Dear SAPlist.com, Vol. 2

(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.

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Dear SAPlist . . .

1 ***In the "SAP Guidelines" (p. 5, "The Evaluation Process", paragraph 2) DOT states that a SAP evaluation should include a mental health status. Where can I find one that is quick, easy to use, and reliable?***

A SAP who works in a hospital system sent me a link to a mental status on the Internet. It can be used freely, as long as the V.A. and St. Louis University are given credit. It is reportedly one of the better mini-status exams available. You can find it by Googling for "mental status exam SLU". The URL is
http://medschool.slu.edu/agingsuccessfully/pdfsurveys/slumsexam_05.pdf

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2 ***I have a question about "dual roles." I know an MRO who is also SAP-trained and has passed the SAP exam. This individual is also co-owner of an outpatient treatment and education program. Problem is, s/he is referring patients to him/herself. S/he is the MRO, then performs the SAP evaluation, and then refers the client to his/her treatment or education program. I think you get the picture. When I brought it up that s/he can't do this, s/he told me it is allowed because there is a lack of programs in the area. Not true - I know a lot of treatment programs in in the area. What can I do about this?***

It would be appropriate for you to report this individual to DOT. In this case, since s/he provides SAP services for more than one transportation mode, I suggest that you start with ODAPC (Office of Drug and Alcohol Policy and Compliance), which oversees testing procedures, MRO function, SAPs, etc.

Point of clarification: The regulation does allow for an MRO to provide a SAP function in two of the modes…FAA and USCG (FAA and USCG modal rules say that an MRO can serve as both MRO and SAP, but the MRO must have completed both an MRO training and MRO Exam and a SAP Qualification Training and a SAP Exam.)

What 40.299 does *not* allow, and what you report s/he is doing, is to refer his/her SAP clients into a treatment program in which s/he has financial interest, and from which s/he receives any type of financial remuneration.

When you report this to ODAPC, ODAPC will ask for specific information. ODAPC won't investigate a general complaint. Give the individual's name, location, the name of the treatment program, etc. It would also be helpful if you gave ODAPC names and addresses of other treatment programs in the area that this individual appears to be ignoring when making recommendations. This applies to any service agent that you suspect is operating out of compliance with the regulations.

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3 ***An employee was hired for a non-DOT position. He was initially given a non-DOT drug test as part of hiring procedure. Later in his employment he became a driver for that company. Can he just be put into the random DOT pool or does he need to have a DOT pre-employment test?***

Every FMCSA employer must comply with 49 CFR Part 382.301, which requires a DOT pre-employment test. That test must be on a federal CCF, and it must be in the employer's files. Since the driver is already working for this employer, this test may be called a "pre-placement" test.

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4 ***An employee refused to be tested, because he uses peyote 4 times a year as part of his religious practice. (He is Native American). I'm not sure how to handle this. Where does the First Amendment end and Part 40 begin?***

It would be impossible for peyote, or its principal psychoactive component, mescaline, to cause a positive laboratory test for any of the DOT drugs using the DOT confirmation testing protocol of gas chromatography/mass spectrometry (GC/MS). Neither the cactus plant (peyote) nor mescaline itself will either metabolize to or be analytically mistaken for any analytes tested for by DOT.

His refusal is a violation, and this requires a SAP return-to-duty process. However, don't assume that he is telling the truth. He might be using the peyote defense to cover up the fact that he uses other drugs.

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5 ***A collector failed to collect a urine sample as a split specimen (in two separate vials), as required by Part 40. The test result was negative. The employee was then asked to provide a second specimen, but he refused. Hence, he has a violation of a refusal. The DER says that "it's not certain if the employee was ever actually told he had to provide another sample."***

Something strange is going on here. I think you should talk to the MRO. What was noted on the paperwork from the collector? The DER's response to you is odd. I'm confused. All DOT collections are conducted as a split (in two bottles). It's possible that one bottle leaked or was lost by the lab. (It happens).

If Bottle A was a confirmed positive, the employee has the right to request a retest of Bottle B. However, if Bottle B is not available for some reason, the employee is then required to provide a new specimen. I'm guessing the employee refused to provide that second specimen. That's a refusal.

If Bottle A had been negative, this would be a dead issue.

This needs some investigation on your part, so you can understand the circumstances. I encourage SAPs to contact the MRO, but this is especially important when an employee's violation is a refusal. (And contact the BAT when there was a refusal for an alcohol test.) There are several reasons for a refusal, and as a SAP conducting the evaluation, you want to know the specific reason for the refusal you are working on.

40.191 Refusal to submit to a required drug test.
40.261 Refusal to submit to a required alcohol test.

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6 *I made a recommendation for inpatient treatment. The treatment provider told me that they accept payment from the employee's managed care system. However, they didn't call for authorization until the employee checked in (yesterday). They found out that the employer's policy has NO benefit for substance abuse treatment, either inpatient or outpatient.*

I feel that the out-of-pocket cost is prohibitive. I think I will really need to change my initial recommendation. To complicate matters, I just found out that the employer's policy is to terminate an employee who doesn't complete a SAP's recommendation within 14 days of the violation date.

Could I have done anything differently?

Read "The Referral Process" in the "SAP Guidelines", p. 7. In addition to knowing available treatment providers, a SAP should be aware of insurance coverage, an employee's ability to pay, employer treatment contracts, and an employer's leave policies and other rules. I encourage SAPs to request a copy of the employer's DOT policy. Read the policy to find any reference to the employer's rules regarding time off, leave of absence, with or without pay, who pays for follow-up testing, who pays for SAP services, etc. In some cases, you may need to have a conversation with the DER about these issues, either for clarification or because they are not addressed in a policy. An employer's decisions are critical aspects of a SAP's decisions related to a referral. (Not that this information should influence your referral, but rather so that you can prepare an employee for what I call "bumps in the road", e.g., an employer might have a rule that the employee is terminated if the SAP process takes longer than 14 days. In that case, you may be the one explaining to the employee that you are requiring him to go into a 28-day treatment program, which means he may lose his job.)

You ask if you could have done anything differently. Here are my thoughts:

1) If, before making the referral, you had called his managed care provider, and they would have told you that his employer had opted out of substance abuse treatment. You could have immediately looked for options at that time, rather than learning this after he had started treatment.

2) You could have had a conversation with the DER to find out if the company would be willing to make an exception to their policy about termination if he wasn't back on the job in 14 days. Sometimes an employer will allow an employee toreturn, in spite of what the employer's policy might say.

3) If the employee will have co-payments or out-of-pocket costs, you could have asked the treatment provider about payment arrangements.

4) Regardless of what you find out, out-of-pocket expenses to the employee should not be your concern. The employee knew what the law required, but violated the law anyway. It's a consequence.

Remember that DOT expects the SAP to facilitate the referral, which includes checking into reimbursement and payment options before the employee starts treatment. (And I suggest you do this even before you tell the employee what your recommendation will be).

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7 *If there is an accident involving a CDL driver, but the accident doesn't meet FMCSA's required conditions [1) fatality or 2) citation plus towing and/or injury], may the company have the driver tested anyway if that is stated in their policy? In that case, it would have to be a non-DOT test, correct?*

If the company wrongly requires a DOT test and the test result is positive, does the SAP still have to do the federal DOT return-to-duty process?

If the accident doesn't meet FMCSA criteria, and the employee has a positive result for drugs on a non-DOT test, it is not a DOT violation. The employer's non-DOT policy should address how this situation would be handled. The driver could be required to have an EAP or plain vanilla assessment. And, if the employer's policy allows for non-DOT follow-up testing under applicable state laws, the employer can then conduct non-DOT follow-up testing. (Under state laws, usually one or two years, but not 5 years, as the DOT rule would require.)

A positive DOT test result, even though the test had been wrongly conducted, can't be ignored. If a test is recorded on a federal CCF, it requires a SAP return-to-duty process. As a SAP, you have no authority to ignore it.

In an audit, however, the employer would be subject to a fine for "falsely representing" a DOT test. (FMCSA, 382.113).

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8 *Where in the regulations does it stipulate that an employee who tests positive on a follow-up test must go*

back to the original SAP who did the initial assessment? Or can he decide to go to a different SAP? It seems to me that it would make more sense—for continuity of care—if the employee stays with the original SAP until the follow up testing plan has ended—completing the entire process with one SAP rather than involving another SAP.

Actually, the regulations are silent about this. Each violation is a separate incident, and each violation can be handled by a different SAP. You may feel that continuity of care is important. But an employer might also feel that if an employee has another positive test, either your assessment fell short, or the treatment that you recommended was not effective, and the employer therefore might provide the employee with the contact information for a new SAP, hoping for a better outcome.

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9 I was the SAP for an FAA applicant who had tested positive on a pre-employment in 2005.

