

Observed Urine Specimen Collections

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OBSERVATIONS AND ANECDOTES ON THE LAW AND BEST PRACTICES

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Why do employers want observed collections?

Safety-sensitive employees:

- For regulated employers, often mandated by law.
 - Even for non-regulated employees, safety-sensitive positions remain a concern for employers.
- Thriving market for adulterants, prosthetics, and tips to defeat urine drug testing.
- Best way to ensure integrity of specimen.



Why do employers want observed collections?

Non-safety sensitive employees:

- Empirical evidence demonstrates that drug use degrades overall workforces effectiveness and attendance.
 - Even if a position is not safety-sensitive, employee attempts to interfere with a testing program constitute workplace policy violations subject to discipline.
- Such attempts also undermine purpose of policy and employer's legitimate interest in promoting a drug-free workplace.



Safety-Sensitive vs. Other Duties

- Many States that have promulgated laws addressing observed collections do not distinguish between employee job duties.
 - Some, however, do. E.g., Georgia, South Dakota
- For testing in States with no regulation, employers may benefit by tailoring observed collection policies to their workforce.
 - Regardless of State common law standards, the ability to demonstrate a rationale basis for a specific observed collection will only assist in justifying practice, e.g., employee observed tampering with specimen



Privacy Issues and Claims

Public Employers

- For public employers, there is “state action” when the employer requires an observed collection, implicating the Fourth Amendment.
- In these cases, courts weigh the government’s interest against the privacy rights of the employee.
 - Diminished expectation of privacy
 - Individualized concern of adulteration or compelling safety issue



Privacy Issues and Claims

Private Employers

- Since there is no “state action” when a employer tests its employees, claims are generally limited to common law invasion of privacy and/or intrusion claims.
- Defenses include
 - At-will employment, i.e., employee is free to decline and quit his or her job.
 - Consent



How is an Observed Collection Performed?

Department of Transportation

- The DOT provides a specific procedure for an observed collection. Steps include:
 - Same-sex observer must ask donor to raise upper garment to above waist
 - Same-sex observer must ask donor to lower pants/skirt and underpants, and turn around, to show that no prosthetic device exists
 - Same-sex observer must watch the urine go from the donor's body into the collection container



Other Observed Collection Procedures

US Department of Health & Human Services

- Same as DOT, but HHS requirements do not require the raising and lowering of clothing—or turning around.
- Observer must watch the urine go from the donor's body into the collection container.



Variations in Federal Standard Adopted by States

- Georgia – Public employees
 - Adopts HHS observed collection procedures
- Indiana – Mining Industry
 - Adopts HHS observed collection procedures
- Tennessee – Workers Compensation
 - Adopts DOT observed collection procedures



Instances In Which Observed Collections Are Initiated

Under DOT regulations, observed collections must be initiated:

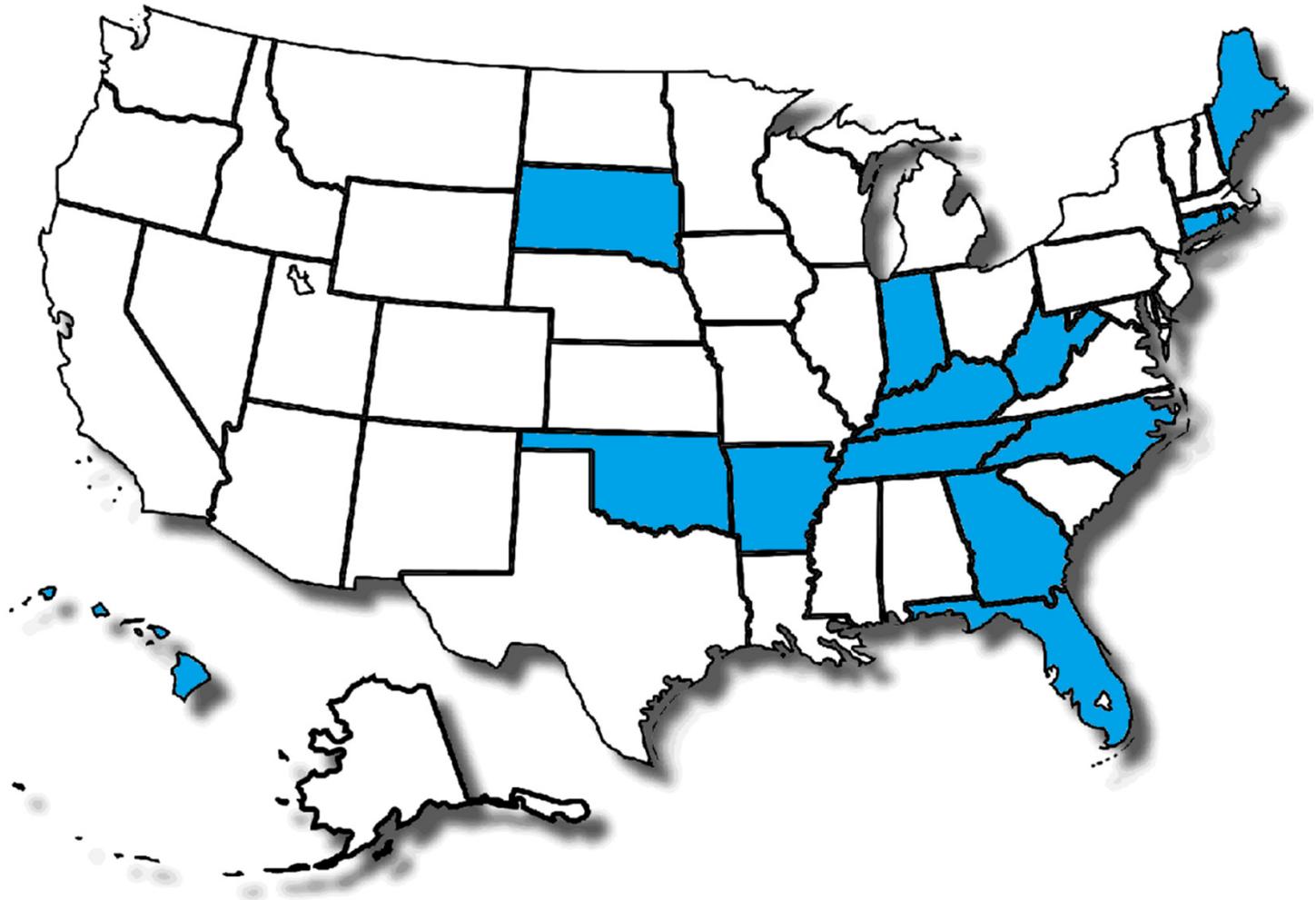
- By an MRO or Employer:
 - When prior result was invalid or met specified SVT criteria
 - When a non-negative result is cancelled due to the unavailability of Bottle B for retesting
 - When an employee returns to duty



