

Drug Testing & Oklahoma Medical Marijuana

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WHY DO DRUG & ALCOHOL TESTING?

- IT IS PROVEN TO BE THE STRONGEST DETERRENT OF ABUSE OF DRUGS & ALCOHOL IN THE WORKPLACE
- CREATES PUBLIC CONFIDENCE IN COUNTY SERVICES



DRUG & ALCOHOL RELATED STATISTICS

Recent statistics reveal that more than

70% of burns

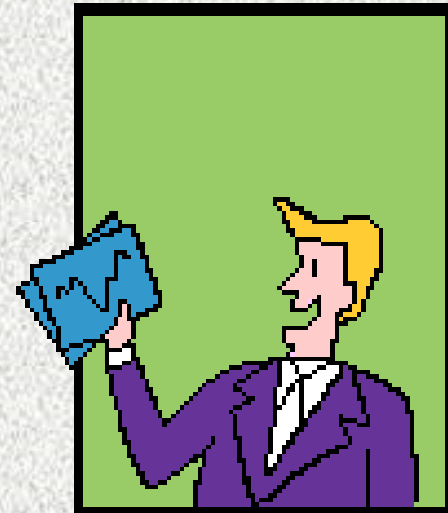
50% of falls

50% of fatal highway crashes

75% of boating accidents

80% of private aircraft accidents

Are alcohol or drug related



Oklahoma Medical Marijuana Act

- SQ 788
- June 26, 2018
- Passed by 57% of Votes



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SQ 788

- Medical Marijuana License holders are allowed to:
 - Consume Marijuana
 - Possess Marijuana (with limitations)
- **Protection only provided to valid license holders**



SQ 788

- Employment Protections
 - No employment discrimination because an employee is a medical marijuana license holder
 - No employment action based solely upon a positive drug test
 - May discriminate, if employer would *“imminently lose a monetary or licensing related benefit under federal law or regulations”*
 - Employer may take action for use, impairment, or possession of marijuana while at work or *“during hours of employment”* **Including Medical Marijuana**

Effect on workplace drug testing

- Cannot discipline or discharge based solely upon a positive test for marijuana
- Conflicted with Oklahoma Standards for Drug and Alcohol Testing
- Pre-employment, post-accident, random (of limited utility) and for-cause testing, but positive test for marijuana may not be the SOLE basis for taking employment action
- Permitted to discipline or discharge for being impaired at work

Marijuana Testing

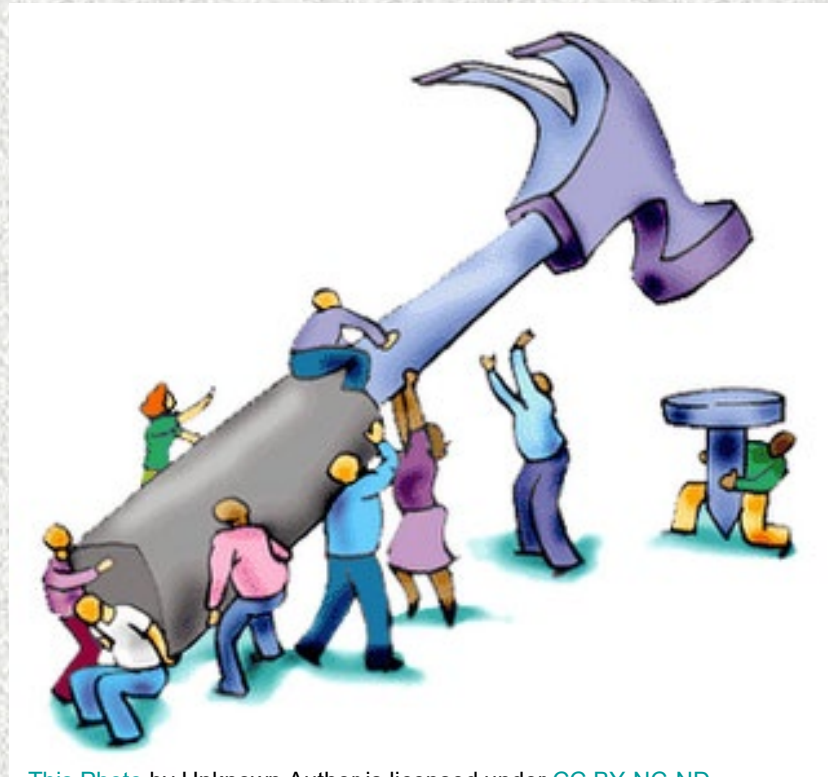
- Marijuana testing challenges
 - Can't determine an individual's impairment
 - Can't determine how long ago consumed
- MROs will report positive marijuana test and leave it up to the employer
- Do not ask applicants or employees if they are license holders unless they test positive
- Ability to take employment action after a positive test will be determined on a case by case basis