She has been hired by a different airline. The DER requested copies of my SAP reports. The DER gave the reports to their company EAP and now the EAP is requesting:

a) my SAP intake and clinical assessment
b) my diagnostic test/instrument
c) information about the referral, and what I learned from the treatment provider

The EAP says they want to compare my information with the information that the new employee has shared with them.

My understanding is the SAP is to give SAP reports to the DER only. I did that, and now this information has been given to the EAP. Is it within the regulations that the SAP should be sharing any information with the EAP or anyone other than the DER?

The applicant has been hired, but she won't be allowed to perform flight duties until the EAP gives final OK.

Here's what I think, and this is simply my opinion. DOT's regulation is about public safety. The airline's EAP is "on the line" for clearing this person for a job with the airline, so the EAP wants to make its decision based on as much information as they can get their hands on.

40.321 speaks to this. Read it, and you'll feel better about how to respond to this request. Bottom line, you can send anything, as long as the individual signs a release.

First, the individual should know exactly what you will be sending to the EAP. I suggest that you prepare a detailed release form that lists each document that you will send. Have the employee initial <u>each</u> item rather than a blanket release that says you will send "the entire file". Give the applicant a photocopy of the signed release. If the applicant doesn't get hired, you want to be certain that she can't accuse you of sending something without her permission.

Explain this to the employee. If she signs the release form, you can send the information. The individual is in control of what gets released.

Yes, this is an unusual request. But we need to remind ourselves that this regulation is about public safety. An employer who pushes on this issue is wiser than an employer who doesn't care.

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10 A driver relapsed in treatment. He told me he has decided to retire instead of following through with my recommendations. I plan to send a report of non-compliance to his employer. I will also send a letter to the driver, confirming our phone conversation when he stated that he will not be complying. I will let him know that my door is open for him to return, if he chooses to comply any time in the future.

The driver then requested that I delay the process for several weeks until he had applied for retirement. However, when I questioned him, I got the feeling that he wanted to delay the process so that he could secure another driving job before his previous employer received my letter of non-compliance. I reminded him that he cannot perform DOT safety-sensitive functions until he successfully complies with my recommendations. I am moving forward with a notice of non-compliance to his previous employer. Are there other things I should consider before sending this letter?

Good job. And don't hold up on sending your report.

I am hearing from more and more SAPs that employees are saying "I'm going to retire", or "I've decided I'm not going to drive a truck any more". My reaction? Hogwash. These are career drivers. Many of them have their life savings invested in a truck. They are not going to start working in a coffee shop. They hope you will believe them and close their file. Then they will start looking for another driving job. Either that, or they hope you will sympathize with them, and lighten up on your treatment recommendation.

I have two suggestions:

1. Don't believe them.

2. The moment an employee tells you he won't be going to treatment, you should immediately send a notice of non-compliance to the employer. (He hopes you'll forget this.)

The notice of non-compliance must go into the employer's record, to at least slow down their chance of getting another job.

Remind the client that if/when he decides to get into compliance, he must return to you, because you are the SAP,

and 40.295 doesn't permit him to start over with a new SAP. (When he does return, you'll probably want to conduct a new assessment…there's a good chance his/her drug use will have changed.)

You can change a notice of non-compliance to a notice of compliance at any time in the future. However, once you report that an employee has "successfully complied", you can't reverse it to a report of non-compliance.

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11 ***A CDL driver failed a follow-up test. The company fired him. He filed a grievance. The company agreed to reinstate him as a driver if he completed a 28-day program. (The company did this on their own without using a SAP.) The employee completed the 28-day program and is back to driving. Is this right?***

This is ***not*** right. A positive result on a DOT test is a violation, and a violation always requires a SAP return-to-duty process. An arbitrator can require an employer to take an employee back, but a violation still requires a SAP process. The employer has no authority to order the employee's treatment, and then put the employee back into safety-sensitive functions. This should be reported to the federal DOT office in your state, along with specifics (driver's name, the DER's name, the employer's phone number, and any other information that you might have).

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12 ***While a driver was completing my treatment recommendation, he quit his job and started driving for a new employer. I sent the initial SAP report to the original DER, but I sent the Follow-up Evaluation Report to the new employer, because they will be doing his follow-up testing. Is this correct?***

Uh-oh. He started driving "while he was completing your recommendation"? It sounds like he was driving before you had reported compliance. The new employer could be in trouble for that in an audit. But that's a separate issue, and it would be a problem in an audit.

Did you have the employee's written authorization to send the Follow-up Evaluation Report to the new employer? In order to send anything to his new employer, you need a specific release signed by the driver, even if you "know" that he is working there.

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13 ***I set up a 3-year follow-up testing plan. The employer wants to know if the employee could be assigned to non-safety-sensitive functions, with no testing, for those three years, and then be transferred to his safety-sensitive job without any follow-up testing. Basically, the employer wants to avoid the hassle and expense of follow-up testing.***

Explain to the employer that he can't do this. It's not about getting through the next three years. It's about DOT's requirement that this employee must be "subject to testing" for 36 months *while he is performing DOT safety-sensitive functions*. Follow-up tests are conducted only when an employee is performing safety-sensitive functions. Since you are requiring 36 months of testing, the employee will ultimately have to complete all 36 months of testing. There's no way to avoid the "hassle and expense". For example, if the employee is in non-safety-sensitive mode for 3 years, the testing plan would be "on hold" for those 3 years, and the employer would then have to extend the plan by 3 years. 40.307(e). One way or another, the employee must be under a follow-up testing plan for 36 months.

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14 ***I was contracted by an EAP to provide SAP services. The EAP assigned a case manager to oversee the case, and she communicates with me and with the client on a regular basis. I referred the client to 12 hours of Education/Relapse Prevention classes and 3 AA or NA meetings a week for 4 weeks. I told him that if everything went well, he could return for the follow up evaluation in four weeks.***

In an early conversation with the EAP case manager, she asked what I was "thinking about" as a recommendation. I said that I was "thinking about" education, and probably requiring 2 AA meetings per week. In that same conversation she asked me if I would consider recommending the client for "Light Duty", in order to get him back to work sooner.

The case manager told me today that the client is very upset. He has directed most of his anger at the case manager, and is filing a formal complaint against the EAP.

I'm guessing the EAP won't be happy if they feel their contract with the employer is threatened. This is new to me and I would like to know how it can impact me in my capacity as the SAP.

Case management and the SAP process don't mix very well. It often gets messy when an EAP gets in the middle. The EAP should have simply said, "Jane is the SAP, and Jane is in charge of the process."

I suspect that the EAP counselor had told the employee that "it looks like" your recommendation would be for education and 2 weekly meetings of AA. The employee was anticipating 2 meetings, and suddenly got 4. The employee got upset and went back to that EAP case manager. (The earlier discussion of "light duty" was probably also the case manager's idea. I doubt that was the employee's idea.)

An EAP wants to accommodate the client, they want the client to feel good, and they certainly don't want to offend the client, which could result in a complaint. Unfortunately, the employer—who understands very little about these rules—will see it as a black mark against the EAP.

For your part, telling the employee that he could return for the follow-up in four weeks could have been a problem. You might have said, "I'll be monitoring what's going on. I'll be checking in with your instructor. I require attendance verification from your AA meetings. When I feel you have made sufficient progress, I'll set up a follow-up evaluation." That puts the onus on the employee. It sends the message that he needs to get serious. However, by telling him upfront that he will have his follow-up appointment in 4 weeks, you set up an expectation, and you compromised his incentive to make it work. No wonder he's upset 4 weeks later, when you tell him he really didn't "get it", and you feel he needs more treatment or education.

When an employee asks a SAP about when the follow-up evaluation will occur, I believe the SAP should say "That depends on how hard you work the program, and how much progress you make. If you make no progress, there would be no reason for me to conduct a follow-up evaluation."

As in many of these cases, it be much easier if EAP were to stay out of the process until the SAP process has ended, and the employee has returned to work.

You have done nothing wrong. The problem is with the EAP. And when you talk with them, don't give an inch. It's their problem, and not yours.

Lesson learned: If you provide SAP services for an EAP, clarify what they expect from you, and what their role and involvement will be. Ideally, they should agree to stand back. Assure the EAP that you will contact them if you have questions or need help. The DOT rule expects you to work independently. DOT has tried to make it clear to EAPs that while case management is important to an EAP case, EAP involvement complicates a SAP case. In a SAP case, the EAP should have no contact with the employee until you have reported compliance. You will maintain control only if you share no (or very little) information with the EAP.

