he is now told by the employer that he has to be seen by a SAP because he has an assumed positive due to refusal to test.*

***If the above is true, is that a refused test?***

***The driver said he doesn't use illicit drugs, that he has not had a positive test in the 10 years or so of this program.***

Under this rule, the employer is the one who determines if an employee has a refusal. (A refusal is a violation in and of itself.) (382.211) See also, "Employer Guidelines", pp. 25-28.)

Also, under this rule, there is no "assumed positive.") A refusal is a refusal is a refusal. A refusal doesn't magically turn into a positive. That would be like saying "Your parking meter expired. So here is your speeding ticket". It doesn't make sense.

You really should talk to the DER. Ask: Was the driver really 300 miles from a collection site? (Note: It wasn't a lab; it was a "collection site") If he was 300 miles away, why did the employer inform him of his random selection at that time? The driver could be distorting the facts a bit, hoping you'll believe him. I suggest that you check out the story with the DER. You might find out that the driver is lying to you. If it really is as he says it is, then I'd ask the DER why they are calling it a refusal. Seems a bit unfair, but in the end, it's still the employer's call.

You might find out that they notified him in the morning before he left on his run. You might learn that they gave him the address of a collection site close to where he was, and he chose not to go there. The one thing that we must keep in mind is that we shouldn't assume the employee is telling the truth. When an employee is caught using drugs, and the employee's job is on the line, that employee is desperate. That employee will say anything, and will try to use every trick in the book. (And a few that aren't in the book). Don't fall for it.

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### 44 *An employer is wondering if his C/TPA should be informed of the SAP's follow-up test schedule, or should the employer simply direct the driver to be tested at the appropriate interval? Or, doesn't it matter as long as the schedule is adhered to?*

It is certainly possible for the C/TPA to "advise" the employer about follow-up testing. This is allowed by 40.355(g). But it is still the employer that would have to notify the employee of a required test. On that same page in Part 40, the next paragraph says that the C/TPA is able to make follow-up testing determinations only if the driver is an independent truck owner-operator. ITO or IOO. (Technically an owner-operator is both an employer and an employee. The owner-operator is "his own boss".)

You say "appropriate interval". It's not really about intervals. Explain to the employer that he can require a follow-up test whenever he wants to. *Example:* He could test the employee on the day before a 3-day holiday weekend, and then again on the employee's first day back after that weekend. 4 days apart. DOT would not object to such a schedule. *Example:* An employee is acting strangely, but it doesn't meet the definition of reasonable suspicion. The employer could order a follow-up test, without having to explain anything to the employee. As long as the employer doesn't try to conduct all the follow-up tests in the last month of the year because he "forgot".

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### 45 *An employee tested positive for marijuana. The employer "read him the riot act" but continued his employment. A CDL was not required for his job at that time. Later this year the employee was off work for a serious medical condition that resulted in hospitalization. He returned to work 6 weeks ago. The employer offered him an opportunity to move into a driver position. The employee now has his CDL. The pre-employment test was negative. When the employer contacted his C/TPA to have the employee added to the list of people for the random pool, he was advised that he is out of compliance because of the failed test in January.*

This is confusing. And this is only my opinion. If he wasn't required to have a CDL, why was he in the DOT pool? If the earlier test was a DOT test, it should be considered in the same manner that a pre-employment test was. The earlier test is in the records of the C/TPA, and it is a violation, just as a pre-employment test would be. True, the employee was not subject to DOT rules at the time, but there is nothing that can be done about it now. The employer could be fined for having had him in the DOT pool. But there is a positive result, it's in the file, and the employer can't ignore it. It should be handled as a positive.

The argument could not be made that he now has a negative test on his pre-employment. The other test is an employer's "actual knowledge", and it needs to be addressed. (The employer should never have conducted that test. But since he did conduct the test, and since the test result was positive, the employee must complete a SAP return-to-duty process.

***Does it matter if the employee was not in the random pool at the time? If the January test was at the employer's request, but not as a DOT test, does it matter?***

If it was not a DOT test, it wouldn't be on DOT forms, and it wouldn't be in the DOT system. Then it would not be a DOT violation.

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### 46 *A driver who had previously worked in Wisconsin moved to Michigan and failed a pre-employment drug test. The prospective employer provided him with names of SAPs. The driver, however, returned to Wisconsin and was rehired by his former employer, who apparently did not conduct another test, and did not inquire about whether the driver had failed any tests since leaving. He resumed driving for the Wisconsin employer, but then decided to return to Michigan. When he applied for another job, the driver admitted to the failed test, but said that he never went to a SAP. The second Michigan employer informed him of the requirement to go through the SAP process and agreed to hire the driver once he had complied with that part of the regulation. Who do I send the report to? The first prospective Michigan employer? Or just the current prospective employer?*

You should not send the reports to the prospective employer unless you get the driver's written authorization. Just because he applied there doesn't mean he wants his SAP reports sent there. The requirement about no releases applies only to employees and employers. He is not an employee…yet. He is only an applicant.

