



Drug and Alcohol Testing Industry Association 2000 Legislative and Regulatory Agenda

DATIA's **key** objective when founded in 1995 was to provide a national voice for the drug and alcohol testing industry among policymakers in Washington, DC. In 1999, this advocacy and lobbying took on increased importance when DATIA succeeded in gaining Congressional recognition of the importance of the Drug Free Workplace Grants Program, which a year earlier the association had played a key role in passing. With the success of the program comes Congress' desire to reauthorize the program and make available considerably more money for grants. This recognition, among other successes, has solidified DATIA's role as an effective and recognized voice for the Drug and Alcohol Testing Industry in Washington. In 2000, DATIA will continue to actively work with Congress to create and endorse new drug and alcohol testing legislation that could open new markets and change the way in which the drug and alcohol testing industry conducts business. In addition, DATIA will closely monitor Federal agencies to ensure that any proposed new regulations, or changes to existing regulations, are consistent with industry desires, especially as they may affect the safety, privacy and dependability of the services that DATIA members provide.

(1) C/TPA Regulatory Clarification

The most important agenda item for DATIA will be to clarify contrary regulations and guidance that may not allow Consortia and Third Party Administrators (C/TPA) to act as "agents of the employer" when implementing drug and alcohol testing programs.

DATIA has found conflicting evidence that the C/TPAs may act as the employer when implementing an employer's drug testing program. DATIA believes that Department of Transportation (DoT) drug and alcohol regulations (46 CFR Part 40) clearly say that the definition of an "employer includes an industry consortium" thereby the terms employer and consortium are

interchangeable under this definition. For example, this means that the C/TPA may act as an agent of the employer by receiving results directly from the Medical Review Officer and transmitting them to the employer.

However, DoT has said that the C/TPA may not act as the agent of the employer and thereby may not receive results directly from the MRO. DoT says the 1995 Guidance on the Role of the C/TPA clearly states that “it is not appropriate for the MRO or BAT to send the results only to the C/TPA.” The guidance, however also allows “operating administrations to make exceptions to this general rule” and that “C/TPAs may receive from employers or other parties...individual test results.” Clearly, the regulations and the guidance conflict with each other although regulations have the force of law and guidance does not.

Of DATIA’s approximately 1000 members, over 80% provide some sort of consortium or third party administration service. It is estimated that there are as many as 2,500 consortiums in the US helping business to comply with drug testing rules. DATIA conducted a random poll of members providing C/TPA services asking them if they act as the agent of the employer, and 99% of them receive the results directly from the MRO. To get more complete information, DATIA enclosed a membership survey on this issue.

To clarify this issue, DATIA has met with DoT, the United States Coast Guard (USCG) and the Federal Highway Administration (FHWA). DoT strongly believes that the intent of Part 40 is that the C/TPA may not receive test results directly from the MRO as per the 1995 Guidance. They did indicate that DATIA made “relevant arguments” as to why the C/TPA should act as the agent of the employer when receiving test results and that DATIA should comment on this issue when the new proposed Part 40 regulations are issued.

The benefits of Consortiums are clear. The fact is that without the value added services provided by Consortiums or TPAs, many companies, especially small ones, would find it very difficult to comply with the DOT regulations. To ensure that C/TPA’s have flexibility in providing employers with the services that they want, DATIA has made this issue a priority and intends to actively

work with DoT, through the Part 40 comment process, to allow the C/TPA to truly act as the agent of the employer.

(2) Small Business Tax Credit – Drug Free Workplace Act II

One of the continuing top legislative agenda items for DATIA in 2000 is to work with Congress, the White House and other industry groups to introduce legislation offering small businesses tax credits for companies that implement drug free workplace programs. This credit will increase awareness of the benefits of drug testing among the small business community and provide much-needed financial incentives.

Currently, only 3 percent of small businesses drug test, while over 97 percent of the 500 largest companies have comprehensive drug and alcohol testing programs. Many small business leaders have said that they do not implement drug-testing programs because they do not know where to start in setting up a program and need guidance as to a legally acceptable model. Information on drug-free workplace programs is not readily available to the small business community, and because they do not have this information, many small business leaders are concerned about the costs of the programs. This proposed legislation would provide both of these components.

To make small business aware of the benefits of drug free workplace programs, and to make the programs financially affordable, a Federal tax credit should be established. DATIA's proposed legislation would allow a tax credit of up to \$500 for businesses:

- (1) Employing 100 employees or less operating in the United States,
- (2) With a written drug free workplace policy,
- (3) Implementing a pre-employment, random, post accident, for cause and random testing program, and
- (4) Providing contact and service information for local substance abuse treatment professionals.

This proposed legislation would be a significant benefit to the industry because it would increase the amount of small businesses implementing drug free workplace programs. DATIA has already met with key industry groups including the Office of National Drug Control Policy (ONDCP) to discuss the viability of such a program. DATIA will keep members informed as to the progress of this very important initiative.