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15 *A client tested positive for cocaine on a pre-employment test. He reports that he has not worked for 20 years because of a back injury. He claims to have a prescription for oxycodone. He said he did not report this information on the day of his drug test, because he had been told you could not be a driver if you are on any addictive pain meds. (Is this an issue for me? As the SAP, do I make the call on an employee's use of prescribed oxycodone?)*

First, the regulation doesn't allow the employee to report any medication use on the day he is tested, so that's a non-issue. If he had tried to write "oxycodone" on the form, the collector would have told him to take that with him, and report it to the MRO, if (IF) he has a positive test result. 40.61(g).

When there is a positive test result, the MRO is required to have a phone conversation with the employee. It's my guess that the MRO asked him about prescriptions, and he reported oxycodone, and the MRO told him that synthetics (including oxycodone) wouldn't show up at all on a DOT test. His test is positive. Oxycodone was not the reason for his positive test result.

I suggest that you call the MRO. Tell him/her the employee reports a prescription of oxycodone. Find out whether the employee had reported this to the MRO. Ask the MRO if it's possible for oxycodone to show up on a DOT test. *Rule of thumb:* When in doubt, always ask the MRO.

When an employee tells the MRO about a prescription, the MRO typically requests the name and phone number of the doctor and the pharmacy, so he can investigate. I wouldn't be surprised if the employee couldn't give him either of those.

The employee might actually be using drugs, but hopes you fall for the oxycodone story. You'll need to do some sleuthing here. And *after* you have done that...*then* make your recommendation.

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16 *Is there a website for the TODD or other appropriate test for a drug evaluation? I will be working through a new SAP company and am not sure what they will supply.*

Do you mean TAAD, Triage Assessment of Addictive Disorders? Do a Google search for "TAAD", and you'll find it. It's published by Evince.

http://www.evinceassessment.com/product_taad.html

But I have a question for you. You say you are not sure what assessment tool the SAP company (I assume you mean "SAP broker" or possibly an EAP) will provide to you.

Are you comfortable making a treatment determination and referral using an instrument that you have never used before? I believe that DOT expects a SAP to use an assessment instrument that the SAP knows well, and uses regularly. No third party SAP broker should require you to use a specific assessment instrument. *You* are the SAP, *you* are in charge of the assessment, and you should use *only* assessment tools that you are comfortable using. There should be no reason for you to go online to learn how to use an assessment tool that is not familiar to you. It's not fair to the employee, and it's

certainly no guarantee of a quality assessment in the name of public safety.

Settle on an assessment tool(s) that you know very well (many SAPs use SASSI), and use *only* that tool(s) consistently, for all of your DOT assessments.

Here are a few suggestions for working with a SAP broker:
A SAP broker should not give you materials for conducting the assessment.
A broker should not have conversations with the treatment provider that you recommended.
A broker should not make "suggestions" about treatment or follow-up testing plans.
A broker should not require you to put information on a SAP report that is not required by 40.311.
A broker should not provide you with "SAP report" forms.
A broker should not tell you when to conduct a Follow-up Evaluation.

At the end of the day, the SAP is the liable party. You are the SAP. It's *your* signature and *your* phone number on the bottom of a SAP report. Not the SAP broker's.

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17 *I attempted to get a BAT result from a service agent and was told that I needed a written release of information form in order to obtain it. I have been getting results from MROs without any problem (without a release of information form). In fact, I have been operating under the understanding that service agents are free to share information without releases. Am I correct?*

A BAT is a Breath Alcohol Technician. And you were trying to get an alcohol test result from the BAT.

You are correct; service agents do not need a release. In fact, 40.355(a) says:

"As a service agent, …(a) You must not require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by this part (including, but not limited to, collections, laboratory testing, MRO, and SAP services). No one may do so on behalf of a service agent."

But…rather than calling the BAT, you really should call the DER. The Alcohol Testing Form (ATF) that the BAT sent to the DER will have the testing level. The DER will be able to give you this information.

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18 *I have received requests from two previous clients, asking me to amend their follow-up testing schedule. In both cases I had required monthly follow-up tests for two years. They are complaining about the time and expense.*

I can handle the heat or the static or whatever. My question is: once I have made that recommendation, is it possible to revise it, even if I am the SAP who originally established the schedule?

My first question is: Does the employee know what his follow-up testing plan is, and if he does actually know it, who told him? This is supposed to be confidential information, not known to the employee.

40.307(f) says: *"As the SAP, you may modify the determinations you have made concerning follow-up tests. For example, even if you recommended follow-up testing beyond the first 12-months, you can terminate the testing requirement at any time after the first year of testing. You must not, however, modify the requirement that the employee take at least six follow-up tests within the first 12 months after returning to the performance of safety-sensitive functions.*"

This is not an unusual request. I hear this from SAPs fairly often. But it's usually the employer that asks for a follow-up testing plan to be terminated. Why is the employee making this request?

Follow-up testing, just like random testing, is a deterrent. When an employee knows that he could be tested at any time, the employee is hopefully less likely to start using drugs again. The moment that the employee is told (and someone *will* tell him) that his follow-up testing plan is terminated, he could see that as his opportunity to start using again.

The employer will argue that all the follow-up tests thus far have been negative. Here's what I suggest you say to an employer in this situation: "Isn't that what we want? It's working! Now, Mr. Employer, if the employee hasn't had an accident while driving his truck for the last five years, does that mean you would cancel the insurance on his truck?"

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19 *I recommended six follow-up drug tests in the first year. The employee completed three tests, with negative results. He reports that he is being laid off. He has found a new job in a non DOT position. How does he go about completing his follow-up drug testing program? Can I be the one to order his follow-up tests while he is not employed?*

DOT's testing regulation is an employment law; therefore, it applies to an employee only when the employee is in a DOT-covered safety-sensitive job, because that is when he could be a threat to public safety. If this employee has a non-DOT job, he is not a threat to public safety, and he cannot be subject to DOT testing. Which means, he does *not* get tested.

When he leaves his DOT job, his follow-up testing plan goes on hold. It starts up again when he returns to a DOT job. If he returns to a DOT job 15 months from now, his follow-up testing plan must be extended by 15 months. This is called a "break in service". (40.307(e)). (Be sure to read the examples in that section.)

Keep in mind: only an employer can order tests. An MRO can report test results only to an employer. A SAP has no authority to order an employee's follow-up tests.

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20 *An employee hasn't completed my recommendation (actually he never even contacted the treatment provider). Should I prepare a report of non-compliance? And then, who should I send it to--the employer and/or the employee?*

Don't delay! Send a report of non-compliance immediately to the employer. It should be in the employer's file so the individual won't be able get a new job in the DOT industry. If your SAP report of non-compliance isn't in the employer's file, several things could be going on. The employee might have gone to a different SAP, which he is not permitted to do. (40.295).

He may have "manufactured" his own letter of compliance and then given it to his new employer. (Yes, this has happened).

He may have already told a future employer that he completed his recommendation, but that you (the SAP) have moved to another town, and he can't find you. (Yes, this has also happened.) Having a letter in the employer's file doesn't guarantee he won't lie his way into a job, but at least you won't be responsible for not having completed the paperwork.

And I repeat…DON'T DELAY!

You could also send him a letter, letting him know that he can return to you anytime in the future when he decides to get back into compliance, and reminding him that he is not permitted to go to a different SAP for this violation.

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21 *Suppose I put a truck driver into a long-term treatment program. It's 3 - 6 months before he returns for his follow-up evaluation. During this time, he continues to work for his employer in a non-safety sensitive position. Does he remain in the random testing pool while he is not driving, and what happens if his name is pulled for a random test?*

You should have a conversation with the DER about this. Since this driver is currently in a treatment program, and because he is not performing safety-sensitive functions, the employer should keep him in the pool, but not test him. If his name is drawn, the employer could simply indicate to the C/TPA that he is not available for testing, and the C/TPA would have to draw an extra name in the next random selection.

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22 *I had to call an MRO recently to get quantitation on a client's positive marijuana test. The MRO said he could only tell me that the quant was over 300. Aren't they supposed to be precise in their numbers? He also required me to send a formal letter of request. What do you think??*

We know the MRO has the specific numbers, because the regulation requires it. 40.97(e)(1) says "*You [the laboratory] must provide quantitative values for confirmed positive drug test results to the MRO.*" (This requirement was added to the laboratory's regulation in September 2010).

40.163(g) says "You must not provide quantitative values to the DER or C/TPA for drug or validity test results. However, you must provide the test information in your possession to a SAP who consults with you (see §40.293(g))."

Yes, the MRO should give you the specific quantitation. In the situation you mention here, it might be 301, and but it might also be 4,000. Which will make a big difference in when you schedule the employee's Follow-up Evaluation. You shouldn't have to play a guessing game.