As an aside, you might want to inform the driver that he was a disqualified driver when he was driving in Wisconsin. He knew he had a positive pre-employment test. FMCSA holds employers AND drivers equally responsible under the law. He shouldn't think he "got away with it" just because the Wisconsin employer didn't ask. He should have volunteered that information to the Wisconsin employer. He shouldn't have even applied for another job until he had completed a SAP return-to-duty process.

There's not a lot of chance that DOT would find out, but it is possible, and he could face fines. He had a responsibility to admit to that positive pre-employment test in Michigan. This is a federal law, and it has nothing to do with state borders.

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### 47 *A client went through the SAP process last year. He tested positive again and he is scheduled to return for another SAP evaluation tomorrow. He has been under a fairly stringent follow-up testing schedule, which I assume will be suspended for now, while he is being evaluated and possibly in treatment again for this new violation.*

Yes, his follow-up testing plan will be suspended while he is not working. After he completes the SAP's treatment recommendation, he will be subject to the SAP's new follow-up testing plan. The new plan will replace the old plan.

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### 48 *I am a DER. My question is this: I am looking for a DOT-certified SAP. I found a SAP on SAPlist, and I called him. He said he is "DOT-qualified, but not DOT-certified". What is the difference? Can I use him?*

He absolutely does know what he is talking about. There is no such thing as a "DOT-certified SAP."

DOT wrote the following sentence in the SAP Guidelines: "DOT does not certify, license, or approve individual SAPs."

A SAP must have the appropriate credential, he/she must have completed a SAP training, and he/she must have "satisfactorily completed" a SAP exam. But DOT says that a SAP who says that they are "certified" is making a false statement. You can read it in 40.365(b)(10). DOT says they would consider issuing a PIE to a service agent (SAP, in this case) who makes that claim.

Unfortunately, many SAPs don't understand this.

When a SAP says that he is DOT-certified, I can only wonder if that SAP understands the regulation.

So, yes, definitely select that SAP. He DOES know the regulation. Be careful of the ones who say they are "certified".

And in the future, if a SAP tells you that he/she is DOT-certified, send them to 49.365(b)(10), and suggest that they not use that terminology. It's misleading.

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### 49 *We are an EAP. We have two SAPs on staff. One SAP has missed the deadline for meeting the required 12 hours of continuing education in the 3 years after his SAP exam date. He has several clients who are in the middle of their treatment recommendation. Can he conduct the follow-up evaluations even though he is no longer qualified, or should those follow-up evaluations be conducted by our other SAP, who technically is still qualified?*

The SAP Guidelines, p. 17, Question 10: Can an employee receive the follow-up evaluation from a SAP who did not conduct the initial evaluation?

DOT recognizes that it may not always be possible for the same SAP to be involved with the process, beginning to end. There are times when exceptions must be made. While "being no longer qualified" is not listed as one of the reasons in Question 10, my opinion is that it would be acceptable for the process to be completed by a qualified SAP. It seems better to transfer the case to a second SAP rather than to expect DOT

to look kindly on services provided by a SAP who has not met their continuing education requirement.

So if the original SAP has to drop out because he/she hasn't met the continuing education requirement, the next SAP, who must eventually do a face-to-face follow-up evaluation, should also take over the monitoring of the employee's treatment plan. That would also be the most appropriate way for that SAP to become familiar with the case, which is critical to doing the follow-up evaluation. It also complies with DOT's regulation, 40.301(b), that the SAP conducting the follow-up evaluation is also the SAP who "must" monitor the employee's progress in treatment.

I urge SAPs to address this requirement in Year 2 of a 3-year period, rather than waiting until the last minute, and then scrambling. If a classroom training is nearby and convenient, and if it fits on your calendar, take it. There is no penalty for meeting this requirement ahead of schedule. The 3-year timeframe and dates don't change.

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***50*** ***A driver works part-time for two bus companies. Bus Company A removed the driver because of a positive drug test. The driver chose not to go to a SAP. But the driver continues to work for Company B. Is it correct that Company A has no responsibility to inform Company B about the driver's failed test?***

***However, what if the driver starts the SAP process, and after the initial interview says, "No, I don't want to go through with this, I am quitting Company A and I will just work at Company B." In this case, does the SAP have a "duty to warn?" Can the SAP or the agency be sued because the SAP failed to warn if the driver injures or kills someone while driving for Company B? Has this been tested in the courts? My staff feels strongly that "duty to warn" prevails—or at least it should!***

There is nothing you can do about it. You would report the employee's non-compliance only to Company A. You must then let it go. 40.351(c) clearly states that a service agent (a SAP is a service agent) may not inform other parties of a test result without having a specific consent from the employee.

Duty to warn applies only when there is a named individual. The driver has not named someone that he is going to harm. So he is protected. In the event of a serious accident, DOT would not hold you responsible. True, "should" might seem appropriate. But the regulations don't permit it. So don't.

