

**Gloucester, Salem, Cumberland Counties
Municipal Joint Insurance Fund
2019 Planning Retreat**

“Designated Employer Representative”

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Disclaimer

This “Designated Employer Representative” presentation is designed to provide a general understanding of the legal principles pertaining to the liability of governmental agencies and their personnel. These principles are subject to numerous exceptions and are highly fact sensitive. Seek the advice of your attorney to evaluate Federal and State laws, rules, cases, procedures and circumstances that may affect your municipality.

- Understand the purpose of the DER
- Provide guidance, to help the governing body and their management personnel make good decisions

Mitigation Strategies

- Why do we need to discuss this topic?
 - Position mandated by law under certain circumstances
 - Potential for litigation
 - Suspension of pay
 - Demotion
 - Termination
 - Reputation of employer and employee
 - Fairness
 - Allegations of retaliation
 - ADA



Designated Employer Representative

- What is a Designated Employer Representative?
 - Defined and covered by § 49 CFR Subtitle A Part 40.3, (Code of Federal Regulations)
 - *The DER is an employee authorized by the employer to take immediate action(s) to remove employees from safety-sensitive duties, or cause employees to be removed from these covered duties,*
 - *Make required decisions in the testing and evaluation processes*
 - *Receives test results and other communications for the employer, consistent with the requirements of this part*
 - *Empowered by the governing body to act to take whatever action is warranted (i.e. suspension, termination)*
 - *Service agents cannot act as DERs.*

Designated Employer Representative

- Every municipality covered by the Department of Transportation regulations that employs safety-sensitive employees must have a Designated Employer Representative (DER)
 - Commercial Drivers License requirement (CDL) - Department of Transportation
 - Gross vehicle weight rating of 26,001 lbs. or more
 - Vehicle that carries 15 passengers or more
 - Transports hazardous waste
 - Towing standards
 - Doesn't matter if you employ one or 100 employees



Designated Employer Representative

- New Jersey exempted certain vehicles under Title 39:3-10j
 - Designated operator of firefighting apparatus
 - Non-civilian operator of a military vehicle owned or operated by the United States Department of Defense or the National Guard
 - Operator of a farm vehicle controlled and operated by a farmer used to transport agricultural products
 - Operator of emergency or rescue equipment for the purposes of first aid, ambulance, or rescues squad or for disaster control, shall not be subject to the licensing provisions of the “Commercial Motor Vehicle Safety Act of 1986”

Designated Employer Representative

- DER is also necessary for any non-DOT employer who has someone managing their drug testing program or is required to maintain a drug free workplace
 - Drug Free Workplace Act of 1988
 - All Federal grantees, some Federal contractors (pre-condition)
 - Grants, check the wording
 - Review the “contract” that was signed by the governing body or the mayor
 - Compliance may be mandatory!



Designated Employer Representative

- “Safety Sensitive Positions”
 - Safety sensitive position is a job or position where the employee holding this position has the responsibility for his/her own safety or other people's safety. It would be particularly dangerous if such an employee is using drugs or alcohol while on the job. An employee has to be with clear mind and diligent while occupying such positions.
 - Balance between privacy rights and the benefits of drug testing
 - Hennessey v. Coastal Eagle Point Oil, 609 A.2d 11 (N.J. 1992)
 - Every “Job Title” in writing with a full explanation as to why?
 - Maintain the records and notify the employee
 - Impact not just on employees but clients and customers

Safety Sensitive Positions



- **Examples: Safety Sensitive Positions**
 - **Police Officers**, use of force, arrest procedures, protection of life
 - New Jersey Attorney General's Directive 2018-2 (March 20, 2019)
 - Statewide Mandatory Random Drug Testing for Law Enforcement
 - Must be promulgated by rule, only the State Toxicology Lab
 - **Fire Fighters and EMS**, ability to operate vehicles at higher speeds, responsible for the safety of others
 - **Crossing Guards** – supervision of children and decision making as to when children can enter the roadway and cross the street
 - **Drivers** of heavy equipment, delivery vehicles, snow plows, government vehicles, etc.
 - **Forklift Drivers**, OSHA requires specific training, failure to train or keep records is a serious violation