If an MRO requests a formal letter, do it. Don't resist. The MRO is just wanting to be sure you are who you say you are. Put a request on your letterhead, and fax it to his office. Include the name of the employee's employer, and the name of the DER. The more identifying information, the better. The fax header on the document will give the MRO extra assurance that you are actually a SAP who has an office. Some MROs may also ask for a copy of your Qualification Training certificate. Send it.

If the MRO still resists, at least you know it's more than 300. Positive is 15. So this is more than a one-time use last week. And in very general terms, marijuana in the human body has a half-life of one week. It's possible that with a quant of 300, it could take 5 weeks before the employee would test negative.

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23 *I am in a geographical area that has few treatment resources, especially those offering any kind of CD education component for clients who don't meet criteria for treatment. I work for a provider that is one of the few, and we are usually the only one with immediate availability. If the only other option for my client requires*

him to wait 2-3 weeks before he can start somewhere else, can I refer him to my program?

I have posed this question to Jim Swart, past Director of Office of Drug and Alcohol Policy and Compliance. He said, "During inspections [audits], the regulators [auditors] will note this. If the 'self-referral' looks legitimate and is based on fact, we agree with the Program Manager to view it as a non-issue."

My suggestion is that you document the situation thoroughly. Note the name of the other treatment provider, the length of waiting time for an employee to enter their program, and anything else that might be relevant. Keep this in the client's file in the event an auditor questions it.

A further comment: Your question mentioned "clients who don't meet criteria for treatment." ODAPC supports sending a client to treatment even when treatment criteria are not fully met, simply because this is a safety issue. An employee who is unable to abstain from using drugs that he/she knows to be in the testing panel is, in the eyes of DOT, an addict. Few education modules effectively deal with addiction. IOP and other treatment modes may be the only way to address the addicted transportation employee. Every SAP needs to give careful consideration to this position.

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24 I am with ABC Building Systems, a manufacturing company located in Texas. We have fleets located across the country, and I use SAPlist.com to identify SAPs across the United States. I am updating my list of qualified SAPs and I am curious about DOT's continuing education requirement for SAPs.

I am confused about the classes SAPs are taking to meet this requirement. I came across a few candidates that list "Pitfalls of Practice", "Understanding the DOT Modes", "Substance Abuse Provider Training", and just plain "continuing education", with 6 hrs. here and 6 hrs. there. THEN there are people that have "SAP/DOT Continuing Education Update—12 (or 14) hrs.", which is pretty much what I am looking for….UPDATED SAPs with 12 professional development hours every 3 years.

What I need to know is, how do I know if a SAP is qualified or not? Do the classes listed above meet DOT's requirement for a SAP's continuing education hours?

In 40.281(d)(1) DOT requires these hours to "…*include material concerning new technologies, interpretations, recent guidance, rule changes, and other information about developments in SAP practice, pertaining to the DOT program, since the time you met the qualification training requirements…*"

In my opinion, all of the classes you listed here would meet DOT's requirements as a SAP's continuing education hours. Classes that would likely *not* be accepted by an auditor are those which are not related in any way to the DOT/SAP process or the transportation worker. Examples of non-qualifying courses would possibly include:

Prescription use in the nursing home
Diagnosing drug use in teenagers
How to motivate an employee for treatment
Confidentiality and HIPAA rules
Dangers of synthetic medications

If an auditor determines that a SAP's continuing education hours don't fit the requirement of 40.281(d), and if the SAP is therefore disqualified, this could have a retroactive effect on SAP cases that were thought to be completed.

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25 An employee's supervisor has called me with a list of questions. He is requesting a complete "transcript" of my evaluation of the employee. I've called the DER and explained that my dealings are to be only with her (the DER). So now the DER is acting as a messenger for the supervisor, passing along his requests for more information. The supervisor is extremely controlling and intrusive, with little to no boundaries. The DER says they've had other SAPs in the past provide a transcript. Do you believe it?

You are correct. You should be communicating with the DER only. There is no reason for you to be talking with the supervisor.

The most that you can provide to the DER is a copy of your SAP reports. The DER should not request or receive anything more than that.

I can't imagine what information previous SAPs may have provided to this employer. It suggests to me that those SAPs really did not know what they were doing.

Stick to your guns. Don't provide details about the assessment. But be prepared for the employer to refuse to use your services in the future. At least you won't be liable for releasing information that the employer has no right to have.

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26 An employee had a violation 2 years ago, completed a SAP process, and returned to that same employer. He now has a second positive test. In my meeting today he told me that the SAP evaluation and treatment 2 years ago had been conducted by the same treatment facility. This is not the first time I heard about this, and I am familiar with the treatment program. I'm sure it's true. Should I report this?

Secondly, this was his second violation in 2 years. Obviously the first "treatment" wasn't effective. I plan to

recommend 4 months of outpatient treatment. I am anticipating a call from the employer complaining about my recommendation. Can I let them know why I am recommending 4 months of treatment?

I don't think you should go into details with the employer. But I do think you can say that this is the employee's second violation, which indicates that he continues to use drugs, in violation of this federal law. Your goal is to get him to stop using drugs illegally, and this is a public safety issue. Since the previous treatment was unsuccessful, you believe that a four-month outpatient program is the next step for him.

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27 A trucking company asked me about the laws concerning a driver who was charged with possession of alcohol (an unopened bottle) and marijuana in his truck. The driver did not report this to the company and the company found out about it recently, a couple of weeks after the event. They tested the driver, and he was negative. They plan to fire the driver, but they have legal concerns.

49 CFR Part 382 is about drug and alcohol testing. Actually, the word "possession" doesn't even appear in the rule. Having alcohol and/or drugs in a driver's truck is not a drug testing violation. It also cannot be the basis of a reasonable suspicion test. (They should *not* have tested him.) DOT's position is that possession does not mean that a driver is either using, or has used.

An employer can establish its own rules for possession, which should be stated in the employer's policy manual or other rules of conduct. Those rules might include that a driver in possession of alcohol and/or drugs in a Commercial Motor Vehicle will be terminated. But this is not a violation of Part 382, and the employer can't require this driver to complete a SAP return-to-duty process.

If they terminate him, they should absolutely not report this to a future employer as a violation of 382.

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28 I am providing SAP services for a C/TPA. That C/TPA is requiring my SAP report to include the names of the assessment instruments that I used in my evaluation. I can't find this in the regulation. Where is it?

40.311 is a list of the information that must be included in a SAP report. The names of assessment instruments are not on that list.

I doubt that there are many DERs who even would understand what a SASSI or a MAST or a DAST is. If this C/TPA wants to know what instrument you used, the C/TPA could ask you about it, or they could even supply you with their own form for their own records. But an instrument doesn't belong on your SAP report. Don't list it. If a C/TPA wants to know what instruments you used, you could send a separate memo or e-mail with that information for their records. It shouldn't be on your SAP report.

I stand firm on saying that a SAP report, because it is specifically defined in regulations and recorded in the Federal Register, is a federal form. To include anything more than what is required, or anything less than what is required, is "tinkering" with a federal form.

Do not give the employee's date of birth. Do not abbreviate the social security number to the last 4 digits. Do not give a diagnosis. Do not list assessment instruments.

Only a court of law could decide about taking liberties with the form. But drug testing is a litigious activity, and there's no way to tell what consequences could result.

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29 A driver was called at home (at 9:30 AM) by his employer and notified of a random test. He told his employer (and his employer OK'd it) that he would be at the collection site by 11:30 AM (two hours later). He did not show up until 2 PM. He tested negative, but he was terminated for showing up late. He was referred to me for a refusal to be tested. I understand this would be interpreted as a positive result, given he did not show in the allotted time.

After assessing this guy, I find no basis for making a referral to either treatment or education.

Ethically I think there may be a question for me insofar as referring this guy for something he does not appear to need at this point. Must I really refer him to something?

I am in a quandary. This guy has contacted an attorney and is apparently going to fight this thing. Quite frankly, I do not want to get caught up in all of that. I would appreciate your insight.

FMCSA does allow employers to notify an employee of random selection when the employee is off-duty. (FMCSA "Guidance", April 2005, 382.305, Question #17). However, I feel it's not a good practice. What happens when the employee says "I have a sick child, and I can't leave here right now."? Would the employer believe the story, or call it a refusal to be tested?

That said, you question why you must refer the driver to treatment or education, when you can find no clinical basis, and certainly no diagnosis. You have no choice. 40.293 says "*…for every employee who comes to you following a DOT drug and alcohol regulation violation, you must (b) Recommend a course of education and/or treatment…*" Treatment/education is a requirement of Part 40. Even though you can find no indication that treatment is needed,

the employee does have a violation, and the employee must therefore be referred to either treatment or education, or both.

The rule *does not* say "except when you can find no basis." There are no exceptions. You *must* make a recommendation.