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***51*** ***During an evaluation after testing positive, a driver admitted that he was also using old pain meds. I recommended outpatient treatment, and I asked him to get a sponsor and show proof of contact with his sponsor and/or any 12 step meetings, to review pain meds with his M.D., and if he was taking a controlled substance, to obtain written authorization from his M.D. to give to his employer. I sent a letter of compliance to his employer and closed his file. The DER told me this week that the employee is filing a grievance with his employer. He claims that he called our office to schedule his follow-up evaluation and was told it would be a 90-minute appointment, and that there was no 90-minute appointment available for a week. He waited a week, and says that I then saw him for only 45 minutes anyway. I believe he is trying to collect money for being out of work that extra week. I told the DER that I would fax him a Release of Information so we could discuss the case, as the SAP process has been completed. Can you give me some tips/coaching before I speak with the DER again? He wants to come and meet with me. My notes indicate that I spoke with the sponsor on 11/10 and saw the employee on 11/15. Like all DOT cases, this gentleman wanted to go back to work "yesterday". He also called me on 11/4 to tell me that he had completed his return-to-duty drug test. I told him that test didn't count as I had not yet conducted his follow-up evaluation. I also called his supervisor to tell him that that the return-to-duty test on 11/4 didn't count.***

You are portraying this situation as being very complicated. However, it's not.

First, you don't need a release to talk to the DER. You can simply move ahead and do whatever you want to do. Talk to the DER without a release. (40.355[a]) Also, explain to the DER that he (the DER) does not need a release to talk with you. (40.27). Closing the case does not affect confidentiality and releases. A SAP keeps records for five years, and you could talk to the DER about this case any time in that five-year period without a release. (See the HIPAA statement, on the last page of this document.

Nothing in the regulations requires this process to move quickly. Remind the DER that this is an employee who broke a federal law by using drugs, and in doing so he put his employer at serious risk. The employee may argue that he shouldn't have been delayed by a week, but I doubt he'll get very far with the argument. He's the one who tested positive for drugs and he caused himself to be away from work for longer than just that one week.

Regarding the return-to-duty test that he took early, direct the DER to 40.305(a). It says that the return-to-duty test cannot occur until AFTER the DER has received your compliance report. Since you had that meeting on November 15, the return-to-duty must occur after November 15. That return-to-duty test doesn't count. Ignore it. The employer will have to arrange for another return-to-duty test. (I suggest that you don't talk with the supervisor about this. Most supervisors don't know much about this rule, and they usually do what they think is "logical".) I suggest that you talk only to the DER. If the DER decides to talk to the supervisor, the DER can do that.

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***52*** ***My SAP client has been in an outpatient program for the last 6 months. He has been removed from safety-sensitive duties, but he has been kept on the payroll doing odd jobs. He has recently tested positive for meth at his treatment program. He told his immediate supervisor that he tested positive in treatment, and that***

***his treatment program has been extended. He did not inform me or the DER about this. Some days later, the outpatient counselor called me to tell me that they were extending his program due to the positive test for meth. About the same time, the employee's immediate supervisor and department head called the DER. They are up in arms over his treatment program test. The DER called me.***

***I told the DER that the employee should talk only to the DER, and not to his supervisor. I was concerned that the information about his treatment program should not be bandied about the workplace. Also, even though the client is in treatment, we shouldn't assume that he is not "using". He is not to be returned to safety-sensitive duties until I send a follow-up evaluation stating that he has satisfactorily complied with my treatment recommendation. Therefore, if they assign him to odd jobs, they should know that he may not be clean yet.***

***Now the department director wants to fire the employee because he tested positive in treatment! Help!***

#1, Yes, but it's actually too late. The employee should not talk to anyone but you, the SAP. Not even to the DER. You are the SAP, and you are in charge of this process. (It's important to explain this to the employee at the very start of this process.)

#2, it's also too late, the treatment program must talk to you if they decide to make any changes to the treatment program. You are the SAP, it is your program and you are the only one who can change it. The treatment program cannot change it without checking with you first, and they cannot change it unless you agree with it. IF you agree with it, you would revise your recommendation, mark it REVISED and send it to the DER. In an audit, the treatment plan in your follow-up evaluation must match the treatment program that you recommended in your Initial SAP Report. If those two reports don't match, an auditor can ask "Who changed it, and why?"

Under this regulation, what happens in an employee's treatment program is between the treatment program and the SAP. Almost every time an employer gets involved, it gets messy. Most employers don't understand treatment, and they panic when a treatment program test is "positive".

The ugly cases are those where an employer takes action based on a treatment program test. That test is meaningless. It is not a DOT test, and an employer should not have access to treatment program test results. Often, when the employer finds out about a positive treatment program test, the employee is terminated. It shouldn't happen this way, and it is wrong wrong wrong.

As the SAP in this case, you should have been the first one to find out about this treatment program test, and you should have talked with the employee about it. In the future you must impress on the treatment program that they should communicate only with you. Historically treatment programs have been intimately involved with the employer. Explain to the treatment provider that a DOT case is different. Tell them that if they communicate with the employer instead of with you, the employer could panic, and it could cost the employee his job. In the case that you e-mailed me about, that still could happen.