Federal Law

- Federally mandated drug testing – Federal contractors, transportation, defense employers
- Example: Department of Transportation notice (updated 10/30/17)
 - DOT regulated drug testing not changed by state laws permitting medical marijuana
 - DOT MROs will continue to treat a drug test as “positive” for medical marijuana users
 - DOT requires testing, does not set employment consequences, other than employee stop safety sensitive duties

Unity Bill (HB 2612)

- Oklahoma Medical Marijuana and Patient Protection Act
- Detailed rules for the implementation of SQ 788



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Unity Bill

- Allowed employers to lawfully refuse to hire or discipline employees that test positive for marijuana who work in **safety sensitive jobs**. Those jobs with tasks or duties the employer reasonably believes could affect the safety and health of the employee...or others.

Safety Sensitive

- Handling hazardous materials
- Operating vehicle, equipment, machinery
- Repairing or monitoring equipment, machinery, etc
- Performing firefighting duties
- Utility work
- Extraction, compression, processing etc., flammable, combustible, volatile or highly regulated components



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Safety Sensitive cont.

- Dispensing pharmaceuticals
- Carrying a firearm
- Direct patient care or direct childcare



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Unity Bill Limitation on Safety Sensitive Employees

- Only limiting testing – not license holders
- Committee to determine safety sensitive
- Clearly communicate who is safety sensitive
- Include in job descriptions and announcements



Recommendations

- Update current drug and alcohol testing policy
- Lawful use of medical marijuana may no longer be an illegal drug under Oklahoma law
- Train supervisors
 - Understanding the law and policy
 - Answering questions
 - Recognizing impairment
 - Help keep the workplace a safe place

Recommendations cont.

- Communicate to employees that perform safety sensitive duties, they can or will be disciplined if tested positive for medical marijuana (even with valid medical marijuana license)
- Have employees sign an acknowledgement they have been told they are performing safety sensitive duties

Recommendations cont.

- Walk employees through the new testing policy
- Communicate the consequences to a violation of the policy
- Many employees have received misinformation from the streets how the new law works
- No one wants employees to innocently fail a test

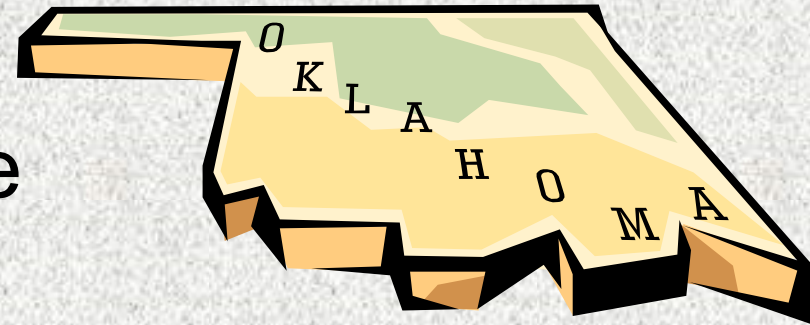
Drug and Alcohol Testing

**Within the new provisions of
Medical Marijuana for safety
and non-safety sensitive
employees**

Applicable Laws in Oklahoma

State of Oklahoma

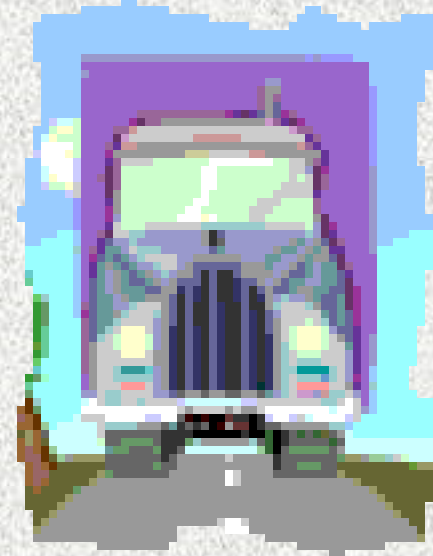
- Statute – Title 40, Chapter 15 – Standards for Workplace Drug and Alcohol Testing Act.
- Regulations – OAC, Title 310, Chapter 638 – Oklahoma State Department of Health.