Initiation of Observation under DOT Procedures

- **By Collector:**
 - When directed to by the DER
 - When the Collector observes materials or conduct clearly indicating an attempt to tamper, or the original specimen appears to have been tampered with
 - When a specimen temperature is out-of-range

States with Laws related to Observed Collections





State Law Mandates

- The various state law drug testing schemes can generally be categorized as:
 - Mandatory for all employees
 - Mandatory for public employees
 - Voluntary workers compensation premium discount programs
 - Mandatory industry-specific programs



Industry Standards for Private Employees

- The vast majority of States do not provide any statutory or regulatory guidance to employers **when** to conduct observed urine specimen collections.
 - This requires critical policy determinations by employers
- DOT's drug testing program is recognized as a national standard for work-place drug testing procedures in general.
 - Absent contrary state law, private employers may therefore rely upon DOT observed collection procedures in their own programs as **how** to conduct an observed collection
 - May bolster defense of claims arising out of a properly justified, observed urine specimen collection



Partially-Observed Collections

Many court decisions involve claims arising from a urine specimen that is “attended” by a same-gender observer.

- These types of cases involve an observer standing behind the donor, or outside the bathroom stall, but in the bathroom.
 - These situations present much lower evidentiary burdens for an employer regarding the the reasonableness of the intrusion, particularly in “diminished privacy” cases.



States that Prohibit Observed Collections

- Connecticut
- Maine
- Rhode Island

Also, Boulder CO prohibits observed urine specimen collections.



Who Decides When Observed Collections are Required?

In addition to the actual procedure used, State laws may also specifically provide when and who may initiate an observed collection.

In the absence of such regulations, Employers should consider other factors.

- Job duties of employee
- Observed collection policy provisions
- Evidence of attempt to tamper or other basis for an observed collection



Determined by Collection Site Personnel After First Collection

- Florida
 - Not a mandatory scheme for private employees
- Oklahoma
 - Mandatory scheme



Determined by TPA or DER After First Collection

At least one State requires that the DER or TPA determine whether the conduct of the donor at the collection site necessitates an immediate observed collection.

- Hawaii
 - Mandatory scheme



Court Decisions and Trends

- DOT observed collection procedures have been upheld for transportation-industry employees.
 - *BNSF Ry. Co. v. US DOT* (2009)
- However, a recent New York District Court decision rejected an argument that no privacy claim existed based upon a Sheriff's department policy requiring observed collections of all urine specimens.
 - *Allen v. Schiff et al.* (2012)



Best Practices—Private, Non-regulated Testing Programs

- Draft and distribute policy that specifically enumerates the instances in which an observed urine specimen collection may occur.
- For non-safety sensitive personnel, consider a provision limiting observed collections to specific instances.
 - e.g., return-to-duty testing, a previous adulterated, substituted, or invalid result, or upon physical evidence of an attempt to tamper.

QUESTIONS



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