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### 53 *An employee had a positive test for morphine. He denies having used drugs. He states that he went to a doctor for an evaluation and they discussed that he ate poppy seed cake before his test. He is a Polish man and doesn't speak English very well. I do believe his story. I plan to call the MRO to discuss the test result. If this is the case, would he still need to go to education? Can I consider this a false positive? I have read that poppy seeds can yield a positive test for morphine.*

Years ago the level for a positive test for opiates was 300 ng/ml, and yes, there was a small window of a few hours after consuming a large quantity of poppy seeds that it could have been possible for someone to have a questionable test result.

However, 7 or 8 years ago, Department of Health and Human Services raised that level from 300 to 2,000, which eliminates that possibility. 40.139[b] states that an MRO must ignore this explanation; there is no basis for it.

In the case of an opiate positive, the MRO must arrange for the employee to be seen by a doctor. (The burden of proof for opiates is on the MRO.) (Read all of 40.139).

Please know these things before you call the MRO, because the MRO could make you feel a little silly.

Remember this: First, you have no authority to change the test result. Only the MRO can do that. And in all cases, if it didn't get past the MRO, you have no choice but to handle it as a positive. Second, there are no exceptions to the rule. EVERY violation MUST have treatment and/or education. At the very least, you MUST recommend education.

I'd be very careful with this one. My cynical side is showing. He may be Polish and not able to speak English very well. But he may also be a drug user, playing on that. Why did he not take this up with the MRO? And if you speak to the MRO, you may learn that he did, and the MRO told him it's just not possible. Now he's trying it out on you.

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### 54 *I was contacted by an EAP-SAP combo. They claim to work with trucking companies all over the U.S. They pay a SAP to do the Initial Evaluation and the follow-up evaluation. Meanwhile, THEY follow up with the treatment provider and THEY monitor the treatment plan— THEY are actually doing much of the SAP's work. Is this OK?*

There's a strategy to this: if they perform the monitoring function, they can justify paying you a lower fee.

There isn't anything that says that the monitoring function can't be delegated. But I caution SAPs about this arrangement, because you have no idea what this group's standards are. You don't know (and may never find out) what

they are learning about the client in treatment, and worse yet, you will never know what they are not telling you.

40.301(b) states that the SAP who will be conducting the follow-up evaluation must be the one to obtain information during treatment. Monitoring an employee's treatment program is the SAP's responsibility. In my conversations with Bob Ashby in DOT's ODAPC office, Bob points to that regulation and says "It is the SAP who must obtain this information."

My concerns are these:
1) What questions do they actually ask the treatment provider?
2) What questions might you ask the treatment provider that they would never think of asking?
3) What do they do if they find out that the treatment plan is not appropriate and might have to be changed?

They might just ignore what they hear from the treatment provider, because they made a commitment to the employer (that you don't even know about) to get this employee back in two weeks. But they are learning information that is crucial to you, the SAP. You are the only one who could change the treatment program. This EAP-SAP combo group can't change your program, and they shouldn't.

Please read all of page 9 of the SAP Guidelines.

So how do you handle this situation? You could say, "Here is how I read the regulations. Here is how I do business. I won't negotiate. And I won't let someone else assume the responsibility for monitoring the employee's treatment. The SAP is responsible for monitoring the employee's progress in treatment. I sign the SAP report. I will do my own monitoring."

And if that's not OK for them, let them try to find another SAP. It's not worth trying to adjust to someone else's model, especially when it is so blatantly in conflict with the law, and especially when it puts you in a difficult position. In the end, you are the SAP.

This is not an unusual situation. But if you agree to allow this group to monitor the treatment of your cases, you should understand that you are entrusting a significant function to a third party. That third party may argue that you can trust them. But keep in mind that DOT sees a SAP's primary client to be the traveling public. In contrast, an EAP or a SAP broker is concerned primarily with keeping a contract, getting an employee back to work quickly, and pleasing their employer client. These two things are in conflict.

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### 55 *An employee doesn't agree with my recommendation, and he wants a copy my file. (He wants to have someone else look it over). Must I give him my chart notes? I do know that I am the only one that can change the recommendation.*

See 40.329(c)

Do not give him your notes. This regulation requires you only to give him a copy of your SAP reports. But be sure to remove the follow-up testing plan before you give him the Follow-up Evaluation.

From the MRO he can obtain a copy of his test results. From the laboratory he can request a "litigation package". From the SAP he can obtain copies of the SAP reports.

Does he think that "someone else" could change it? Show him 40.297, which says that no one else can change a SAP's recommendation. And show him 40.329(c) which says you can give him a copy of his report. Explain there is no reason for him to involve someone else. You have full authority.

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### 56 *A PHMSA employer is asking me to conduct a SAP evaluation on an employee who reported to him that he has a drinking problem, and gets "pretty plastered" on Saturday nights. The employer doesn't have a self-identification policy in his statement. So is this a SAP case? How do I handle this request?*

The only transportation mode that allows a self-identification policy is FMCSA. None of the other modes, including PHMSA, have that provision. So, this is really not a SAP case. When a PHMSA employee tells his employer that he has started drinking again, it isn't a PHMSA violation, unless he is caught drinking at work.