Yes, he will be angry. Yes, he may hire an attorney. But the law is the law, and your recommendation, because it is required by the law, will survive a legal challenge. I understand why you may not want to "get caught up in all of that." But none of this will fall on you. The employer may have to defend his actions, but you will not have to explain why you recommended treatment or education. The law requires it because he has a violation. You have the easy out.

And, by the way, when this employee did not show up at the collection site, you say that "would be interpreted as a positive result." That is not correct. He had a refusal to be tested. That's the employer's call. A refusal is a refusal. A refusal is a violation. *A refusal is not a positive test*.

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30 ***An applicant tested positive on a pre-employment test. The employer, unaware of the regulations, continued to test him until he was negative, and then hired him. The employer was audited. Auditors pulled him from duty and required the employee to complete a SAP process. The driver said that he talked with DOT and they told him he could drive a vehicle less than 26,001 pounds. Then they told him he could not drive a smaller vehicle. He is currently not driving. May he drive vehicles less than 26,001 pounds?***

If the employer is an *intrastate* employer, meaning the employer's trucks never cross a state line, the driver can drive any smaller vehicle (under 26,001 pounds).

If the employer is an *interstate* employer, meaning the employer's trucks *do* cross at least one state line, the driver can only drive trucks that are less than 10,000 pounds.

This driver might not have explained to DOT that his employer is an *interstate* carrier, which resulted in ending up with those two different messages.

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31 ***A SAP broker has requested I recommend testing for specific drugs in the follow-up testing plan. The employee self reported for Oxycontin and Vicodin addiction. My initial recommendation was testing for "drugs". The broker's care manager requested that I be more specific, so I revised my recommendation to benzodiazepines and opiates, since the employee had also been abusing Xanax. Now the care manager is requesting I again revise the recommendation, this time to include Xanax, Vicodin and Oxycontin. This seems very unusual. All other recommendations for this broker and for other TPA's have been simply for alcohol, drugs or both. How should I reply to them?***

You didn't indicate, but I assume this is a non-DOT case.

I hope they weren't asking you to do this for a DOT follow-up plan. DOT doesn't test for synthetics, and no one is permitted to test for more than the DOT panel of five drugs. (40.85). A DOT employer can't test for these synthetics.

What would I do if I were you? First, I would object. Here's the reason. Drug testing is a most litigious area in today's workplace. The moment an employee loses his job, he runs to a lawyer. The first thing the lawyer will do is request a copy of the employer's policy.

It is generally accepted practice that an employer's policy must identify the drugs that the employees are being tested for. And drugs that aren't on the list can't be added to the panel on a whim. That's bordering on a "witch hunt" or maybe even discrimination charges.

The argument is this: An employer would like to get rid of an employee. The employee has a negative drug test. So the employer tests him for a different drug. Still negative. So the employer keeps adding a test for another drug until the employee finally tests positive, and gets fired.

I frankly think the broker is putting this employer in jeopardy by making this request. The employer probably has no idea that a lawsuit could result.

Case managers don't often understand state laws. Case managers also tend to think they can do anything. State laws protect employees from these arbitrary actions.

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32 ***I did a SAP evaluation for a client who is being treated with Suboxone. Is there a DOT regulation for someone who is taking Suboxone?***

FMCSA has published the following clarification about Methadone and Suboxone.

> *Methadone and Suboxone differ in some areas of treatment use but when compared, they are generally used for the same treatment plans; detoxification and pain therapy. Because of their pharmacokinetic properties, efficacy, and use, and in the interest of public safety, FMCSA recommends that commercial drivers who take these prescribed medications should not be found medically qualified to operate a commercial motor vehicle.*
>
> *Suboxone also known as Buprenorphine is a partial agonist that has a long therapeutic duration and is considered to be 25-40 times more potent than other agonist opioids. Due to Suboxone's high potency, only a small amount is needed to*

achieve the desired effects. Typical effects include analgesia, a sense of euphoria, drowsiness, and respiratory depression. In addition, Suboxone, if taken with central nervous system depressants may lead to death.

FMCSA's standards are minimum health requirements. The medical examiner must make the determination as to whether a driver's diagnosis or treatment plan has a direct impact on public safety. Since we rely on Medical examiners to make determination, the driver must provide full medical disclosure of medical health and medication use.

Notice that DOT "recommends" that drivers who use Suboxone should be found to be not medically qualified. That determination, ultimately made by a DOT Examiner, presumes that the driver tells the Examiner about his/her Suboxone prescription.

49 CFR Part 391, Subpart B, specifically prohibits a CDL holder from driving if he is on a Methadone regimen, but makes no mention of Suboxone.

You could have a conversation with the DER about this, and suggest that the driver be examined by the employer's DOT Examiner before returning to driving. The Suboxone use is an issue most appropriately addressed by the employer's DOT Examiner.

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33 ***A driver has received a Notice of Claim from the FMCSA with a Civil Penalty for $610.00 for violation of 49 CFR 382.215 -- performing a safety-sensitive function after testing positive for controlled substance. Charge #1 states: "On or about [date] Driver...transported property in a commercial motor vehicle from ...to...while driving for... Driver had knowledge he had tested positive for a controlled substance and continued to perform a safety-sensitive function."***

The driver tells me that after his positive test result, his employer kept testing him until he tested negative (two more tests), then allowed him to drive. DOT discovered this violation in an audit. The driver stated that at first DOT told him he could continue to drive, then they told him he could not. I'm not sure about the timeframes for this confusion, maybe a few days. Questions: isn't the employer responsible for all civil penalties related to this violation? Is that correct? What recourse does this driver have? He is successfully complying with the SAP process at this time.

Unfortunately, the driver has no recourse. He has a violation, and he ignored it. He was fined, and he still has a violation.

Actually, I doubt that anyone at DOT told him he could drive. I think he's saying that to get off the hook.

Nothing in the rule allows an employer to continue testing him until he has a negative result.

In 49 CFR Part 382.103 (Applicability), the regulation starts with "*This part applies to every person and to all employers of such persons who operate a Commercial Motor Vehicle in commerce in any State*…" This means that the law applies to drivers, as well as employers of drivers.

Then, 382.507 says: "*Any employer or driver who violates the requirements of this part shall be subject to the civil and/or criminal penalty provision of 49 U.S.C. 621(b).*"

So, in answer to your question, the driver and the employer are both subject to civil and criminal penalties. He was fined. I've heard of drivers being fined as much as $8,000, so he got off easy with $610.

This applies to the situation where the driver knows he has a violation, but he/she doesn't tell a new employer about it, and the new employer doesn't do a background check with the previous employer. No driver should say, "He didn't ask, so I didn't say anything." That excuse doesn't fly under this regulation. The driver needs to fess up.

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34 ***I have a client who failed a drug screen while he was on court-ordered probation. His probation officer referred him to me for an evaluation and assessment for treatment or education. During our session, I learned he was a CDL holder and is presently driving a truck. Should I report this to his employer as a DOT violation? I have told him it is illegal to use drugs at any time and he may have to go through the SAP Return to Duty. He has not reported the test result to his employer. So it appears there is no "actual knowledge" on his employer's part.***

This is not a DOT violation, and it does not require a SAP return-to-duty process.

A DOT/FMCSA violation is only under Part 382. A drug test for an individual who is on probation is not a test authorized by Part 382.

As a SAP, you don't have authority to report this to his employer. You should simply conduct a straightforward evaluation and write up, and send it directly to the probation officer. This is not a DOT violation. Do not prepare SAP reports. Do not report to the employer without the employee's written authorization.

It is correct, however, that DOT's rule prohibits a DOT employee from using any controlled substance at any time unless it is a prescription medication, authorized by a licensed medical practitioner. You may explain that to him, but no other action is required.

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35 ***I recommended aftercare sessions with an AODA counselor. At the third session the client discussed hardship, how he is now anxious, angry and having***

dreams about harming himself. He then signed himself out of aftercare. How do I proceed when he has not completed aftercare? Since he is noncompliant now, does that mean he cannot drive until he has completed aftercare, etc.?

40.303 is the regulation about aftercare. It says that the employer may monitor it, or the EAP or the SAP may monitor it. However, these "mays" are not "musts". There is no DOT requirement that your aftercare plan MUST be followed.

However, continuing participation in an aftercare program *could* be an employer's rule. 40.303(c) states that the employee is obligated to comply with the aftercare program. If he fails (and it sounds like he has), he MAY be subject to disciplinary action *by the employer*. It is completely up to the employer. You can tell the employer that the employee has dropped out of aftercare. But that doesn't make him non-compliant with treatment. The employer would have to then decide what to do.

The employer could choose to ignore this, and allow the employee to continue working. Or the employer could terminate him, or take other job action. It's really up to the employer.