Applicable Laws in Oklahoma

Federal

- Regulations – 49 CFR, Parts 40 and 382 – U.S. Department of Transportation.
- Commercial Motor Vehicle:
 - Gross weight of 26,001 lbs or more; or
 - Designed to carry 8 people for compensation; or
 - Designed to carry 15 people not for compensation; or
 - Transporting hazardous material.



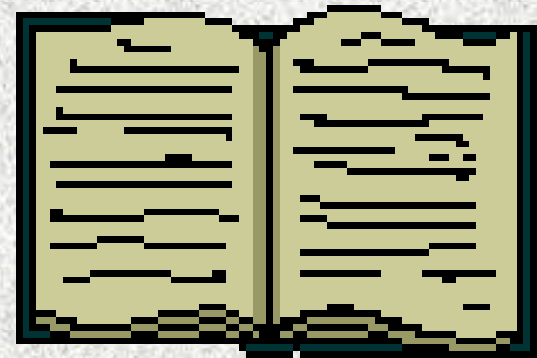
Applicable Laws in Oklahoma

- Federal regulations cover everyone who drives a Commercial Motor Vehicle.
- State law and regulations cover everyone else.
- All employees are covered by one or the other.
- No employee is covered by both.



Drug and Alcohol Testing Policy

- ACCCO has provided a model policy to all members.
- Model policy complies with all laws and regulations.
- Model policy contains some options for individual Counties.
- Recommend that all counties adopt some version of model policy.



State Laws and Regulations

- All testing under state regulations is optional with the county.
- But, if county does any testing, there must be a written policy that meets all requirements. (See 40 O.S. § 555.)
- Remember: This does not apply to CDL holders who drive CMV's.



State Laws and Regulations

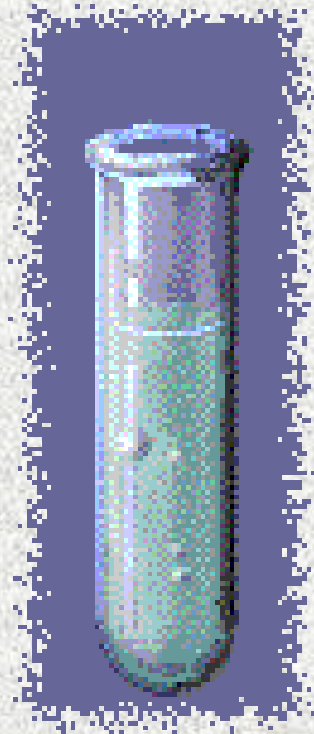
- Employers may test for the following substances:
 - Alcohol
 - Drugs
 - Including marijuana



State Laws and Regulations

Types of Testing Available:

- ✓ Testing of Applicants – Pre-employment
- ✓ For Cause,
- ✓ Post-Accident Testing,
- ✓ * Random Testing,
- ✓ * Scheduled Periodic Testing,
- ✓ Post-Rehabilitation Testing-Return to Duty.



State Laws and Regulations

* Can only be used for:

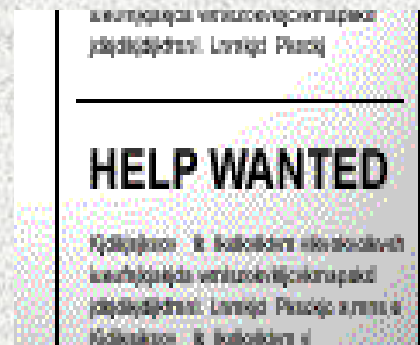
- Police or peace officers,
- Employees with drug interdiction responsibilities,
- Employees authorized to carry firearms,
- Employees whose work directly affects the safety of others,
- Employees who work in direct contact with inmates or juvenile delinquents in custody.