At the most, this PHMSA employer could ask you to conduct a plain vanilla chemical use evaluation. None of PHMSA's alcohol prohibitions fit this situation. It sounds like the employee admits to "drinking on my own time, at home, when I am not on duty". If he is drinking, at home, on his own time, he is not a DOT threat to public safety. If he is sober when he is at work, he's also not a problem for DOT or the employer. On the other hand, if he isn't sober at work, he should be tested under reasonable suspicion.

There is no violation of PHMSA regulations here. The employer should not require a SAP process, and there couldn't be follow-up testing related to a DOT violation.

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### 57 *In 40.329(c) I understand that an employee has a right to copies of my SAP reports. In the technical amendments to Part 40 (August 1st, 2001) it says....."we do not believe that an employee returning to duty following a rule violation should have access to the follow-up testing plan, which could lessen the deterrent effect of follow-up tests". I understand this, and it makes good sense. I assume however that if an employee wants to know or see my report, I can at least tell him how many tests I'm requiring, just not how many years—correct?*

Anything you tell him about his follow-up testing plan is more than DOT wants him to know. If you tell him he will have 20 follow-up tests, and he keeps track of his tests until he has had test #20, he knows that he could then start using again, with less chance of being caught. DOT would rather

have him spend the next five years wondering if and when someone is going to tell him to be tested. That's the deterrent.

Telling him how many tests he must take is giving away a big part of the secret. Don't do it. That's why DOT says a SAP must redact (remove) that testing plan from any paperwork you give it to the employee. Some SAPs have tried to get around this part of the regulation by simply "showing" it to the employee and putting it back in their file. That's ignoring the intent of this regulation.

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### 58 *A driver complied and participated in my recommendation for treatment. I also required him to have negative results on two non-DOT tests (which he did not take) and I referred him to a Mental Health Counselor (which he did not follow-through with). His employer kept him in a non-safety sensitive position until recently, when he was terminated. In subsequent calls that I made to him he told me he was working in a non-safety-sensitive position, but he is still "interested" in completing the SAP process. I have not done a follow-up evaluation with him, nor have I sent a notice of non-compliance to his previous employer. He has contacted me and states that he wants to complete the SAP process and return to a DOT job. How should I proceed with this?*

Two things. First, you NEED to send a non-compliance report to his former employer, just to get it into his file for now. He hasn't completed your recommendation. He hasn't complied. It's a year later. Whether he is in safety-sensitive duty or not is not the issue. He has not complied.

Send that non-compliance report now. You can always change it later. But you want to be sure that he doesn't apply for a job with another DOT employer, and dream up some false story about having completed treatment, but the SAP report got lost, and he doesn't remember who the SAP is, yada yada. Report him as non-compliant. If this employer were audited, and auditors found a violation that is a year old that still has no report of compliance or non-compliance, they might raise questions.

Second, he can restart the process at any time. DOT has not set time limits. Even if he is out of compliance, he can decide to get into compliance at any time in the future, and since you are the SAP, and since he can't go to a different SAP, you have no choice but to work with him. The problem is, a year later you might decide that so much time has passed since his initial evaluation that you must conduct another evaluation or perhaps even start from the beginning. Professionally you know that things have possibly changed in that year, and you would want to know where he is with his drug use *today*.

Your next question will be whether you can charge him again for a new round of SAP fees. I don't know, and DOT doesn't care. That's up to you. But if he refuses to pay, you really can't refuse service, because he can't go to another SAP, and you can't withhold services.

First and foremost, send that non-compliance report now, just so the record is clear. Explain to him (and the DER) that you can't leave this case dangling, and that the report of non-compliance can be revised if and when he decides to get back into compliance.

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### 59 *This is a new one for me. A Canadian employer had a driver who got a DUI in his commercial vehicle while driving in North Dakota. Is there anything different I need to do with him?*

Yes, he is under this regulation when he operates his truck in the U.S. (382.103(a)(3)). But you should handle this case no differently.

He got a DUI in his Commercial Motor Vehicle. Driving a personal car at 0.08 is DUI. But when he is driving a Commercial Motor Vehicle, 0.04 is DUI. Since he was driving a CMV, he has a violation of 382.201, positive for alcohol. And this citation gives the employer "actual knowledge". (The definition of actual knowledge [382.107] includes "a traffic citation for driving his CMV while under the influence".) His employer will have to arrange for his follow-up testing to be conducted in Canada (there are collection sites in Canada, and also two DHHS-certified labs in Ontario and one lab in Alberta).

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### 60 *We are an EAP. A driver was sent for a random test. After the collection, he told his employer that he had taken a single Hydrocodone 4 days earlier while helping his sister move. (He said it was her prescription, not his.) The employer has a self-admission policy that meets the requirements of 382.121.*

***The driver disclosed this information AFTER he provided a specimen for his test. He was probably expecting a positive test result. However, the test result was negative. The employer returned him to safety-sensitive functions because of the negative result, but the employer is referring him to us, his EAP, for a SAP assessment.***

***Our question: Is this a DOT violation or not?***

<u>This is not an EAP case. This is a DOT violation.</u> It's a violation of 382.213(b), using a controlled substance without authorization. The fact that the test result was negative is irrelevant. (Actually, this medication had probably cleared his system in the 4 intervening days, so it should not be a surprise that the result was negative.)