I encourage SAPs to help employers implement a return-to-work agreement when the employee goes back to work. That agreement should spell out specific consequences of dropping out of an aftercare plan. Unfortunately, many employers see no need for a formal document. Having no formal agreement signed by the employee could mean that the employer might not be able to easily terminate this individual.

As a SAP, you have done as much as you can do. You can't do more. It's in the hands of the employer.

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36 *A local treatment center completed a DUI assessment on a DOT employee when it should have been a SAP return-to-duty process. The driver got a DUI in his Commercial Motor Vehicle. The treatment center sent a treatment report to the DOL (Dept of Licensing) which has led to this guy's Class C license being revoked. When an individual receives a DUI in their work vehicle, Class B, and the proper channels are followed, do they lose their personal (Class C) license?*

It is likely that this driver will lose his CDL for a year. That is a law, passed by Congress in about 2005, and it now applies in every state. (49 CFR Part 383.51). If a driver is cited for driving a CMV at or above 0.04 while on duty, or in a personal vehicle on personal time at or above 0.08, and his license is revoked, canceled or suspended, the driver loses his Class C license for one full year. There is nothing he can do about it, and it is not related to a SAP process. His state DOL will contact him about that.

On the federal DOT side of things, the definition of an employer's "actual knowledge" includes the driver receiving a citation for driving a CMV while on duty, above 0.04. That violation requires a SAP return-to-duty process. (There's no need to rush this, because if he loses his CDL for a year, he'll have plenty of time on his hands before he can return to driving a truck.)

But before he goes back to his DOT safety-sensitive functions after that year, he must have completed a SAP return-to-duty process, in addition to the program that he completed with this treatment center.

(NOTE: If he receives another citation in the future, either in a CMV or in his personal vehicle, he will lose his CDL for the rest of his life.)

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37 *Company A started a driver's follow-up testing plan. The driver then quit. Company A sent the follow-up testing plan to the new employer, Company B. He worked for Company B for two years, but Company B did not conduct any follow-up tests. The driver quit Company B and got hired at Company C. I'm not sure how Company C found out that Company B had not conducted follow-up tests, but they did. Company C is now telling the driver that they need to lay him off until the SAP gives them a new report that he is cleared to drive. What is your response???*

This is a tough one. It could go a couple ways.

I assume his pre-employment test for Company C was negative.

Company C could simply document that they discovered that he wasn't tested by Company B, and that they will pick up where Company A left off. If he had been at Company A for 8 months, Company C picks it up at the 8-month mark.

On the other hand, they may want you to conduct an assessment simply to determine if he is staying clean. You could certainly do that. This is permitted in the "SAP Guidelines", (Question #5, last paragraph). A write-up to the DER would be sufficient, using caveats like "based on the information I received from the employee", and "in my limited time with the employee", and "it appears that…", etc. Steer clear of saying that he no longer uses drugs, or that he could be safely returned to work. Ultimately the decision to return him to work is Company C's.

And…if you conduct an evaluation, someone should pay you for it. Personally, I think it should be the employer's dime.

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38 *My SAP Exam date is May 3, 2003. I've been keeping up with my required hours, but I plan to attend an in-*

person update training in my hometown, June 7, 2012, 6 weeks after my qualification expires. What happens now?

This part of the regulation has confused almost everyone. Here's what I understand to be the position of ODAPC:

First, the date for your continuing education is always the date of your SAP Exam, and then in 3 year increments after that. Since your SAP Exam was May 3, 2003, the three-year deadlines are May 3 2003, May 3 2006, May 3 2009, May 3 2012, etc. The date of May 3 NEVER CHANGES. The years change…3 plus 3 plus 3 plus 3.

If you don't have 12 hours by May 3 2012, you cannot provide SAP services after that date until you manage to complete those 12 hours. If you pick up those hours in June, you can provide SAP services as soon as you complete that update training. And you then need your next 12 hours sometime before May 3 2015.

I tell SAPs to mark these dates on a long-range calendar. You know what the dates are, and you know the dates will never change. Plan ahead. And… there is nothing wrong with picking up those hours early, even in the first or second year if the opportunity presents itself. So grab the hours when you can. Don't wait until the end of 3 years.

Also: If you miss your continuing education hours, *do not* start over with a Qualification Training and SAP Exam. As a SAP you can take only one Qualification Training and one SAP Exam.

In the situation you present in your e-mail, you will be unqualified from May 3 to June 7. Don't do any SAP work during that time.

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39 ***I set up a follow-up testing plan for drugs only (not alcohol). According to the DER, the collector conducted a follow-up drug test <u>and</u> (in error) a follow-up alcohol test. And guess what! The employee's alcohol test was positive!***

The DER asked me to amend my follow-up plan to include follow-up alcohol testing. I told her that the employee now has another violation, and it requires a SAP. The DER is upset because the alcohol test should not have been done, and she doesn't feel he has an alcohol problem.

You are correct. This employee has a violation. It's recorded on an ATF (Alcohol Testing Form), which is a federal form, and the employer can't ignore it. Either the DER didn't give clear direction to the collection site as to what test was ordered, or the collection site made an error. But neither of these is your problem.

The employee will have to go through a complete SAP process. The original follow-up testing plan will be replaced by this one. And if you are the SAP for this second violation, you might consider a more stringent plan, with tests for drugs *and* alcohol, since the employee is obviously not able to give up using.

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40 ***I assessed a man who has a CDL, but he never drives a truck on the highway. He operates a forklift to load trucks, and he moves trucks in the yard on the company's property. The violation was 'shy bladder'. As soon as I saw him, I tested him and it was negative. I spoke to the company and they state this is a DOT violation. I disagreed. They said that part of his job requirement is to have a CDL and be ready in case he is needed to drive. He's been there six years and has never driven. Is this a DOT violation or company policy?***

If he has a CDL, but he never drives, and there was no plan to have him *ever* drive, then he should not be in the pool. But the fact that the employer says he "could possibly" drive in the future makes him subject to testing. If the employer suddenly needs him to drive this afternoon, and he has not been in the pool and subject to random selection, then the employer would have to get a pre-employment test before he could drive. And that would take a few days. In the meantime, he couldn't drive.

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41 ***I referred an employee to an outpatient program that conducts tests during treatment. He has been there for two weeks and he still tests positive. I am planning to release him to non-driving/non-DOT duty. I won't release him to his DOT job until he has a negative treatment program test.***

The client says he has found a new job. He says that he didn't sign a release for his new employer to get testing info from his current employer because his union advised him not to. He says he will stay in touch with me but he won't tell the new employer about this violation. I told him that would not work, because his new employer is required by law to obtain test results from his current employer. And if he drops out of this program he won't be in compliance, which means he could lose his CDL.

Question:
1. What can his current employer (or I) do in this situation? He hopes to get off free and disappear. I spoke with the previous employer today. They have received an inquiry from a future employer seeking a reference, but not asking for DOT information.
2. Given what I know, should I hold off on even a "conditional" return to work?

The current DER wants to take him off administrative leave and return him to a non-safety position. I know that he CANNOT be in a DOT safety-sensitive job. But I also

question whether I should release him to a non-DOT driving position.

Should the DER/HR manager send testing information to the new employer even though they haven't requested it? They are trying to keep their own liability down as well.

There are a number of things that are wrong with what's happening.

First, he should not listen to his union. They are giving him bad advice. 382.507 says that both the employer AND the employee are subject to criminal and civil penalties under this law. He has a violation and he knows it! If he drives a CMV without clearing up that violation, he could face possible criminal and civil charges. It would be even more complicated if he were to be involved in a fatal accident.

A new employer can't hire him unless they receive his DOT testing information. Their records must show that he either had no violations, or that he had a violation and then the SAP reports to verify that he has complied with a SAP return-to-duty process, and his follow-up testing plan.

His current employer can't forward his testing information unless he provides written authorization to do so. Sending that information without his authorization would constitute a violation of confidentiality under this rule, 40.323.

Returning to work right now, even in non-safety-sensitive duty, could be a distraction. He needs complete his treatment plan. SAPs have lots of stories about employees dropping out of treatment. Employees who return to work often see no need to complete treatment. He might be tempted to do that. I think you should give some thought as to whether he might be a potential dropout.

And one other suggestion: In your e-mail, you made references to "releasing him to work" or "releasing him to non-safety-sensitive duty", etc. As a SAP, your responsibility is to report that he has complied (or not complied) with your recommendation. Period. If this were an EAP case, you might "release him back to work." But this is DOT. A SAP *does not* release an employee back to work. You must avoid using words that suggest to an employer that it is safe to bring him back. If you report that he has complied with your recommendation, the employer must then decide what to do. Don't get yourself in the middle, don't tell the employer what to do, and don't give the employer any guidance about next steps. Don't "release him to work". The employer would like you to say those words, but I can't say that often enough: Don't take on that liability.

