



American Substance Abuse Professionals

DOT SAP or NRC SAE?SOS!!

Navigating the differences between the Department of Transportation and Nuclear Regulatory Commission substance abuse evaluation requirements

*Presented by Laura Lacey Dashner
Director of Account Management, ASAP, Inc*

www.go2asap.com

888-792-2727

NRC Mandate for Fitness for Duty

- The Nuclear Regulatory Commission (NRC) first established rules mandating a Fitness for Duty (FFD) program in 1989. It required NRC licensees who were “authorized to operate or contract a nuclear power reactor to implement an FFD program for all personnel having unescorted access to the protected area of its plant.”
- The rule was updated (amended) in 1993 to include licensees who were “authorized to possess, use, or transport formula quantities of Strategic Special Nuclear Materials (SSNM).”
- The most recent amendment to 10 CFR Part 26 took effect on March 31, 2010. In this amendment, the NRC establishes the qualifications and responsibilities for the Substance Abuse Expert (SAE).

Why review the differences between SAE and SAP?

- The NRC regulations bear similarity in structure, content, and intent to 49 CFR Part 40, the Department of Transportation regulations for drug and alcohol testing that define and regulate the role of the Substance Abuse Professional (SAP). However, the NRC warns that the SAP who did not take an SAE qualification training would *not be fully qualified* to assume the SAE role and its responsibilities:

“A SAP under 49 CFR Part 40 would be *partially qualified* to serve as an SAE under 10 CFR Part 26. However, although many of the U.S. Department of Transportation’s SAP and NRC’s SAE provisions are similar, an individual solely trained to be an SAP would not have knowledge of the specific requirements of Part 26 that differ from those contained in Part 40 (e.g., some of the basic knowledge and qualification training requirements in § 26.187(c) and (d) respectively).”

The Regulatory Goal: DOT

- DOT:
 - The primary safety objective of the DOT rules is to prevent, through deterrence and detection, alcohol and controlled substance users from performing transportation industry safety-sensitive functions.
 - The job of the SAP as “Gatekeeper” of the return-to-duty process provides important help to the employee, the employer, and to the traveling public.
 - The SAP represents the major decision point an employer has in choosing whether or not to place an employee in a safety sensitive role.

The Regulatory Goal: NRC

- NRC:
 - The NRC rules provide for the protection of public health and safety and the common defense and security. The NRC views this goal as particularly important because it directly affects the quality of “trustworthiness and reliability of personnel” *before* they are granted unescorted access to protected areas of nuclear power plants.
 - Part 26 is intended to provide clear and easily interpretable requirements to follow when determining whether to grant or maintain an individual’s unescorted access, which includes the determination that an individual can be trusted to avoid substance abuse, and, therefore, may be permitted to have the types of nuclear plant access necessary to perform requisite duties.
 - While the SAE is not directly involved in granting, reviewing, re-instating and maintaining authorization, she must appreciate the critical importance of authorization in order to truly fulfill functions of the role. The authorization process lies at the ‘heart’ of NRC FFD mission. SAE evaluations and testing records are routinely reviewed as part of authorization “suitable inquiries” and self-disclosure reports.

The Function of the Substance Abuse Evaluation: DOT and NRC

- NRC: The SAE shall evaluate individuals who have violated the substance abuse provisions of a FFD policy and make recommendations concerning education, treatment, return to duty, follow-up drug and alcohol testing, and aftercare. The SAE is not an advocate for the licensee or other entity, or the individual. The SAE's function is to protect public health and safety and the common defense and security by professionally evaluating the individual and recommending appropriate education/treatment, follow-up tests, and aftercare.
- DOT: The SAP is not an advocate for the employer or employee. The SAP's function is to protect the public interest in safety by professionally evaluating the employee and recommending appropriate education/treatment, follow-up tests, and aftercare.