By admitting to using a prescription that was not his own, he gave his employer "actual knowledge". His employer should have immediately removed him from safety-sensitive functions and charged him with a violation.

Under 382.121 a driver's admission of use must occur off-duty. It sounds like the driver was tested while he was on-duty, and then told his employer about the Hydrocodone. If he thought he had Hydrocodone in his system, he should not have reported for work. Reporting for work and then admitting to drug use while he is on-duty is a violation.

Explain to the DER that this is a violation.

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### 61 *Where does it say in the regulations that a SAP should use assessment tools?*

You'll find this in the SAP Guidelines, p. 5, second paragraph. "…and utilizing reliable alcohol and drug abuse assessment tools". Using an assessment tool provides a SAP with objective criteria for making determinations about an individual's treatment. DOT is silent about which tools to use. Decide which tools work best for you, and use them with every assessment. Auditors could ask you which tools you use, and they could even want assurance that you always use an assessment tool. Be ready for those questions.

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### 62 *A treatment provider is trying to bypass the SAP process. She sent a letter to the employer saying that the client has completed treatment and she even recommended her own follow-up testing plan for alcohol. She also recommended that the client has "issues" to continue working on and she will continue treatment sessions with him privately. She maintains that the client needs to get back to work. My thoughts are to pull the client out of treatment with this provider and refer him somewhere else. Please advise me if I should be considering other courses of action.*

You are correct. You need to pull the client. But you also need to have a conversation with the employer. Explain that the treatment provider has no authority to send the employee back to work, that the SAP is the "gatekeeper", and as such you are the only person who can make those determinations. Unfortunately, the employer could face serious fines if he takes the employee back just because the provider says he should or can. This regulation is about protecting public safety, and about making certain that the employee completes the treatment plan that you recommended. It isn't about getting the poor, inconvenienced employee back to work.

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### 63 *A CDL driver is in his truck on the clock. His supervisor confronted him about being under the influence. The driver agreed that he was. Now it gets messy. The supervisor told the driver to get out of the truck. He then drove the employee home. A reasonable suspicion test was NOT conducted. When the driver came to work the next day, the supervisor told him he was suspended until he completes the DOT process by meeting with the SAP. Is this a violation under FMCSA rules?*

For the driver to have said that he was intoxicated is not a violation. The supervisor should have tested him. Since he wasn't tested, we don't have a way to be certain that he was intoxicated. Just the driver's word.

If the driver admitted to drinking alcohol on the job, i.e., drinking while he was on the clock, it would be a violation of 382.205, on-duty use. So the question is, did he tell his supervisor that he had been drinking on the job, or did he merely say he was intoxicated?

If he said only that he was intoxicated, then we can't be sure if it was from partying the night before, or drinking on the job.

Technically, what you describe here is not a violation because there is no test result and there is no indication that the employee was drinking while he was on-duty.

The only thing that would change this is if he said he was drinking on the job, or if the supervisor saw him drinking on the job.

Also, when did it happen? If this was the afternoon, and he says he drank on his lunch hour, then it would be a violation of 382.207, pre-duty use (using alcohol within 4 hours of driving.)

Without knowing these other things, I would say this is not a DOT violation. The supervisor was wrong in not getting him tested. (This is a good example to use in a supervisor training.)

If nothing else changes, this should be handled under the employer's policy, and not under DOT.

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### 64 *An active duty Coast Guardsman received a DUI in his personal vehicle. I do not see this as a required SAP evaluation. Is this a violation?*

US Coast Guard has been moved to Homeland Security Administration. However, USCG remains under DOT for the drug and alcohol testing portion of the rule.

And a further note… you are correct. A DUI in a personal vehicle NEVER requires a SAP, under any of the administrations. In the Preamble to Part 40, DOT wrote: "A commenter asked whether a SAP evaluation would be needed for an employee who had a DUI/DWI charge against him or her in a private automobile. The answer is no."

If an employee is sent to you because he/she received a DUI/DWI in a personal vehicle on Saturday night, this is not a DOT violation and does not require a SAP return-to-duty process. I suggest that you call the employer and explain this. The employer may want you to conduct a chemical use evaluation, and you may certainly do that. But because this is not a DOT violation, it is not subject to Part 40. That means you would require the individual to sign a release of information form, and also a HIPAA form, which you would not do if this had been a DOT violation.

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### 65 *Somewhere I heard that when an employee is on a follow-up testing plan, the company is not supposed to do regular random testing—in other words, the employee should not be in the random pool if he is also under a follow-up testing plan. Was I imagining this?*

This employee must continue to be in the employer's random pool. He continues to be subject to all the other testing that an employer must conduct (random, post-accident, reasonable

suspicion). See also the SAP Guidelines, p. 12, toward the end of the second paragraph.

