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INSIGHTS

Mistakes Pipeline Companies Make With PHMSA-Required Substance Testing

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Under the Biden administration, the Pipeline and Hazardous Materials Safety Administration (PHMSA), like other federal regulatory enforcement agencies generally, is taking a more active approach to regulatory enforcement.

One element of PHMSA regulation where covered operators are not uncommonly falling short during PHMSA inspections is the content and application of their required drug and alcohol testing plans. For businesses eager to avoid monetary fines and other difficulties that come with PHMSA findings of noncompliance, a practical consideration of the most common mistakes by covered operators is worthwhile.

Key Background

Based upon concerns raised by a variety of high-profile accidents involving impaired workers between 1987 and 1991, Congress concluded that action was required and, in 1991, enacted the Omnibus Transportation Employee Testing Act, which required agencies within the United States Department of Transportation (DOT) to implement drug and alcohol testing of transportation workers holding safety sensitive positions. In response, regulators within the DOT have adopted rules requiring drug and alcohol testing of certain safety-sensitive transportation workers in trucking, pipelines, railroads, mass transit, aviation, and other DOT-regulated industries.

In particular, PHMSA testing rules apply to covered employees who perform an "operations, maintenance, or emergency-response function" falling within the scope of 49 CFR Parts 192, 193 or 195. As a result, the testing requirements cover many, but not all, operations and maintenance workers employed with (i) natural gas pipelines or other gas pipelines, (ii) liquefied natural gas facilities, and (iii) oil pipelines and other hazardous liquid pipelines.

For the pipeline and liquified natural gas industries, the applicable DOT regulations administered by PHMSA, are codified at 49 CFR Part 199.

The DOT's regulations found at 49 CFR Part 40 entitled "Procedures for Transportation Workplace Drug & Alcohol Testing Programs" are also key to the development of appropriate plans and the administration of those plans for a covered pipeline or liquified natural gas business.

Unfortunately, some operators misapply the PHMSA requirements of Part 199 in particular. A consideration of some of the most common mistakes is in order.

Mistakenly Allowing Your PHMSA Drug and Alcohol Plans to Become Simply a Regurgitation of the Regulations

PHMSA regulations included in Part 199 require the operator to maintain what is termed an "Anti-Drug Plan" and an "Alcohol Misuse Plan." As a practical matter, these two plans are typically included in a single document by the operator. Unfortunately, some operators misunderstand what PHMSA intends with the word "plan." For instance, when considering the applicable regulatory sections regarding what an "anti-drug plan" should encompass, the agency directs that the plan set forth "[m]ethods and procedures for compliance with all the requirements of [Part 199]." Similarly, the regulations indicate that the "Alcohol Misuse Plan," is to "contain methods and procedures for compliance with all of the requirements" of the alcohol provisions of Part 199.

In other words, PHMSA intends for the operator not to simply restate the requirements of the regulations in their plan but rather explain how, based upon that business's individual circumstances, the company intends to comply with those regulations. Instead of taking this approach, all too frequently, operators allow their plans to become largely a restatement of the various regulatory sections of Part 199.

In both PHMSA enforcement documents and in guidance provided on the agency's website, PHMSA has warned businesses against just parroting the language of the regulations. For instance, on its website, the agency cautions "written plans are intended to supplement, and not to paraphrase or regurgitate the regulations with the specific methods and procedures the operator uses to meet the regulations in Part 199 and Part 40."

In fact, enforcement documents found on PHMSA's website illustrate that the agency will find a company in violation of the regulations where it has essentially just regurgitated the regulations in their plans rather than explaining how, under its' circumstances, the company intends to comply with the requirements of Part 199 and Part 40.

Conflating PHMSA Drug and Alcohol Plans With the Operator's Non-PHMSA Company Policies

Another frequent error made by covered operators regarding Part 199 is comingling their PHMSA Anti-Drug and Alcohol Misuse Plans with their own company policies. This could potentially create confusion for employees about what PHMSA mandates, and what the company's position is with respect to its own drug and alcohol prohibitions and testing outside of PHMSA.

Of course, operators are permitted to have their own drug and alcohol policies. Those company procedures, to the extent permitted by applicable state and local laws, may extend beyond what PHMSA requires with regard to drug and alcohol testing. However, in no sense is it permissible to allow those policies, or the operator's individual company testing programs, to be comingled or otherwise confused with the company's PHMSA drug and alcohol plans and testing programs.

For instance, if an employee reading the operator's plans and policies cannot readily understand what is provided for under the operator's PHMSA anti-drug and alcohol misuse plans as opposed to the operator's own company drug and alcohol policies, then PHMSA may find that the operator has improperly conflated those PHMSA and non-PHMSA drug and alcohol programs and, as a result, violated Part 199. In sum, the business must be very clear in distinguishing in any written materials between what is part of their PHMSA anti-drug and alcohol misuse plans, and employer practices or policies that fall outside the scope of those PHMSA plans.

Blurring the Lines Between PHMSA and FMCSA Drug and Alcohol Testing Compliance Programs

PHMSA has also taken covered businesses to task for improperly confusing their PHMSA drug and alcohol plans with other drug and alcohol testing programs intended to comply with a separate Department of Transportation agency's requirements.