The Outcome: NRC

- A determination of fitness must be made by a licensed or certified professional who is appropriately qualified and has the necessary clinical expertise, as verified by the licensee or other entity, to evaluate the specific fitness issues presented by the individual. A professional called on by the licensee or other entity may not perform a determination of fitness regarding fitness issues that are outside of his or her specific areas of expertise.
- An SAE who meets the requirements of § 26.187 may determine the fitness of an individual who may have engaged in substance abuse and shall determine an individual's fitness to be granted authorization following an unfavorable termination or denial of authorization under this part, but may not be qualified to assess the fitness of an individual who may have experienced mental illness, significant emotional stress, or other mental or physical conditions that may cause impairment but are unrelated to substance abuse, unless the SAE has additional qualifications for addressing those fitness issues.

The Outcome: DOT

- The SAP, after having prescribed assistance under §40.293, must re-evaluate the employee to determine if the employee has successfully carried out the education and/or treatment recommendations.
- If the employee has demonstrated successful compliance, the SAP must provide a written report directly to the DER highlighting her clinical determination that the employee has done so with the initial evaluation recommendation
- Neither the SAP nor the MRO may make a “fitness for duty” determination as part of this re-evaluation unless required to do so under an applicable DOT agency regulation. It is the employer, rather than the SAP, who must decide whether to put the employee back to work in a safety-sensitive position.

Qualifications: SAE vs. SAP

- Both may be:
 - A licensed physician;
 - A licensed or certified social worker;
 - A licensed or certified psychologist;
 - A licensed or certified employee assistance professional; or
 - An alcohol and drug abuse counselor certified by NAADAC (National Association of Alcoholism and Drug Abuse Counselors Certification Commission) or by ICRC (International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse.)
- SAP only:
 - A state-licensed or certified marriage and family therapist
 - A drug and alcohol counselor certified by NBCC (National Board for Certified Counselors, Inc. and Affiliates/Master Addictions Counselor)

Qualifications: SAE vs. SAP

- Basic Knowledge:
 - Both must have knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled-substance abuse disorders
 - Both must have knowledge of the role's function; however the SAE must know how the SAE function relates to the "public's interests in the duties performed by the individuals who are subject to this subpart" while the SAP should understand his role as it relates to "employer interests in safety-sensitive duties"
 - Both must have knowledge of the applicable federal regulations and any changes to those regulations

Qualifications: SAE vs. SAP

- Qualification Training:
 - Both must have qualification training that covers; the appropriate regulations (49 CFR part 40 or 10 CFR part 26); key drug/alcohol testing requirements; evaluator qualification, prohibitions and roles; procedures for consultation, communication, reporting and record keeping.
 - Only the DOT SAP, however, is required to take a qualifying exam from a nationally recognized professional or training organization. The SAE is not yet required by the regulations to take a qualifying exam; however individual licensees may require one.
 - Note that each NRC Licensee must review and approve the SAE training taken by the SAE determining fitness for duty.

Qualifications: SAE vs. SAP (Continued)

- Continuing education:
 - Both SAP and SAE require 12 hours of continuing education every 3 years directly related to the performance of the function and that contain new technologies, interpretations, recent guidance, rule changes and other information about development in the specified practice area. Both require a documented assessment tool to determine the material was learned and that such documentation be maintained and available for regulatory representatives.

Reason for Evaluation: SAP vs. SAE

- A DOT SAP evaluation is required:
 - Following a verified positive, adulterated, or substituted test result
 - Following a refusal to test
 - According to the mode agency rules, some self referrals may require the SAP return to duty process.
- A determination of fitness is the process entered when there are indications that an individual may be in violation of the licensee's or other entity's FFD policy or is otherwise unable to safely and competently perform his or her duties. The SAE is required to make a fitness for duty determination in *at least* following situations:
 - When an individual has violated the substance abuse provisions of an FFD policy;
 - When there is an acceptable medical explanation for a positive, adulterated, substituted, or invalid test result, but there is a basis for believing that the individual could be impaired while on duty;
 - Before making return-to-duty recommendations after an individual's authorization has been terminated unfavorably or denied under a licensee's or other entity's FFD policy;
 - Before an individual is granted authorization when potentially disqualifying FFD information is identified that has not previously been evaluated by another licensee or entity who is subject to this subpart; and
 - When potentially disqualifying FFD information is otherwise identified and the licensee's or other entity's reviewing official concludes that a determination of fitness is warranted under § 26.69