Be sure to explain this to the DER when (if) an employee returns to work. If the employee is selected for a random test, he must submit to a random test. If the employer decides to conduct a follow-up test, the employee must submit to a follow-up test. These are two separate categories of tests. An employee who returns to safety-sensitive functions after a violation is subject to both.

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### 66 *A driver was terminated. He completed his treatment recommendation, and I mailed a report of compliance to the DER in the company that he was driving for when he had the violation. The DER called me and told me that he doesn't want to receive any paperwork on this case, that the driver has been fired, and that his records have been sent to dead storage. Now what should I do with my reports?*

I hear this from SAPs very often. Here's what I suggest:

Prepare a "To Whom it May Concern" letter, indicating that you are the SAP, and that a prospective employer can obtain your SAP Reports and the follow-up testing plan directly from you.

I discourage SAPs from providing reports to the employee, for several reasons:

1) Whatever paperwork that you give to the employee will be incomplete, because you can't include the follow-up testing plan (40.329[c]). That means the employer will still have to contact you in order to obtain the follow-up testing plan.

2) There have been situations where an employee has falsified the SAP's paperwork, changing the reports in some way, and in some cases, creating their own follow-up testing plan, in the hope that the employer will accept it.

In the "SAP Guidelines", Question #5, p. 14, is the following:

> "In addition, the SAP may have to hold the employer reports until asked to forward that information to a gaining employer wishing to return the individual to safety-sensitive duties."

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### 67 *Please clarify this for me. A school bus driver came to our EAP admitting he has a drug problem. He wants to get help. Is this considered a non-DOT referral? Or must he be seen by a SAP?*

Who else did he admit to? Did he also tell his supervisor or any other company official? If so, it's a violation, because the employer now has "actual knowledge". (Unless the employer's policy has a provision that meets the requirements of 382.121, which would allow this to be handled as an EAP self-referral).

You should obtain a copy of the employer's policy. What does that policy say about self-admission? (I encourage SAPs and EAPs to ask every employer for a copy of their policy. This regulation is so intricately involved with an employer's rules that a SAP can't really function effectively without knowing an employer's rules).

If this driver told his employer that he has a drug problem, and if the employer's policy has no 121 provision, then it is a DOT violation, and it requires a SAP. (See the definition of "actual knowledge" in 382.107).

However, if he only admitted to you (the EAP), then the question is: What is in your EAP Statement of Understanding about this? If you haven't written anything in your Statement of Understanding about reserving the right to report safety concerns to his employer, and if he fails treatment, you could be in an awkward situation if he has an accident with his school bus and then has a positive post-accident drug test.

This is why I suggest that EAPs should include in their Statement of Understanding something like this: *"If you are a DOT-covered employee and you tell us about a problem with drugs or alcohol, and if we have concerns about your ability to perform safety-sensitive functions for your DOT employer, we reserve the right to share that information with your employer."* And then, if he fails treatment or drops out of treatment and goes back to driving a bus, you could decide to tell his employer. But without including that in your Statement of Understanding, you're really sort of stuck. And you may end up helping him keep his dirty little secret.

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### 68 *What's this I hear about DOT wanting SAPs to use a depression screen when we do an assessment? I've looked around, and I don't see anything like that. Should I? Must I? Where did this come from?*

DOT's Office of Drug and Alcohol Policy & Compliance occasionally publishes ODAPC Dispatch, a four-page newsletter with information related to this regulation. The office has published a number of those newsletters since 2001. The newsletters are on ODAPC's website. Go to www.dot.gov . Click on "Office of Drug and Alcohol Policy and Compliance" In the left column, click on "Documents & Forms". Scroll way down to "ODAPC Dispatches."

On the first page of the April 22, 2005 Dispatch is an article entitled "Increased Chances of Rehabilitation with Depressions Screens". In it, ODAPC says that depression screens are "an essential assessment tool to determine the correct course of treatment." The word "essential" suggests that a SAP would be well-advised to include an assessment tool—most depression screens are short and simple—in the list of assessment instruments.

While you are on ODAPC's website site, you really should look at each of those ODAPC Dispatches. You'll probably find more information that you didn't know about. And also, click on the box that says "Sign up for Automated E-mail

Announcements". DOT will deliver important information and changes right to your e-mail inbox.

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***69*** ***An FAA employee tested positive for marijuana. He was referred to a SAP and subsequently complied with the SAP's recommendations. The SAP advised the employee to take an independent drug test before he took the DOT return-to-duty test. He had a negative result on an over-the-counter drug test kit. But his DOT return-to-duty test a day later was positive. His employer fired him. In following up with the company, I was told that an employee who tests positive twice must be terminated. Is this accurate? It is my understanding that DOT doesn't take job action, and that an employer makes that decision. What am I missing here?***

FAA is an exception. An FAA employee with a second positive must be permanently barred (permanently precluded) from that job for that employer and for any other FAA employer. FAA is the only mode that takes that action.