(3) School Drug Testing Legislation

DATIA will continue to work with Congress in support of drug-free school legislation. DATIA is supportive of any measure by Congress that targets schools in an effort to curb drug use by children and strongly believes that drug-testing is an important component of any legislation.

In 1999, DATIA submitted testimony to the House of Representatives in response to a hearing by the House Subcommittee on Early Childhood, Youth, and Families which is part of the Committee on Education and the Workforce. This Committee is responsible for considering most legislation that affects school drug testing programs. This committee may also consider two bills that have been introduced in the House that create grant programs to fund school drug testing programs.

HR 1735 (Empowering Parents to Fight Drugs Act of 1999; Peterson, R-PA) will provide federal matching grants for local school districts to implement random drug testing for students enrolled in grades 7 through 12. Parents may exclude their children from the random testing program. Each local education agency would have contracting authority with outside sources for implementing drug testing. In May, the bill was referred to the Subcommittee where it remains awaiting action.

HR 1642 (Parental Consent Drug Testing and Counseling; Rogan, R-CA) would establish a random drug testing program for high school students. This bill is different from Peterson's bill in that the program only tests students at the parents' request. Another difference is that Rogan's bill provides \$500 to implement the program and does not require matching state grants. This bill, too, was referred to the Subcommittee in May, and is awaiting action.

As part of DATIA's testimony to the House of Representatives, they reiterated their support of a good drug-testing model for school districts across the country. DATIA will actively work with Congress to positively promote this issue in the House and the Senate.

DATIA will continue to work with the Committee to reenergize movement on HR 1735 and HR 1642, or on new legislation with the similar goal of creating drug-free schools, during the second session of the 106th Congress.

(4) DoT Part 40 Rewrite

The Department of Transportation (DoT) is currently completing the process of rewriting the Federally mandated drug and alcohol testing regulations which will affect every single collector, lab, TPA and MRO, as well as all private-sector drug and alcohol testing policies (since most model those policies after the government). Once Part 40 comes out for comment, DATIA will analyze the changes to the regulations, determine how they affect each segment of the industry, garner input from DATIA members, communicate to the DOT support of and opposition to specific changes, and recommend specific solutions to problematic policy changes.

This rewrite is a complete overhaul of the drug testing rules affecting the DoT and the private sector, which uses Part 40 as a model for their own drug testing programs, and would impact thousands of employees. There has been a great deal of speculation about how the rewrite will affect each segment of the drug and alcohol testing industry. DATIA has met with key officials from the DoT responsible for writing and implementing the rules and regulations in an effort to keep them apprised of the drug and alcohol industry's concerns and questions.

Some of the industry concerns include: (1) Will Part 40 contain increased regulatory burdens for collectors, TPAs, consortiums, SAPs, and laboratories? (2) Will drug and alcohol service providers be held accountable for mistakes in drug testing procedures? (3) Is the DoT considering changing the random testing

program? (4) As legislation moves through Congress to mandate that Federal forms be available by computer, will the Administration consider the use of electronic signatures for the CCF forms and will that be included in Part 40? (5) DHHS' review of the use of alternative specimens in Federally mandated drug and alcohol testing continues and is gaining support from members of the scientific community. If DHHS decides to allow all or some of these technologies, will DoT strongly consider their use and will this mean another rewrite of Part 40?

As we enter 2000, and the review and comment process begins, DATIA will keep members apprised of developments regarding this very important issue, and will assist members in understanding the changes and how they will affect the industry.

(5) Federal Use of Alternative Specimens in Drug Testing

DATIA has been actively involved with the Department of Health and Human Services (HHS) consideration of the use of alternative specimens: sweat, saliva, hair and on-site urine tests, in Federally mandated drug testing. Congress is also considering the use of alternative specimens for mandated drug testing, and the Senate has introduced S 5, (Drug Free Century Act; DeWine, R-OH) which would require inclusion of these specimens in Federally mandated programs. If the agency and/or Congress decides to allow their use in mandated tests, employers, laboratories, TPAs, consortiums and collection sites will be able to determine which testing process works best for them and which is the least costly. In January, S 5 was referred to the Senate Judiciary Committee for their consideration and further action.

DATIA's Board of Directors has voted to support on-site urine testing. The Board recognized that the accuracy of the on-site urine technology has significantly improved and offers immense benefits to everyone in the drug testing industry. DATIA's Board endorsed on-site testing as long as the on-site testing process did not jeopardize the quality of the collection and that strict training standards for collectors are incorporated with their use. In addition, they emphasized the need for a standard operating procedure for custody and

control form use and proper chain of custody procedures must be implemented. Lastly, they stressed the need for laboratory GC/MS confirmation of all presumptive positives. DATIA's Board of Directors has not yet considered endorsement of any of the other alternative specimens currently being considered by HHS.

DATIA has presented comments strongly encouraging HHS to consider implications that may arise for collection sites if alternatives specimens are allowed in Federal drug testing. DATIA used the success of the association's voluntary training program as a model as to how the agency can encourage improvement of services without placing additional mandatory cost burdens on collectors.