State Laws and Regulations

Applicant Testing:

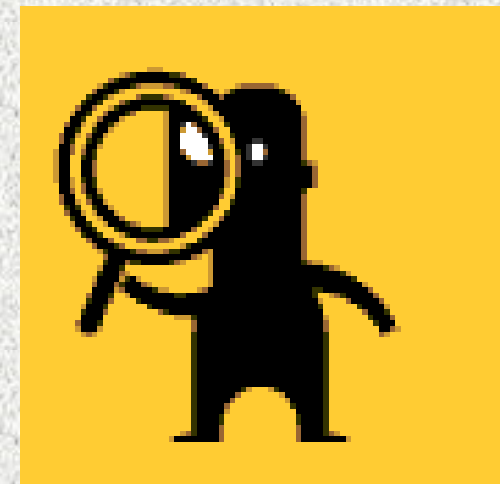
- After a conditional offer of employment.
- When applying, must be told that position requires d & a test.
- Must be given a copy of written policy.
- Refusal to take test or a confirmed positive test will result in withdrawal of offer.
- Communicate if safety sensitive



State Laws and Regulations

- **For-Cause**

- May require testing if employer “reasonably” believes employee may be under influence. Including:
 - D or A on or about employee or vicinity
 - Conduct suggests impairment or influence
 - Report of use on duty
 - Indication of tampered test
 - Negative performance patterns
 - Excessive or unexplained absences or tardiness
- Med. Marijuana Lic. Will not protect



State Laws and Regulations

Post-Accident Testing:

- If you have reasonable suspicion that accident was a direct result of drug or alcohol use,
 - Requirement for \$500 property damage removed
 - Work related accident changed to “at work”
 - If injured, refusal or positive test prevents employee from receiving work comp benefits
- Med. Marijuana Lic. Will not protect

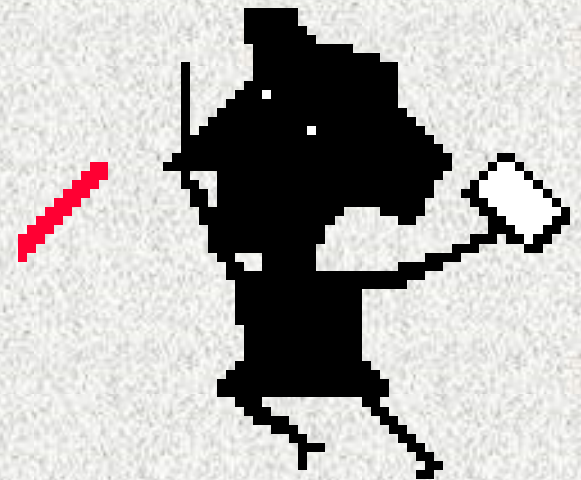


State Laws and Regulations

* Random Testing:

– Public employees limited to “safety sensitive”

- Police officers
- Drug interdiction responsibilities
- Authorized to carry firearm
- Engaged in activities which directly affect the safety of others
- Work for public hospital
- Work with inmates or juvenile delinquents or kids with DHS supervision



State Laws and Regulations

* **Random Testing:**

- All employees in group must have equal chance of being selected
- One employee may be selected several times in a row, and someone else not selected.
- Employer does not have discretion to waive selection.



State Laws and Regulations

* Scheduled Periodic Testing:

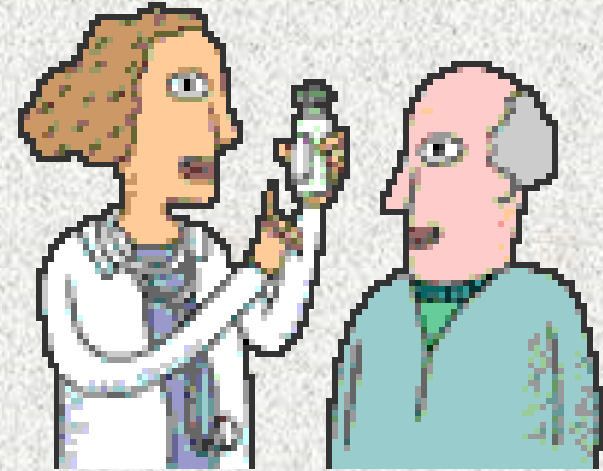
- Limited to same group as Random testing (safety sensitive)
- For example: on birthday, on anniversary, or some set date.
- Must apply to all employees in group.
- Should be scheduled in policy



State Laws and Regulations

Post Rehabilitation Testing:

- May require testing without prior notice for two years after:
 - confirmed positive test; or
 - voluntary dependency treatment



State Laws and Regulations

Testing Procedures:

- Very specific procedures required.
- Strict confidentiality requirements.
- Drugs – urine or hair samples for initial test and for confirmation test.
- Alcohol – initial test – breath, saliva or blood; confirmation test – breath, blood, urine.
- Employee must sign consent form.