He could get a different safety-sensitive job, but not the same job that he has now. If he had been a dispatcher, he can never again be a dispatcher, for any FAA employer. He could be a flight attendant, but not a dispatcher.

This is a good example of independent tests being not really reliable. THC levels tends to spike, or jump around a lot. An individual could test positive one day, negative the next day, and positive the third day. With marijuana, one negative independent test by itself doesn't mean much, especially if it was coincident with a low THC level at the time of the test.

I believe this SAP is somewhat responsible for the employee's positive return-to-duty test. This is precisely the reason I suggest that a SAP should not even set up a follow-up evaluation appointment until the employee can provide 3 negative independent tests, 3 days apart. And if one of those tests is positive, the employee must start the process over. Even then, there's no assurance that the DOT test will be negative. Remind the employee that THC stays in the system for a long time. When an employee's marijuana use has been significant and long-term, there is almost no way to be 100% certain that a return-to-duty test will be negative.

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***70*** ***Several of the SAP networks require my education requirements to be up-to-date, of course. If I understand this regulation, all I need to do is send them the certificate of completion from an update training or the coursework that I took to obtain my 12 hours of continuing education. Correct? Do I have to send them another certificate of my certification?***

This continues to confuse many SAPs. In the SAP Guidelines, DOT states that a SAP is not "certified, licensed or approved." A SAP doesn't need a document that proves that he/she is "certified." A certification number has no meaning to DOT or DOT auditors, and it is not part of this rule. If an organization or association requires you to pay money in order to "maintain your certification", or if an organization warns you that you will "lose your certification", you can ignore that warning. As long as you have a certificate that indicates you have completed 12 hours of continuing education, and if that education meets the requirement of 40.281(d), you will be in compliance with this regulation. You do not need to be "certified", and you are not required to have a "certification number."

If you complete SAPlist U's continuing education module, for example, the certificate of completion is all you need. There is no reason for you to send additional money to an organization or association in order to "maintain your certification".

If you have a Profile on SAPlist, it would be important for you to always update your Profile by adding your continuing education hours to that Profile. Employers and others who search for SAPs want to know that you are keeping your education requirements up to date. If anyone requests proof of your continuing education hours, 40.281(e) requires you to send them a copy of that documentation, which would be a certificate that indicates you have obtained those continuing education hours.

# HIPAA STATEMENT

**(Health Insurance Portability & Accountability Act)**

## Issued by ODAPC, July 2006

## Question

Are employers and their service agents in the Department of Transportation (DOT) drug and alcohol testing program required to obtain employee written authorizations in order to disclose drug and alcohol testing information?

## Answer

- In the DOT drug and alcohol testing program, employers and service agents are not required to obtain written employee authorization to disclose drug and alcohol testing information where disclosing the information is required by 49 CFR Part 40 and other DOT Agency & U.S. Coast Guard (USCG) drug and alcohol testing regulations. 49 CFR Part 40 and DOT Agency & USCG regulations provide for confidentiality of individual test-related information in a variety of other circumstances.
- Even if drug and alcohol testing information is viewed as protected under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) rules, it is not necessary to obtain employee written authorization where DOT requires the use or disclosure of otherwise protected health information under 49 CFR Part 40 or the other DOT Agency & USCG drug and alcohol testing regulations.
- Unless otherwise stipulated by 49 CFR Part 40 or DOT Agency & USCG regulations, use or disclosure of the DOT drug and alcohol testing information without a consent or authorization from the employee is required by the Omnibus Transportation Employees Testing Act of 1991, 49 CFR Part 40, and DOT Agency & USCG drug and alcohol testing regulations.
- Consequently, an employer or service agent in the DOT program may disclose the information without the written authorization from the employee under many circumstances. For example:
  - Employers need no written authorizations from employees to conduct DOT tests.
  - Collectors need no written authorizations from employees to perform DOT urine collections, to distribute Federal Drug Testing Custody and Control Forms, or to send specimens to laboratories.
  - Screening Test Technicians and Breath Alcohol Technicians need no written authorizations from employees to perform DOT saliva or breath alcohol tests (as appropriate), or to report alcohol test results to employers.
  - Laboratories need no written authorizations from employees to perform DOT drug and validity testing, or to report test results to Medical Review Officers (MROs)
  - MROs need no written authorizations from employees to verify drug test results, to discuss alternative medical explanations with prescribing physicians and issuing pharmacists, to report results to employers, to confer with Substance Abuse Professionals (SAPs) and evaluating physicians, or to report other medical information (see §40.327).
  - SAPs need no written authorizations from employees to conduct SAP evaluations, to confer with employers, to confer with MROs, to confer with appropriate education and treatment providers, or to provide SAP reports to employers.
  - Consortia/Third Party Administrators need no written authorizations from employees to bill employers for service agent functions that they perform for employers or contract on behalf of employers.
  - Evaluating physicians need no written authorizations from employees to report evaluation information and results to MROs or to employers, as appropriate.
  - Employers and service agents need no written authorizations from employees to release information to requesting Federal, state, or local safety agencies with regulatory authority over them or employees.