

What can go wrong with DOT testing? A lot!

Test Your Knowledge with Common Industry Scenarios



There are many moving pieces in a DOT drug and alcohol program, including multiple internal and external individuals who play a role.

With so many hands involved in the process, mistakes can and will happen along the way. Some situations are simple to manage or correct. Others are so obscure that they leave program managers at a loss as to how to respond.

In the following scenarios, we explore real-world examples of unexpected challenges faced by DOT program managers and provide insights into how they should navigate these complex situations — offering lessons that every compliance professional should know.

KEY PLAYERS IN YOUR PROGRAM

If you're a motor carrier that's operating commercial motor vehicles (CMVs) requiring a commercial driver's license (CDL), you must set up a DOT drug and alcohol program that satisfies the Federal Motor Carrier Safety Administration's (FMCSA) testing rules in 49 CFR Part 382.

Active participants in your program include:

- Drivers operating or who may be called upon to operate CMVs requiring CDLs,
- Facilities to collect drug testing specimens and/or perform alcohol testing,
- Certified laboratories to process drug-testing specimens,
- Medical review officers (MROs) to review the laboratory's findings and issue official results, and
- Consortium/third-party administrators (C/TPAs), if you outsource administrative services.

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The motor carrier's designated employer representative (DER) handles communication between all these parties.

Note that some facets of the carrier's program may be farmed out between different departments (HR, safety, operations) with several job titles handling different pieces of the program, such as managing the random selection, requesting Clearinghouse queries, notifying drivers of testing, setting up appointments, maintaining records, and so forth.

With so many details to oversee, it's no wonder that program administrators deal with a multitude of scenarios. Note that even though some situations are outside of the control of the motor carrier, they're still held responsible for the actions of everyone with a hand in the process — employees, contractors, and service agents.

Now that we have the players identified, let's dive into some real-life situations. Carefully read the following scenarios and consider how you would have handled the issue.



ACTUAL KNOWLEDGE

Actual knowledge as defined in 382.107 occurs when an employer learns a driver used drugs or alcohol in violation of Part 382. This information can be learned through the employer's direct observation, a traffic citation, previous employers, or a driver's admission.

Dissect the following situations to determine whether they qualify as actual knowledge.



ALCOHOL POSSESSION

SCENARIO: During a roadside inspection, a driver who was operating a CDL vehicle was cited with 392.5(a)(3), possessing alcohol that's not manifested while on duty or operating a commercial motor vehicle. The driver had an unopened six-pack of beer that the officer saw in the truck's cab. The driver wasn't cited for being under the influence. Based on the fact the citation appears on the roadside inspection report, is this event considered actual knowledge under 382.107? Is the incident reported by the motor carrier to the Drug and Alcohol Clearinghouse as an alcohol violation?

ANSWER: No. Even though the driver was engaging in behavior that violates 392.5, possession is not listed in Subpart B to Part 382 as prohibited behavior requiring the return-to-duty process and follow-up testing. The event isn't reported to the Clearinghouse. According to 392.5, the driver is placed out of service for 24 hours, and any additional consequences would be based on company policy.

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FAILED NON-DOT TEST

SCENARIO: A motor carrier has a drug-free workplace (non-DOT) testing program in addition to its DOT (Part 382) testing. The non-DOT drug panel covers the same substances as the DOT test. The carrier's CDL drivers are placed in both testing programs.

One of the carrier's CDL drivers failed a non-DOT random drug test. When approached about the results, the driver admitted to using drugs. Is this a positive test that the MRO or employer should report to the Clearinghouse?

ANSWER: This is a trick question. The test results aren't reported to the Clearinghouse, as there are no DOT consequences for failing a non-DOT drug or alcohol test. The MRO can't report the results of a non-DOT test to the Clearinghouse. In this scenario, the driver admitted to using the drugs found in the testing panel. The drug test result can't be used as actual knowledge; however, the admission of drug use fits within the definition in 382.107. It qualifies as actual knowledge, which holds the same consequences as a failed DOT drug test and is reported to the Clearinghouse by the employer.

Had the driver refused to comment on the result or denied drug use, then no violation was committed. It would not be actual knowledge, and nothing is reported to FMCSA.



PROBLEMS AT THE CLINIC

Often motor carriers must figure out how to respond to issues occurring at the clinic. Here are two situations for your consideration. What would you do?



UNOBSERVED TEST

SCENARIO: A driver was sent for a DOT return-to-duty drug test. The chain of custody showed that the clinic failed to observe the collection when required. Is a new drug test required?

ANSWER: At first, you might think the test should stand since failing to monitor a test when required is not a flaw (see 40.209(b)(6)) that cancels a test. However, anecdotal evidence from motor carriers that went through FMCSA audits leans toward retesting.

To find out what FMCSA expects of the carrier, J. J. Keller reached out to the agency with this exact question. We learned that FMCSA auditors would expect the carrier to send the driver for another return-to-duty or follow-up drug test since FMCSA regulations require that those test types be under direct observation.

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INCORRECT CUSTODY AND CONTROL FORM (CCF)

SCENARIO: A CDL holder was sent for a random test under an employer's drug-free workplace (non-DOT) program. The driver is not in a safety-sensitive position for the employer, meaning the employee will never be called upon, even occasionally, to operate a CDL CMV.

The collector conducting the test sees that the employer is a motor carrier client and automatically grabs a Federal Drug Testing Custody and Control Form (CCF), the form used for DOT testing. The test is processed as DOT and comes back positive. What are the motor carrier's options to help correct this mistake? Or is the driver stuck with a violation in the Clearinghouse, requiring the return-to-duty process and follow-up program?