NRC: § 26.69 Authorization with potentially disqualifying fitness-for-duty information

- Potentially disqualifying FFD information within the past 5 years has been disclosed or discovered about the individual by any means, including, but not limited to:
 - The individual's self-disclosure
 - The "suitable inquiry"
 - Drug and alcohol testing records
 - The administration of any FFD program under Part 26
 - A self-report of a legal action
 - A behavioral observation
 - Or other sources of information, including, but not limited to, any background investigation or credit and criminal history check conducted under the requirements of this chapter
 - The potentially disqualifying FFD information has not been reviewed and favorably resolved by a previous licensee or other entity

Sanctions for Violations DOT vs. NRC

- In the DOT Procedures for Transportation Workplace Drug and Alcohol Testing Programs (49 CFR part 40), there is a single sanction for all rule violations – removal from service.
- The DOT Mode regulations (FAA, FMCSA, PHMSA, USCG, FRA and FTA) specify additional sanctions related to legal actions and multiple rule violations up to and including permanent disqualification.
- The NRC sanctions for rule violations are spelled out in § 26.75. Note that any attempt to subvert the testing process such as a refusal to test or adulterated specimen results in a permanent disqualification.
- Under NRC, disqualification for 5 years results from possession, sale and use of illegal drugs or consumption of alcohol in a protected area of a plant, or a second positive test.
- Any violation following a 5 year disqualification results in permanent disqualification.

Evaluations

- DOT regulations require a comprehensive face-to-face assessment and clinical evaluation.
- NRC regulations currently call for the SAE to conduct a face-to-face evaluation only in instances of for-cause (observed behavior or a physical condition)FFD policy violations. Part 26 is silent on the requirement of face-to-face evaluations in other instances; however, a licensee/entity may choose to exceed the regulatory minimum and require face-to-face evaluations beyond for-cause situations.

Reporting Requirements: SAE vs. SAP

- The reporting requirements for DOT SAPs are clear and concise. Every detail of the information that must be provided to the DER is spelled out in Part 40, Subpart O, including letterhead requirements and identifying information for clients.
- For SAE evaluations, policies for conducting evaluations, reporting and consultation/communication with licensees, MROs and treatment providers follows the policies and procedures established by the licensee/entity.

Referrals

- DOT regulations require that the SAP recommend a course of education and/or treatment with which the employee must demonstrate successful compliance prior to returning to DOT safety-sensitive duty. The SAP must make such a recommendation for every individual who has violated a DOT drug and alcohol regulation. This recommendation must, to the greatest extent possible, protect public safety in the event that the employee returns to the performance of safety-sensitive functions.
- Part 26 is currently silent on a requirement for the SAE to make treatment and/or education recommendations in all cases as part of the SAE evaluation; however, the licensee/entity may choose to exceed the regulatory minimum and require clinical recommendations in all cases.

Follow-up Evaluations

- Under the DOT regulations, after the SAP has prescribed assistance, the SAP must re-evaluate the employee to determine if the employee has successfully carried out your education and/or treatment recommendations.
- Part 26 is currently silent on a requirement for a follow-up SAE evaluation following treatment/education; however, the licensee/entity may choose to exceed the regulatory minimum and require follow-up evaluations.

Follow-up Testing

- The DOT regulations stipulate that the SAP must recommend a minimum of 6 tests to be completed in the first year following return to safety sensitive duty. The SAP may recommend more tests for a period up to 5 years following the return to duty (§ 40.307).
- Under 26.69, the NRC regulations state that for a first confirmed positive drug or alcohol test result, the licensee must ensure that the individual is subject to unannounced testing at least quarterly for 3 calendar years after the date the individual is granted authorization. Both random and follow-up tests, as defined in § 26.31(c), satisfy this requirement.