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42 An FMCSA employee, participating in a day of training classes, drank two beers at lunch. Although she was participating in training that day, she was also in uniform and on call so she could have been called out to make a delivery. The employer did not test her because the DER didn't find out about it until two days later. (This happened on a Friday afternoon, and the trainer reported it to the DER Monday morning.)

The DER saw this as a DOT violation and set up an evaluation with me. After the initial meeting, I told the DER it was not a violation of the DOT regs because no testing had been done and the employee did not have the opportunity to have a split specimen test. Is this correct? Is drinking while on the job not considered a DOT violation?

Several things:

Actually, it's a good thing that she wasn't tested.

If she was considered to be on-duty during her lunch hour, consuming alcohol would have been a violation in itself. There should not have been a test. That would have been a violation of 382.205, On-Duty Use.

On the other hand, if she was *not* on-duty during her lunch hour, the violation would have been Pre-Duty Use, 382.207. Since she was on her own time, using alcohol at lunch would have been consuming alcohol within 4 hours before performing safety-sensitive functions, or of being in readiness to perform those functions.

It's important to keep in mind that not all DOT violations are positive test results. Simply "using on the job" is a violation, and if she is caught drinking alcohol while on-duty, or if she consumes alcohol within 4 hours prior to safety-sensitive functions, she is immediately removed from safety-sensitive functions and is required to complete a SAP return-to-duty process before returning to safety-sensitive functions. **There should be no alcohol test.**

Split specimen? A split specimen applies only to a drug test, conducted on a urine specimen. Alcohol tests are conducted on a specimen of breath. There is no split specimen for a breath test.

But here is another issue: Who observed her drinking? Was it a supervisor? Did anyone confront her about it? Three days later the employee could dispute the charges. And if the "informer" was a fellow employee, the employer definitely shouldn't take action on it. Only a trained supervisor should have input or authority in this situation.

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43 An employer conducted a non-DOT sweep, testing all employees. One of his DOT drivers tested positive for cocaine and THC. The employer sees this as a DOT violation and he wants me to do a SAP return-to-duty process on the driver.

Since this was a non-DOT test, it is not a DOT violation. The employer can't require a DOT SAP process, with follow-up

testing, etc. DOT and non-DOT programs can't be mixed. (40.13). An employer can't turn a non-DOT test into a DOT violation. Only a DOT test can result in a DOT violation.

You could, however, conduct a non-DOT "plain vanilla" evaluation. If you do, be sure to get a release. (You wouldn't be permitted to use releases if it were a DOT case.)

Ask the employer specifically what he wants. Is this just an assessment with a write-up of your recommendation? Is the employer requiring the employee to go to treatment? If he does, is he then expecting you to monitor treatment? Will you do a second assessment when the employee finishes treatment? Will the employee be allowed to work during treatment? What is the employer's agreement with the employee? Each employer must decide how he wants to handle non-DOT violations, and you need to know what those agreements are.

If the employer asks you to set up follow-up testing, I suggest you push back. Let the employer make his own decisions about follow-up testing. That's how state laws are written. Get yourself out of the middle of that one. Yes, DOT requires you to set up follow-up testing. But this is non-DOT. The employer can do whatever he wants to do, provided he observes testing laws of his particular state (where they exist). When the employer is concerned about the employee for any reason, he could order a follow-up test.

If the employer is not concerned about the employee using drugs, he could decide not to do any (or many) follow-up tests. A non-DOT follow-up testing plan should be entirely the employer's call instead of expecting you, the assessor, to come up with a "magic" program. (On one hand, the employer may complain that you required too many tests, but then again, if the employee causes an accident and then tests positive, the employer will tell you that you didn't require enough tests. You'll never win that one.)

I suggest that you not use DOT/SAP forms for reporting. It's too easy to get your clients and your forms mixed up. Use a reporting format that makes it very clear that this individual is not a DOT employee.

When you sign paperwork for a non-DOT evaluation, call yourself a DAC (Drug and Alcohol Counselor), not a SAP. FRA wrote this into the rule in 2011, in order to distinguish SAP cases from non-DOT cases. It's my guess that all the modes will eventually move in this direction, so we may as well start making the distinction now.

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44 An HR manager wants to cover my SAP fees by using the employee's health insurance. The company is self-insured. She is asking me for a CPT code so that they can reimburse him for what he paid me. Given that a SAP evaluation is a DOT evaluation rather than a clinical evaluation, I am not sure what an appropriate response would be to this request.

I don't know what to tell you. I'd ask the company what code they would accept. (Actually this *is* a clinical assessment, and it requires the use of clinical instruments for making the assessment).

Since the company is self-insured, they can approve whatever they want. Health insurance applies to medical necessity. A positive drug test is not a medical necessity. In fact, DOT doesn't consider a drug test to be medical information. An employer's testing records should not be stored in the company's Medical Department.

This request baffles me. I think the employer needs to give you some guidance here.

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45 A DOT employee tells me that he does not intend to complete my treatment plan. He told me he found another job. Am I "required" or "supposed to" or "not advised" to send a SAP letter of non-compliance to the company? I've had this happen a couple of times and one time the company asked me for a formal letter stating noncompliance. Your thoughts? Does not the absence of a return-to-work/second letter to the company tell them all they need to know?

Immediately send a letter of non-compliance to the employer he was working for. I've heard stories about what happened when a final SAP report was not submitted. In one case, an employee used the format from the Initial Report to "create" his OWN Follow-up Evaluation Report. The forged report looked very official; the new employer accepted it without even contacting the previous employer. Even though there are loopholes, a written report of non-compliance might stop this guy in his tracks.

SAPs often explain to the employee (at the beginning of an evaluation) that they will issue a letter of non-compliance the moment the employee doesn't cooperate with either the SAP or the treatment provider, or when the employee won't return the SAP's phone calls.

A report of non-compliance is not final. It can be revised at any time if/when the employee decides to get into compliance. Taking a non-DOT job may be necessary right now so he will have some income. But eventually he may try to return to a DOT job, and when that happens, you really want this non-compliance letter to be in the previous employer's file, so it can be forwarded to future employers.

Auditors will expect to see a report of compliance (or non-compliance) to make sure an employee's file is complete, even if the employee has been terminated. This is the

paperwork that a previous employer would send to a future employer when the employee obtains a new job.

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46 ***A client completed IOP as I recommended. She returned to work after I reported compliance, but she was still in aftercare. Lately, she has been inconsistent in aftercare, and she has now officially been terminated from aftercare. I want to have her repeat IOP and then more aftercare. Even though she is back at work, I plan to send her employer a non compliance report regarding her failing aftercare. Can she continue to work, since he has not incurred another violation?***

Whoa! You can't do this. Once you have reported compliance, you are done. You can't suddenly report non-compliance. You can report that she has been booted out of aftercare, but it's really up to the employer to decide whether to take job action. Your report of successful compliance can't be changed (by you or anyone else) to a report of non-compliance.

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47 ***In my Initial SAP Report, should I specify where treatment will take place, or should I just leave it in general terms, that the employee just needs to complete a treatment program. I conducted an assessment on a veteran and, for cost factors, he would like his treatment to take place at his V.A. Hospital. I called the hospital, and found out that they do have a CD program and are willing to tailor it to his needs. I have suggested he complete 10 outpatient sessions and 10 marijuana 12-step meetings, but I have no idea what recommendation the V.A. CD program might come up with regarding his CD treatment, and whether they would even pay attention to my input.***

The regulation requires the SAP to be specific. "SAP Guidelines", p. 5, "*The evaluation should provide a diagnosis, treatment recommendations, and a treatment plan…"* Name the provider, and precisely the type and length of treatment. The SAP must determine what the treatment program is. In the "SAP Guidelines", p. 7, "*The SAP should transmit, by appropriate means, the treatment plan with diagnostic determinations to the treatment provider*." That's why DOT requires a SAP to have "knowledge and experience in diagnosis and treatment". Otherwise anyone could be a SAP, and simply direct the employee to a treatment provider to be assessed. It would make the SAP process meaningless.

The example I use is "Two weeks of IOP at St. Mary's."

Don't let the treatment provider tell you what this employee needs. DOT expects the SAP to tell the treatment provider what the treatment plan will be. And the treatment provider can't change it. (40.297 says only a SAP can change the SAP's recommended treatment plan.)

The Follow-up Evaluation Report requires you to list the treatment program, the treatment provider, and the inclusive dates of treatment on that report. Whatever you report as the completed treatment plan in that Follow-up Evaluation must exactly match what you had specified as your recommended treatment plan on the Initial Report. In an audit, those two reports will be compared to each other. If you recommend one thing in the Initial Report, and Follow-up Evaluation Report indicates that the completed treatment was something different, the auditors will ask "Who changed it, and why?" That could be a problem.