Even though Congress has been critical of HHS' slow consideration of these technologies, HHS has said that more information is needed from the manufacturers of the alternative technologies. The Board has indicated that they are still missing information on specific areas such as how to ensure the anonymity of the donor with on-site tests, are alternative specimens scientifically sound or whether on-site kits are specific for a given analyte class.

DATIA is continuing to participate in a working group created by the Board to determine what additional information the Board needs to make a final decision on alternative specimens in Federal workplace and DoT drug and alcohol testing.

(6) Electronic Signatures and Electronic Chain of Custody Forms

DATIA is working with the Department of Health and Human Services and Congress to allow the use of computerized signatures for use in Federal and non-Federal chain of custody forms. DATIA believes however, that the use of this technology must remain optional and not be mandated in order to allow small businesses that may not have the capabilities for the technology to continue to operate.

An electronic signature is a computerized (digital or digitized) signature used by an organization through a software program that allows the user to download their signature so that he or she can sign a document on the computer to be able to send the information and the signature electronically.

Clearly, the electronic forms can solve critical problems of accuracy and missing information on CCFs because it:

- (1) Mitigates mistakes by not allowing you to enter an incorrect date or an incorrect response,
- (2) Forces the collector to fill in all the information because it will not allow you to move to the next section until the previous one is filled, and
- (3) Saves pertinent information for the required amount of time.

In addition to solving these key problems, the technology benefits the industry because it reduces paperwork costs by sending the information through the use of on-line services, reduces storage space for the hard copies and speeds processing time.

Both Congress and the Administration have indicated their support for making federal agencies responsive to these types of technologies. In 1999, the House passed HR 439 (Paperwork Elimination Act of 1999; Talent, R-MO), which generally would promote the optional use of electronic versions of federal forms and electronic signatures. The bill, passed in February, remains in the Senate Government Affairs Committee. Also in 1999, the House passed HR 1714 (Electronic Signatures in Global and National Commerce Act; Bliley, R-VA), which would validate the use of electronic forms and electronic signatures in e-commerce. The bill awaits action in the Senate Commerce Committee.

The Administration has given Congress a strategic plan for agencies to provide full service electronic commerce by 2001. In fact, the National Institute of Standards and Technology has issued standards on the use and acceptance of electronic signatures, which the Working Group should use as a standard. DATIA will continue to work with all of these groups to encourage electronic use of the Federal Chain of Custody Form (CCF).

DATIA will continue to follow this issue closely and monitor the legislation. In addition, DATIA will work with DoT to determine how the legislation will specifically affect mandated drug testing.

(7) Congressional and Executive Branch Outreach

DATIA will continue to be a resource to Congress by providing Congressional Committees testimony to promote the interests of the drug and alcohol testing industry. Both the House and the Senate have held hearings and introduced legislation on different aspects of drug and alcohol testing. Congress is currently considering issues directly affecting the drug and alcohol testing industry. Two major provisions include consideration of alternative specimens in mandated drug testing (S5), and HR 279 (Federal Employment Applicant Drug Testing Act; Sweeney, R-NY) proposes drug testing Federal employees, including Members of the House of Representatives and their staff. HR 279 is currently pending in the House Subcommittee on Civil Service.

These issues are proving to be popular issues for this Congress and have elicited strong emotions from both proponents and opponents of drug testing.

(8) Adulterants

DATIA has identified the sale and use of adulterants to falsify a drug test result as an issue requiring legislative action at the state and local levels, as well as at the federal level. DATIA finds that falsifying drug tests through the use of adulterants compromises health and safety, and undermines the integrity of the drug and alcohol testing industry.

Currently, four states (Texas, Pennsylvania, Nebraska and South Carolina) have implemented laws criminalizing the use of adulterants to falsify drug test results, as well as offering for sale clean urine and other forms of adulterating substances. Under federal law, no such prohibitions exist, even though the majority of drug tests are federally mandated. Guidances have been issued on the subject, but nothing has been done to prevent their sale and use.

DATIA is proposing a two-pronged approach to combat the sale and use of adulterants, and bring back the level of reliance and credibility that drug testing was always meant to provide to employers and others. The first prong of DATIA's strategy calls on its members to contact their State Attorney General concerning the ease with which products to falsify a drug test result can be purchased, particularly on the Internet. Members should also contact the major search engines (Yahoo!, Excite, HotBot, etc.) informing them of the illegality of listing such sites.

DATIA will work on behalf of the industry at the federal level to propose ways of banning the sale and use of adulterants at the national level. DATIA will accomplish this through cooperative efforts with the Office of National Drug Control Policy (ONDCP), Congress and various federal departments.

There is a strong voice for the industry located in Washington, DC ready and able to provide expert advice on matters of public policy as it relates to drug and alcohol testing. See DATIA's website (www.datia.org) for additional information on legislation considered by Congress.

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