Follow-up Testing

- The Licensee must verify that the individual has negative test results from a minimum of 15 tests distributed over the 3-year period, except as follows:
 - If the individual does not continuously hold authorization during the 3-year period, the licensee or other entity shall ensure that at least one unannounced test is conducted in any quarter during which the individual holds authorization;
 - If the 15 tests are not completed within the 3-year period specified in this paragraph due to periods during which the individual does not hold authorization, the follow-up testing program may be extended up to 5 calendar years to complete the 15 tests;
 - If the individual does not hold authorization during the 5-year period a sufficient number of times or for sufficient periods of time to complete the 15 tests required in this paragraph, the licensee or other entity shall ensure that an SAE conducts a determination of fitness to assess whether further follow-up testing is required and implement the SAE's recommendations.

Issues specific to the NRC FFD process

- It should be noted that the SAE's role in the NRD FDD process is specific to substance abuse. However, unlike the simplicity of the DOT RTD process, many other issues can impact an individual's fitness for duty that the SAE may not be qualified to address.
- While the SAE may be qualified to assess for a particular issue she may not be the appropriate party to assess the concern. Should the SAE become aware of other issues, the appropriate FFD personnel must be notified.

Who determines Fitness for Duty?

- Substance Abuse: The SAE “who meets the requirements of §26.187 may determine the fitness of an individual who may have engaged in substance abuse and shall determine an individual’s fitness to be granted authorization following an unfavorable termination or denial of authorization under this part [10 CFR Part 26].”
- A clinical psychologist may determine the fitness of an individual “who may have experienced mental illness, significant emotional stress or cognitive or psychological impairment from causes unrelated to substance abuse, but may not be qualified to assess ... a substance abuse disorder, unless the psychologist is also an SAE.”

Who Determines Fitness for Duty?

- A psychiatrist may determine the fitness of an individual “who is taking psychoactive medications consistently with one or more valid prescription(s), but may not be qualified to assess potential impairment attributable to substance abuse, unless the psychiatrist has had specific training to diagnose and treat substance abuse disorders.”
- A physician may determine the fitness of a “individual who may be ill, injured, fatigued, taking medications in accordance with one or more valid prescriptions, or using over-the-counter medications, but may not be qualified to assess the fitness of an individual who may have a substance abuse disorder, unless the physician is also an SAE;”
- The MRO, a physician with special training, “may determine the fitness of an individual who may have engaged in substance abuse or may be ill, injured, fatigued, taking medications under one or more valid prescriptions, and/or using over-the-counter medications, but may not be qualified to assess ... fitness to be granted authorization following an unfavorable termination or denial of authorization ... unless the MRO is also an SAE.”

Fatigue

- In a communication from the NRC Fitness for Duty Team (10/19/2009), this clarifying statement was issued: “If, during an SAE evaluation, an SAE suspects that the individual is fatigued and may not be fit to safely and competently perform his or her duties, the SAE shall notify the individual’s management or other trained and qualified FFD program personnel to conduct a for-cause fatigue assessment. While an SAE may be properly trained to assess fatigue under §§ 26.29 and 26.203(c) and may have the appropriate qualifications to assess the particular characteristics of the individual as described in § 26.189, the rule states (in § 26.211(b)(1)) that the person who observed the individual’s condition of impaired alertness may not conduct the for-cause fatigue assessment. Therefore, the SAE who first observed the condition may not perform the fatigue assessment and must allow other trained and qualified managers or FFD program personnel to conduct the assessment. Similarly, if an individual conducting a fatigue assessment suspects a case of substance abuse, the individual conducting the fatigue assessment shall notify the individual’s management or FFD program personnel to ensure that the individual is subject to for-cause drug and/or alcohol testing.”

Resources

- FitnessforDutyResource@nrc.gov Email resource for Questions.
- <http://www.nrc.gov/reactors/operating/ops-experience/access-authorization/faq.html> NRC website - Frequently asked questions
- ASAP, Idashner@go2asap.com or 888-792-2727 ext 114

Questions and Discussion