Designated Employer Representative

- The DER is a very important position
 - The governing body should:
 - Promulgate a rule, identifying the official position, and outline their responsibilities
 - Position should be included in the employee handbook
 - The DER cannot assume his/her duties until properly trained*
 - The DER should be appointed to the position
 - Consult with your Municipal attorney, length of assignment, resolution (yearly) or ordinance
 - The DER cannot be sub contracted out, they must be an employee

Conditions of Employment

- Governing body should have this in their personnel manual
 - Prior to implementing, random testing, reasonable suspicion testing, and applicant testing procedures, It is imperative that the municipality review their collective bargaining agreements
 - Make certain there are no provisions that conflict with Federal regulations for CDL drivers
 - Employees are not required to give up all of their union rights to appeal a decision of the DER
 - Make clear the Federal Law trumps collective bargaining rights
 - Consult with your local municipal attorney or labor counsel

Designated Employer Representative

Overall responsibilities:

- Managing the municipality's drug and alcohol testing program
- Acting as the liaison for drug and alcohol testing agents
- Selecting Service Agents!
 - Municipalities are required to follow the NJ Local Public Contracts Law in soliciting proposals for the selection of
 - » Servicing agents
 - » Medical Review Officers
 - » Etc.
- Part of the specifications should include a copy of the applicable Federal Regulations



DER Selecting Servicing Agents

- Selecting Service Agents:
 - Third Party Administrator (TPA) - any person or entity, other than the employee or employer who provides services in connection with the drug testing program
 - As an employer, you can use a service agent to perform the task(s) of collection
 - Your responsibility to ensure that they are in compliance, your good faith use of a service agent is not a defense in an enforcement action initiated by the DOT agency in which your alleged noncompliance may have resulted
 - Get qualified service agents that are certified and have a reputation for following the rules!

DER Selecting Servicing Agents

- Choosing a “Collection Site”
 - A place selected by the employer where employees present themselves for the purpose of providing a urine specimen for a drug test
 - DER needs to ensure that the collection site meets the requirements of 40.4, some requirements include:
 - Security, privacy, monitoring procedures
 - Single toilet room, or multi-stall restroom, place to wash hands
 - Collection procedures, DOT approved collection kits
 - Place to temporarily store the specimens
 - Etc.
 - Conduct a site visit, document what you observed!

Urine Collection Personnel

- The DER must ensure that the personnel collecting the urine samples are properly trained under CFR 40.33
 - Immediate supervisors may not conduct the collection, unless no one else is available
 - The collector cannot be the HHS-certified laboratory technician or assistant, could link the employee and the specimen
 - Trained by a qualified trainer
 - How to complete the collection....
 - “Problem” collections
 - Understand fatal flaws and correctable flaws
 - Maintaining the integrity of the collection process
 - Demonstrate proficiency, (5) mock collections
 - Monitored and evaluated



DER Responsibilities

- *Chain of custody* - the procedure used to document the handling of the urine specimen from the time the employee gives the specimen to the collector until the specimen is destroyed.
 - This procedure uses the Federal Drug Testing Custody and Control Form (CCF) as approved by the Office of Management and Budget.
 - Ensure that the procedures are followed and documentation is completed

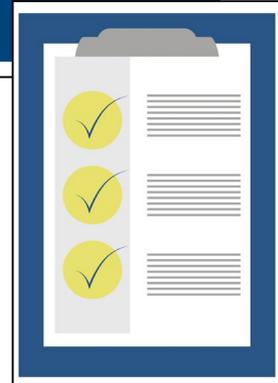


Documentation is your salvation!

Ensure that the Proper Collection Information is Collected

- **Collection Information**

- Full name of employee being tested
- Employee SSN or ID number
- Laboratory name and address (can be pre-printed)
- Employer name and address, phone number, fax number (can be pre-printed)
- DER information
- MRO name, address, phone number, and fax number (can be pre-printed)
- The DOT Agency which regulates the employee's safety sensitive duties
- Test reason, pre-employment; random; Reasonable suspicion/reasonable cause; post accident; return to duty; and follow up



DER Responsibilities

- DOT test versus non-DOT tests
 - You cannot mix the test, one sample for DOT test and a second sample must be taken if additional drug testing is being conducted
 - Separate voids are required
 - Laboratory cannot test for DNA or other types of specimen identity testing
 - Exception drug test collection is conducted as part of a physical examination required by DOT regulations