State Laws and Regulations

All tests (drug and alcohol) must have a confirmation test.

May temporarily suspend or transfer employee after initial positive test while awaiting confirmation test.

After confirmed positive test, can take any disciplinary action, up to and including discharge.

Refusal to undergo test is same as confirmed positive test.

State Laws and Regulations

- Who pays for tests
 - Employer for all initial
 - Employee for confirmation until positive reversed, then reimbursed



State Laws and Regulations

Questions?



Federal Regulations

Unlike the Oklahoma program, most testing under the Federal Program is **mandatory**. Employers don't have a choice.

Like the Oklahoma program, employers are required to have a detailed written procedure. (49 CFR § 382.601)

Federal Regulations

DOT regulations require that substantial portions of the regulations be reflected in the policy.

Recommend providing each driver with copy of policy, **plus** commercially available copies of regulations.

Must also provide information on effects of alcohol and controlled substance use, also commercially available.

Federal Regulations

Alcohol

Controlled Substances:

- Marijuana metabolites;
- Cocaine metabolites;
- Amphetamines;
- Opiates;
 - Opioids, including hydrocodone, hydromorphone, oxymorphone and oxycodone
- Phencyclidine (PCP)



Federal Regulations

Types of Testing:

- Testing of Applicants or Transfers,
- Post-Accident Testing,
- Random Testing,
- Reasonable Suspicion Testing,
- Scheduled, Periodic Testing (Optional),
- Return-To-Duty Testing,
- Follow-Up Testing.

Federal Regulations

Testing of Applicants or Transfers:

- Prior to performing any safety-sensitive duties,
- Must have a verified negative test result W/6mo
 - For controlled substances, and
 - An alcohol test result of less than 0.04



Federal Regulations

Must conduct query of driver in FMCSA Clearinghouse.

Must request permission for full query of driver using Clearinghouse.

Cannot assign employee to safety sensitive duties until you have permission and query results.

Must also report or ensure any Drug or Alcohol test violations are reported to Clearinghouse.

Federal Regulations

Safety-Sensitive Function:

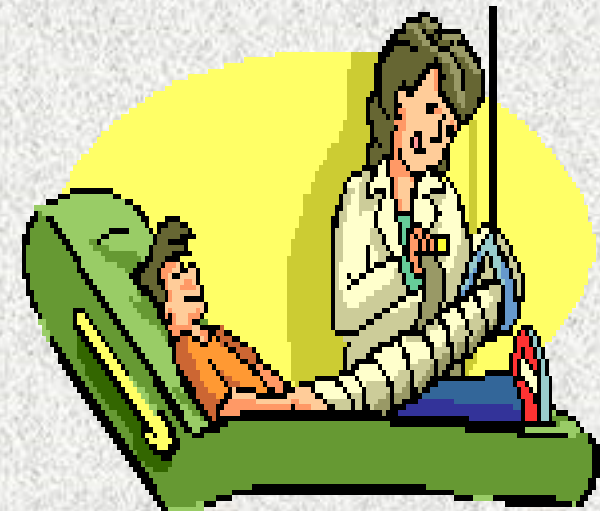
- Waiting to be dispatched,
- Inspecting, servicing, or conditioning any CMV,
- Driving a CMV,
- Time in a sleeper berth,
- Loading or unloading, or giving receipts for shipments,
- Repairing, obtaining assistance, or remaining in attendance.



