

## DOT Reinstates Direct-Observation Rule

In June 2008, the U.S. Department of Transportation (DOT) adopted a rule requiring that all return to duty and follow up drug tests performed on commercial motor vehicle drivers be directly observed as a way of preventing cheating.

Several groups expressed concerns that the rule violated employees' privacy rights. Federal appeals were filed that delayed the rule until May 2009. The federal appeals court decided in favor of the DOT and the DOT reinstated the rule. Direct observation is now mandatory for all return to duty and follow up drug tests, even if a collective bargaining agreement says otherwise.

Under direct observation procedures, an observer watches the employee provide a urine sample and checks for prosthetic devices and adulterants. Direct observation had always been an option — at the employer's discretion — for return-to-duty and follow-up tests, but the DOT wanted to make it mandatory.

Several unions and a railway company argued before the court that the DOT had acted "arbitrarily and capriciously" in requiring direct observation for certain tests, and violated the Fourth Amendment's protections against unreasonable searches.

Privacy concerns were based on changes the DOT made to the direct-observation procedures themselves, namely requiring employees to raise their shirts, lower their slacks and undergarments, and turn around so the observer could check for devices or adulterants that could be used to cheat on the test. Those changes to 40.67(i) took effect on August 25, 2008.

The DOT has reasonably concluded that the proliferation of cheating devices makes direct observation necessary to render these drug test — needed to protect the traveling public from lethal hazards — effective. Weighing these factors, a balance was struck in favor of permitting direct observation testing in these circumstances.

In reinstating the rule, the DOT is aware that some employers and labor organizations may have entered into collective bargaining agreements that prohibit or limit the use of direct observation collections. Now that the DOT rule is in effect, such agreements are void and contrary to federal law.

The DOT remains convinced that conducting all return-to-duty and follow-up tests under direct observation is the most prudent course from the viewpoint of safety.

### What This Means For Counties

Counties will want to modify their procedures concerning the use of direct observation collections. Their procedures should include requirements that direct observations be conducted so as to allow the observer to check the individual for prosthetic or other cheating devices. This is a requirement for all direct observation collections for return-to-duty and follow-up drug tests.

For more information, contact CTSI at 303-861-0507.