HHS Drug Testing Laboratories

- DER needs to ensure that the proper lab is used
 - DOT testing, must be certified by the Health and Human Services (HHS) under the National Laboratory Certification Program
 - What are they testing for:
 - Marijuana
 - Cocaine
 - Amphetamines
 - Opioids
 - Phencyclidine (PCP)



Drug Testing Laboratory

- Ability to evaluate the specimen
 - Tampering
 - Concentration of the drug
 - Adulterants and cutoffs
- Report
 - Category 1 – Negative, or negative-dilute
 - Category 2 – Non-Negative results
 - Positive, positive dilute,
 - Adulterated
 - Substituted I
 - Invalid test



Selection of a Medical Review Officer

- DER needs to ensure that the Medical Review Officer (MRO) is qualified
 - Licensed physician
 - Basic knowledge
 - Clinical experience in controlled substances
 - Knowledgeable about issues relating to adulterated and substituted specimens
 - Knowledgeable of DOT guidelines
 - Collection, chain of custody, reporting, & record keeping
 - Interpretation of drug tests and validity test results



DER Responsibilities

- DER needs to ensure that the laboratory does not enter into any relationship with the Medical Review Officer that creates a conflict of interest or the appearance of a conflict of interest
 - No financial benefit
 - Lab cannot employ the MRO
 - Lab cannot have a contract or retainer with the MRO
 - Lab designates which MRO will be used by the employer
 - Lab gives the employer a discount to use a specific MRO
 - Lab and the MRO col-located
 - MRO has a financial interest in the lab

DER Responsibilities

- Performing the functions necessary according to the test results
 - Making necessary decisions in the testing and evaluation process
 - Receiving test results and other communications for the employer
 - Following the municipalities rules and regulations regarding the consequences of a positive test result or refusal to test
 - Removing employees from safety sensitive duties
 - Report test results to the agency and/or state, local authorities if necessary

Substance Abuse Professional (SAP)

- *DER needs to ensure that a qualified professional is chosen to act as the Municipality's Substance Abuse Professional*
 - Credentials, you must have one of the following
 - Licensed physician (MD or DO)
 - Licensed or certified social worker
 - Licensed or certified psychologists
 - Licensed or certified employee assistance professional
 - State licensed or certified marriage and family therapist, or
 - Drug and alcohol counselor certified by an organization that is listed at www.transportation.gov/odapc/sap
 - Clinical experience in the diagnosis and treatment of alcohol and CDS related disorders
 - Knowledgeable as it relates to employer interests in safety sensitive duties
 - See CFR § 40.281 for additional qualifications
 - Research New Jersey Requirements

Results

Applicant:

Employer cannot assume that “no news is good news” and permit applicant to perform safety sensitive duties before receiving the result

Employee:

Prohibited from standing down an employee, before the Medical Review Officer has completed the verification process

Verified Test Result!

- If the DER receives an initial report of a verified positive test result, do not wait for the written report!
 - Immediately remove the employee involved from performing safety-sensitive functions
 - May not return to the safety-sensitive position until the employee successfully completes the return to duty process



Reporting / Effective 1/20/2020

Commercial Driver's License Drug and Alcohol Clearinghouse

- Clearinghouse rule requires FMCSA-regulated employers, Medical Review Officer (MROs), Substance Abuse Professionals (SAPs), consortia/third party administrators (C/TPAs), and other service agents to report to the Clearinghouse information related to violations of the drug and alcohol regulations in 49 Code of Federal Regulations, part 40 and 382 by current and prospective employees.
 - *Employers required to query current and prospective employees, for drug and alcohol violations before permitting the operation of a commercial motor vehicle on public roads*
 - *Employers will be required to query annually all drivers they currently employ*
 - *Tools to identify drivers who are prohibited from operating CMV based on DOT drug and alcohol violations*
- Include this requirement in your solicitation for services

Designated Employer Representative

- DER should research the latest information and consult with the municipal attorney and the governing body to ensure that the latest laws, rules and best business practices are being used
 - Clear policies
 - Provisions for education and training
 - Drug alcohol testing
 - When needed, referral for evaluation and treatment
- The employer is responsible for meeting all applicable requirements and procedures of the act!