Federal Regulations

Post-Accident Testing:

- Loss of human life,
- Citation for moving violation, and either
 - Bodily injury to a person, who immediately receives medical treatment away from the scene of the accident, or
 - One or more vehicles disabled.
- Testing done as soon as practical. Within 8hr & 32hr



Federal Regulations

Random Testing:

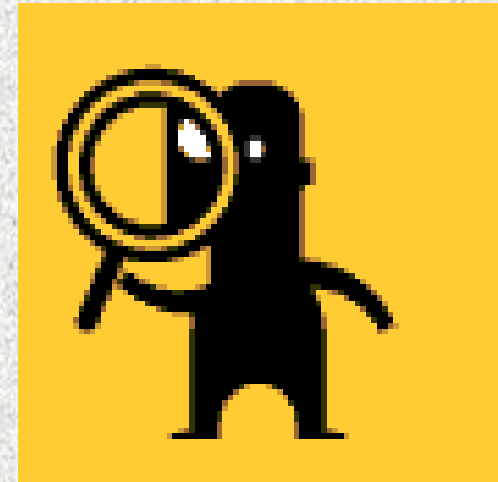
- Percentage of drivers to be tested is set each year by the Federal Motor Carrier Safety Administration, (25% & 10%)
- Each driver has equal chance of being tested each time selections are made.
- Electronic selection



Federal Regulations

Reasonable Suspicion Testing:

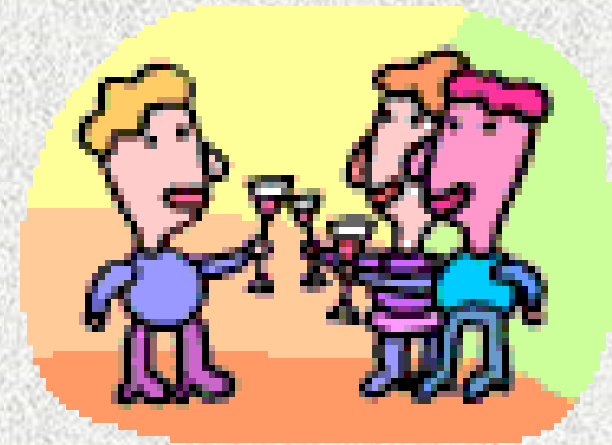
- Reasonable suspicion must arise during, just preceding or just after the work day,
- Requires specific, contemporaneous, articulable observations concerning appearance, behavior, speech or body odors.



Federal Regulations

Scheduled Periodic Testing:

- This is the only optional testing!
- On birthday, anniversary, set date, etc.



Federal Regulations

Return-To-Duty Testing:

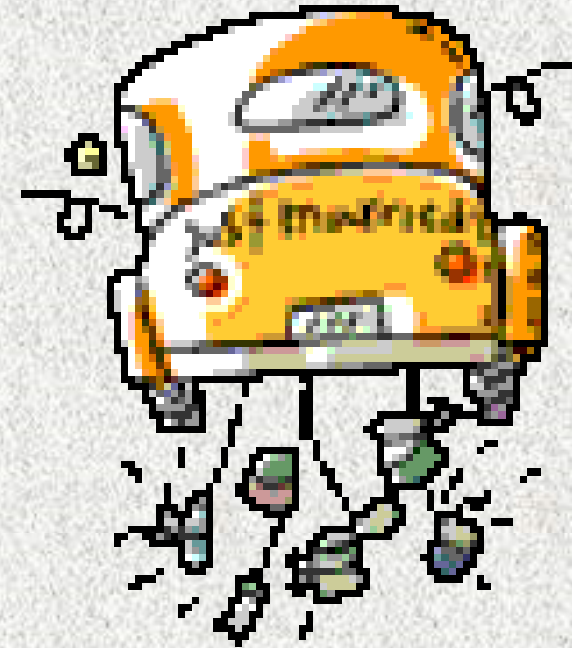
- Only applicable with EAP or if the County decides to return an employee to work,
- Requires certification from a Substance Abuse Professional (SAP) that employee has successfully completed treatment,
- Must be drug-free, with alcohol of 0.02 or below.



Federal Regulations

Follow-Up Testing:

- Only applicable if employee is employed after Return-To-Duty Testing.
- Must include at least six unannounced follow-up tests in the first twelve months of duty following return.
- Can test up to 60 mos.



Federal Regulations

All test results must be verified by a Medical Review Officer (MRO).

Cannot take any disciplinary action or “Stand Down” a driver until the MRO has verified the test results.

Once verified, can take any disciplinary action, up to and including discharge. (as stated in policy)

Refusal to undergo test is same as verified positive test.



Federal Regulations

DOT tests must be completely separate from non-DOT tests. Different procedure, different forms, even different samples.

May **not** use consent forms for DOT tests.

Must advise employee that test is being conducted pursuant to federal regulations (except for Scheduled Periodic Test)



Federal Regulations

Questions?