ANSWER: Use of the federal CCF does little damage if the result is negative. The error is remedied through a signed statement by the supervisor and/or collector explaining that it was supposed to be a non-DOT test. FMCSA is not involved in the process. In fact, the agency has made it clear that they don't want you to reach out to them in this scenario.

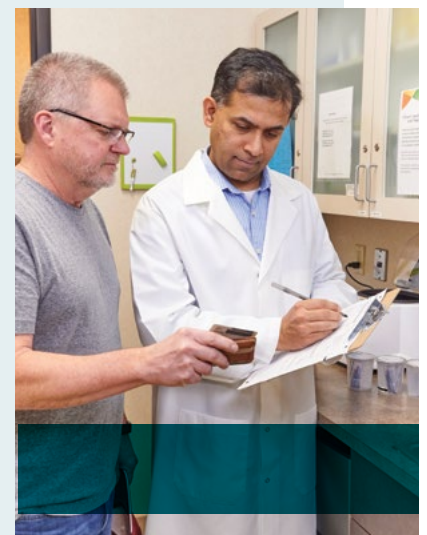
On the other hand, a failed DOT drug test can ruin the career for someone who holds a CDL. It's reported to the Drug and Alcohol Clearinghouse by the MRO. The CDL holder is now in a "prohibited" status and unable to operate even a non-CDL CMV based on 382.501(c). The driver will soon have a downgraded CDL once the state driver's licensing agency learns of the status.

It's more complicated to correct a failed drug test that used a federal CCF in error. It requires the motor carrier or employee to submit a petition to downgrade the test to non-DOT. The request is made through a DataQs account. FMCSA will investigate the circumstances and decide whether to downgrade and remove it from the Clearinghouse.

The rules don't require that the employer contact the lab to redesignate the result as non-DOT (remove it from the lab summary). Some labs may accommodate such a request, while others will not entertain it.

If the driver lost CDL privileges before the error is fixed, the driver may have to show the state DMV the Clearinghouse status of Not Prohibited and proof of the successful DataQs challenge.

When a motor carrier has two testing programs through the same facility, they must clearly communicate with the collection site which test type is being requested. When errors are discovered, they must be addressed with the clinic to avoid dilemmas.



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ISSUES WITH SPECIMENS

Specimen collection doesn't always go as planned. When you receive a call from the clinic, it's important to know your next steps.

The following situations are common, but also commonly misunderstood.



SHY BLADDER

SCENARIO: A driver is sent for a random drug test and subject to a urine specimen collection. However, the driver is unable to provide an adequate specimen, even after waiting three hours and drinking water.

After the three-hour waiting period, the collector immediately notifies the DER of the incident and provides both the DER and MRO a copy of the chain of custody form. What is the DER's role after this notification? Can the driver go back tomorrow for another try? Is this a refusal to test?

ANSWER: The driver can't return for another try the next day. Instead, the DER must consult with the MRO, and then direct the employee to seek out an evaluation from a physician that is acceptable to the MRO. The driver is given five days to provide information from this doctor that there was a legitimate medical explanation for the shy bladder. During those five days, there is no official drug or alcohol test result. It's not a refusal to test at this point.

If the driver fails to pursue a medical exam or the doctor's findings don't substantiate a reason for the inadequate sample, the MRO will determine that it's a refusal to test. If there's an acceptable medical explanation, the MRO will cancel the test. There isn't a violation.

Another common question: What do you do with the driver during these five days if there's no official test result? The motor carrier's policy should address how this interim is handled, just as it would a period waiting on a lab analysis and MRO result.

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ALCOHOL CONFIRMATION TEST

SCENARIO: An alcohol screening test indicates a .03 BAC, requiring a confirmation test using an evidential breath testing device (EBT).

The facility performing the test notifies the DER that their EBT isn't working and won't be repaired until the end of the week. What should the DER do next?

ANSWER: The DER must arrange a confirmation test at a different facility. This may require some phone calls, if the screening facility doesn't have a sister site equipped to perform the test.

The driver must be accompanied to the new facility by the alcohol screening technician, another technician, or an employer representative. The driver must be directed not to attempt driving to the confirmation testing site.

The driver is given the same instructions no matter where the confirmation test is performed: not to eat, drink, put anything (e.g., cigarette, chewing gum) into the mouth, or belch. The transit time to the new clinic counts toward the waiting period of 15 to 30 minutes. In the event more than 30 minutes pass, the confirmation test must still proceed (see 40.251(e)-(g)).

Whoever accompanies the driver must be instructed to carry a copy of the ATF to the BAT who will perform the confirmation test.

If the confirmation test is .04 BAC or greater, it's a failed alcohol test. If the result is .02 to .039, it's not a violation but requires that you remove the driver from duty for at least 24 hours from the test. If less than .02, there are no DOT consequences.



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THE RISK OF NONCOMPLIANCE

If you thought you were the only one contending with odd drug and alcohol testing scenarios such as these, you were wrong. The situations provided here were a very small sampling of the many variables encountered by motor carriers.

Most issues are black and white in the regulations. But there will always be problems that are not addressed in the regulations or DOT interpretative guidance. And there's no reading between the lines to find an answer when it comes to compliance.

But the risk of not knowing the answer is dangerous — potentially leading to fines and penalties, nuclear verdicts, or claims by current and former drivers that you



It's where having a trusted advisor is invaluable.

Our team of experts will help walk you through the complexities of running a DOT testing program. They have decades of experience handling scenarios such as these and maintain regular contact with agencies to help find answers.

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