For instance, pipeline companies generally employ workers who operate large trucks that require a commercial driver's license (CDL). Those pipeline company employees, as a result, may also be subject to drug and alcohol testing regulation maintained by the Federal Motor Carrier Safety Administration (FMCSA) and codified at 49 CFR Part 382.

Those rules are substantially different in certain key respects from the PHMSA drug and alcohol testing rules. Moreover, the FMCSA does not require the operator to have written drug and alcohol "plans" in the same sense that PHMSA mandates for pipeline and liquified natural gas workers who perform functions covered under Parts 192, 193 or 195.

Again, a persistent problem is that some operators, in written materials or in practice, confuse the drug and alcohol requirements of the FMCSA and PHMSA. Comingling these rules in the operator's written materials is problematic. The operator's PHMSA drug and alcohol plans must clearly spell out how the operator will comply with the PHMSA requirements of Part 199 and should not create any confusion for employees reading that plan by amalgamating drug and alcohol testing requirements for commercial drivers.

As a result, many operators choose to maintain separate documents. In other words, in many instances, operators maintain their Part 199 PHMSA anti-drug and alcohol misuse plans wholly separate from any written materials maintained in connection with complying with the commercial driver drug and alcohol requirements of Part 382.

A key test that operators should consider in determining whether they have clearly delineated what is within the scope of their PHMSA drug and alcohol plans (separate and apart from what FMCSA may require for commercial drivers, or what the operator may provide for under its non-DOT drug and alcohol policies) is whether a typical employee subject to those rules would clearly understand the difference – that is, the differences between the operator's PHMSA drug and alcohol plan, and what is intended to comply with the FMCSA requirements or to govern the operator's own drug and alcohol policies.

Misconstruing What Workers and What Situations Are Subject to PHMSA Drug and Alcohol Testing Requirements

Another problem sometimes raised in PHMSA enforcement actions is the failure of operators to understand the limited scope or coverage of the PHMSA testing rules found at Part 199. Specifically, the drug and alcohol testing requirements of Part 199 apply to what is termed a "covered employee." The term "covered employee" is defined under Part 199 as a "person who performs a covered function, including persons employed by operators, contractors engaged by operators and persons employed by such contractors."

Critically, according to the regulations' definitions section, a "covered function" means "an operations, maintenance or emergency-response function regulated by part 192, 193 or 195. . . that is performed on a pipeline or on an LNG facility." Also, the regulations include a definition for the phrase "performs a covered function." Specifically, that phrase is defined to include "actually performing, ready to perform, or immediately available to perform a covered function."

Understanding coverage is critical to recognizing which workers are subject to testing and when. The types of drug testing provided for under the PHMSA rules include pre-employment testing, post-accident testing, random testing, testing based on reasonable cause, return to duty testing and follow-up testing. As for alcohol, Part 399 provides for each of these types of testing - except random testing.

The scope of persons subject to testing in the case of an accident is further limited. Specifically, the worker must be an individual whose "performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor of the accident."

A covered operator might mistakenly believe that the safe approach to determining coverage is to err on the side of being overinclusive. That view, according to PHMSA, is unacceptable. The agency will penalize an operator for including workers or situations in its testing program, that do not fall within the precise scope called for by the regulations' language. PHMSA is particularly sensitive about an overbroad approach by operators because a federal agency's legal authority to require drug and alcohol testing of individuals is subject to limitations under the United States Constitution as recognized by the Supreme Court in its 1989 decisions in *National Treasury Employees Union v. Von Raab* and *Skinner v. Railway Labor Executives Association.*

Consequently, in determining who and when to test, rather than aiming to be overinclusive or underinclusive, PHMSA wants operators to apply the actual Part 199 definitions and standards, such as “covered employee” and “covered function,” in good faith and as precisely as possible. Importantly, when struggling with questions of scope, operators can often find valuable guidance in interpretation letters issued by PHMSA, which are available on its website.

Wrongly Employing a Broad Approach to Part 199 Coverage to Deal with the Growing Number of States and Localities Restricting Marijuana Testing

Increasingly, safety-sensitive employers concerned about marijuana use among their workers are finding their normal company testing programs hamstrung by new statutory restrictions in jurisdictions such as New York and New Jersey with respect to marijuana prohibitions and testing. Some businesses wrongly attempt to mitigate this difficulty by taking a broad view of the scope of DOT-mandated drug and alcohol testing. After all, an employer’s obligation to comply with DOT-mandated testing, whether it be testing pursuant to PHMSA, FMCSA or another DOT agency’s regulations, are not curtailed by state or local rules providing marijuana use protections.

It is critical that businesses not attempt to evade the state and local marijuana use protections by applying their DOT testing programs more broadly than the regulations provide. PHMSA and other DOT agencies will punish businesses that do so.

Key Takeaways to Avoid Regulatory Trouble

Businesses eager to avoid these and other common errors with their PHMSA drug and alcohol testing programs, should (i) focus on what the regulations actually require, (ii) make use of the valuable guidance resources available on the agency’s website - including interpretation letters and individual enforcement case documentation, and (iii) when necessary, communicate with PHMSA staff about compliance questions.

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