Don't leave the treatment recommendation open-ended, and don't ask the employee to make his/her own decision about where to go for treatment. DOT expects a SAP to be familiar with quality programs, and to refer the employee to a program that will do the best job appropriately. "SAP Guidelines", p. 7, says *"the SAP may permit the employee to select the facility or practice from a SAP-approved provider list."* That means you have actually investigated each of those programs, and that you are confident that each of the programs on that list would be equally effective. And if one of the programs on your list is actually better than the other(s), then you should recommend **only** that program.

Regarding reimbursement, DOT's position is that you are not required to find a treatment program that will be covered by the client's insurance plan. If a program is not covered, but you feel it is the best program, you should still require it. If the employee cannot afford to pay for a program, it means he may have to find another job outside of the transportation industry. DOT will back you up on that. It's ok to start by looking for a program that is reimbursable. But if you can't find one, don't compromise and send him to a schlocky (inadequate) program just so he can meet the requirement and get his job back. That's not showing concern for public safety.

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48 ***I just completed an evaluation for a guy whose company requires the ENTIRE SAP process, including the negative return-to-duty test, to be completed in 10 working days from the day they notify him of his violation. I talked with the DER, and she confirmed it is their company policy, for both DOT and non-DOT employees. Can an employer do this? I don't know how I can do this, but I don't want to be responsible for getting him terminated?***

When it comes to job action (termination, leave without pay, etc.), an employer can make whatever decisions he wants to make related to running his business. Granted, this job action is a little harsh, but nothing prohibits the employer from having this policy.

Keep in mind that this employer's rule shouldn't influence you and your recommendation in any way. If you recommend 4 weeks of outpatient, it simply means he will lose his job…another consequence of using drugs. You are under no expectation or obligation to try to find treatment or education that will fit this 10-day window. Don't let the employee guilt you into that.

Here is another thing that could happen… If his positive test had been for marijuana, the THC level might not even be cleared out of his system in 10 days, and he wouldn't be able to get a negative result on his return-to-duty test. He'd lose his job in that scenario too.

I wrote a policy a couple years ago for a very small company that had two drivers. The owner said he couldn't be without a driver for longer than 10 days. Thus, his policy includes the statement that if the SAP process takes longer than 10 days, the employee will be terminated and replaced. The owner said, "I can't shut down my business just because an employee used drugs. I can't sit here and wait for that employee to get back after treatment, especially since I have no way of knowing if he will even be successful in his treatment."

As a SAP for this employer, this doesn't mean you have to find a 9-day program for an employee with a violation. It's not about getting that employee back to work. (That's the employee's problem.) It's about public safety. (That's your responsibility).

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49 *An employee's test result was positive for THC. He tried to use the hemp oil excuse. The MRO stated his nanogram level was consistent with that of a cannabis smoker, not someone who used hemp oil to cook a meal. This guy does NOT get it.*

He is a railroad conductor. He keeps saying he needs to return to work but I don't feel that he has "successfully complied".

Could I report that he has completed outpatient treatment, but that he tested positive afterwards and fails to relate his use to the seriousness of his job. Your thoughts?

You should simply report that he did not "successfully comply" with your recommendation. Period. Don't say more than that.

40.311 requires you to give clinical reasons for non-compliance. You can state that treatment program tests indicate continued drug use. You can also say that he appears to not understand DOT's rule of *no* use of controlled substances at *any* time. Period.

The SAP report requires that you indicate the inclusive dates of treatment. List the dates. Don't get into details like "completed outpatient treatment", etc. The basic fact is that he has not completed your recommendation.

When you write a SAP report, it is important to be objective. And brief.

Look at 40.311 to see exactly what must be in your Follow-up Evaluation Report. Do not deviate, do not substitute, and do not change it. These reports are intended to be short and concise. No details needed, no explanations needed. Just the facts.

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50 *An employee's violation is a refusal to submit to a drug test. Do I need documentation to verify that it was a refusal?*

I suggest that you call the DER to find out the reason for the refusal. The employee won't know, and won't be able give you the answer to that question. Go directly to the DER.

There are a number of reasons that an employee will have a refusal. Don't assume it means he didn't show up for the test. It could have been a shy bladder. It could be that the employee attempted to adulterate his specimen. Or the MRO might have determined the specimen was a substitution.

Each of these is a refusal, and each of them might give you a different perspective on your assessment and ultimate treatment recommendation.

Call the DER and ask the reason for the employee's refusal.

For definitions of a refusal for a drug test, read 40.191
For definitions of a refusal for an alcohol tests, read 40.261

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51 *I am being told by a SAP broker that I must give the employee a list of possible treatment providers, so the employee can make a choice. Is this in the regulation?*

This is **not** in the regulation. That SAP broker is giving you wrong information. DOT expects a SAP to make a recommendation for the best treatment for an employee. If you are confident that one of the treatment providers is superior to all others, that one provider should be your recommendation. The only time a "list" is appropriate is when you determine that more than one program meets the needs of a client, and you would be equally comfortable with the employee going to any of those programs.

In the "SAP Guidelines" "The Referral Process", p. 7, "*When a variety of appropriate treatment programs are available within the employee's geographical area, the SAP may permit the employee to select the facility or practice from a SAP-approved provider list.*"

The key word here is "may". There is no "must". And then, only if every program on the list actually meets with your approval. I tend to think that this should be rarely used.

An employee knows almost nothing about treatment programs. If an employee is given choices, he will choose the program that is most conveniently located. Or the program that requires the fewer meetings. Or the program that his uncle went to, and who said it was "easy." Irrelevant reasons like that. Quality of treatment will not be one of them.

You are the SAP. This should be your decision. It is not about the employee's convenience.

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52 *A railroad employer told me that FRA auditors commented that my SAP Follow-up Evaluation Report had not indicated if follow-up tests were for drug only, alcohol only or both drug and alcohol. What is that about?*

As a SAP, you can order follow-up testing for both alcohol and drugs. 40.307(c) *"You are the sole determiner of the number and frequency of follow-up tests and whether these tests will be for drugs, alcohol, or both…"*

This is the first time I heard auditors say anything about this. And some auditors might look for this, and others don't.

If you use a form for your follow-up testing plan (and I suggest that you do, rather than trying to put this into a narrative which can be easily misinterpreted), you could have two columns, one for alcohol and one for drugs, with number and frequency of tests in each column. If you require both, enter the number and frequency for both. (They don't have to be the same). If you are requiring testing for drugs only, simply put zeros in the alcohol column. Then an auditor would know that you at least knew about this part of the regulation, and that you did consider it.

The same for the return-to-duty test, since the SAP has the authority to require a return-to-duty test for both alcohol and drugs.

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53 *A trucking company terminated a driver for having a positive test. The driver has filed for unemployment and the employer was asked the reason for termination. The employer wants to know if he can tell the Unemployment folks that the employee had "a positive drug test", or should he just report "violation of a policy"?*

This is addressed in 40.323. **May program participants release drug or alcohol test information in connection with legal proceedings?**

(a) As an employer, you may release information pertaining to an employee's drug or alcohol test without the employee's consent in certain legal proceedings.

(1) These proceedings include a lawsuit (e.g., a wrongful discharge action), grievance (e.g., an arbitration concerning disciplinary action taken by the employer), or administrative proceeding (e.g., an unemployment compensation hearing) brought by, or on behalf of, an employee and resulting from a positive DOT drug or alcohol test or a refusal to test (including, but not limited to, adulterated or substituted test results).

(b) …..

(c) …..

(d) As an employer or service agent, you must immediately notify the employee in writing of any information you release under this section.

Notice that (d) requires the employer to notify the employee in writing about this. I would suggest that the employer also references the fact that 40.323 gives him permission to do this, so as to discourage the employee from running off to hire a lawyer.

In these situations, the employee will likely not have his claim honored.

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54 *An employee tested positive on a DOT test. The driver has a CDL, but that CDL is not required for his job (interstate delivery of furniture). All the company vehicles are under 26,001 lbs. As the SAP in this case, do I handle this as a non-DOT, even though the employer ordered a DOT test?*

If a test is conducted on a federal DOT form, it requires a federal SAP return-to-duty process. As a SAP, you can't move it to a non-DOT status.

I encourage SAPs to contact the DER and request a copy of the Custody-Control Form (CCF). Even when the employee has been terminated. The CCF will provide you with the information that you need in order to carry out the evaluation and write your SAP reports.

You don't need a release in order to do that. If the DER makes it difficult for you to get this information, e-mail a copy of the "Employer Guidelines", or at least a copy of page 23 of the Guidelines—the section that explains that the employer **must** provide this information to you, and that you don't need a release.

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