



Holme Roberts & Owen LLP
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November 10, 2008

DENVER

Mine Safety and Health Administration
Office of Standards, Regulations and Variances
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

BOULDER

EMAIL: zzMSHA-Comments@dol.gov

Re: RIN 1219-AB41
Comments on Proposed Rule Regarding Alcohol and Drug-Free Mines

COLORADO SPRINGS

Dear Sir or Madam:

LONDON

We represent a coalition of western mine operators with coal and metal/nonmetal operations in Colorado, Montana and Nevada. On behalf of these operators, we thank MSHA for the opportunity to submit public comment upon the proposed rule ("the Rule") to be codified at 30 CFR Subchapter N, Part 66 and entitled "Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training and Assistance."

LOS ANGELES

These western operators appreciate MSHA's recognition of the importance of maintaining mine operations that are alcohol- and drug-free. However, the proposed Rule would represent a significant step backward for these operators in their efforts to achieve that goal and would reduce – rather than enhance – the level of safety at these operations. Therefore, these operators respectfully submit that the proposed Rule should be withdrawn.

MUNICH

PHOENIX

If the proposed Rule is not withdrawn, we offer the following comments regarding the proposed Rule. In addition, we have attached a red-lined draft of the proposed Rule, showing the changes we propose to address the concerns expressed in the comments.

SALT LAKE CITY

GENERAL COMMENTS

SAN FRANCISCO

- The Rule should set only a minimum standard regarding drug/alcohol programs, and operators should be free to adopt and maintain programs that are more stringent than the Rule requires. Many western operators currently maintain drug and alcohol programs that are more strict than the proposed standard and should not be required to weaken their programs.**

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2. **The Rule should not require mine operators to give any employee a “second chance” after testing positive for drugs or alcohol, tampering with or adulterating a sample, refusing to be tested, or otherwise violating the operator’s drug and alcohol policy. MSHA should not purport to dictate the proper personnel action to take in response to a violation of the operator’s employment policies.**
3. **The Rule should clearly state that mine operators are free to use testing methods other than breath testing for alcohol and urine testing for drugs. The Rule should not bar operators from testing blood, hair or saliva or using other testing technologies that are or may become available.**
4. **The Rule should clearly state that mine operators are free to use broader definitions of prohibited substances than the Rule contains. Operators should have the flexibility to test for new designer drugs and other substances that may impair physical or mental functioning.**
5. **The Rule should clearly state that mine operators are free to ban more conduct than the Rule prohibits. For example, the Rule would allow miners to (a) use or possess prohibited substances when working or operating a motor vehicle away from mine property [66.100(a)], (b) perform safety-sensitive functions while impaired by prescription drugs as long as the miner has a valid prescription and was using the drugs as prescribed [66.100(b)]; and (c) adulterate or substitute urine specimens with their own urine from an earlier time or with another’s urine [66.3]. The Rule should make clear that mine operators are free to ban such conduct.**
6. **The Rule should clearly state that mine operators are free to test for the presence of drugs or alcohol at lower detection thresholds than those prescribed in the Rule and are free to take such personnel action as they deem appropriate in response to a positive test. For example, many western operators test for blood-alcohol concentrations of 0.02 percent rather than 0.04 percent and take disciplinary action up to and including discharge for a positive test.**

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7. **The Rule should clearly state that mine operators are free to require “reasonable suspicion” testing upon a lesser showing of reasonable suspicion than the Rule describes.** Many operators require “reasonable suspicion” testing based upon observations of co-workers, possession of alcohol containers or drug paraphernalia, or other factors not described in the Rule. MSHA should not limit reasonable suspicion testing to situations in which a supervisor has made “specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the miner.”
8. **The Rule should clearly state that miners who admit a substance abuse problem and request assistance will not be insulated from the employment consequences of their misconduct.** As currently drafted, for example, the Rule would allow a miner to escape the consequences of a safety violation resulting in a fatal accident by promptly announcing that he was under the influence of drugs or alcohol at the time of the accident.
9. **The Rule should clearly state that mine operators are required to refer a miner to an SAP or other rehabilitation service only the first time the miner admits a substance abuse problem and requests assistance.** As currently drafted, the Rule would allow a miner to admit a substance abuse problem and claim statutory protection repeatedly over the course of his employment.
10. **The Rule should clearly state that the SAP or other rehabilitation service need not be local, if no local services are available.** Many western mines are located in areas that have no local substance abuse professionals.
11. **The Rule should clearly state that mine operators are not required to pay for evaluation by the SAP or for any education or treatment program recommended by the SAP.**
12. **Any requirement for training should be included in the existing training requirements and should not extend the duration of mandatory training.**

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13. **The mandatory training for supervisors should be stricken.** MSHA should not purport to dictate the amount of training required for a supervisor to perform supervisory functions under a drug and alcohol policy.
14. **The six mandatory follow-up tests should be reduced to two.** Some operators might, in some circumstances, be willing to grant a second chance to someone who tests positive or refuses a test. However, the requirement of six follow-up tests in 12 months is so onerous as to discourage that option. The number of mandatory follow-up tests should be reduced to two.
15. **The Rule should clearly state that testing is not required when a miner is transferred or reassigned from one safety-sensitive position to another.** As currently drafted, the Rule appears to require otherwise.
16. **Operators should have flexibility to decide whether and when to conduct random testing or reasonable suspicion testing.** Some western operators have found that pre-hire testing and post-accident testing are sufficient to deter drug and alcohol use, without the necessity of random or suspicion-based testing. Operators should have the flexibility to determine where and how their alcohol- and drug-free mine efforts should be focused.

Sincerely,



L. Anthony George

LAG:dm
Attachment

30 CFR Subchapter N--Uniform Mine Safety Regulations

**PART 66--ALCOHOL- AND DRUG-FREE MINES: POLICY, PROHIBITIONS,
TESTING, TRAINING, AND ASSISTANCE**

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Authority: 30 U.S.C. 811.

30 CFR Subchapter N--Uniform Mine Safety Regulations

PART 66--ALCOHOL- AND DRUG-FREE MINES: POLICY, PROHIBITIONS,
TESTING, TRAINING AND ASSISTANCE

Subpart A--General

§ 66.1 Purpose.

This part establishes the requirements for mine operators to develop an alcohol- and drug-free mine program to prevent accidents, injuries, and fatalities resulting from the misuse of prohibited substances by miners performing safety-sensitive job duties and their supervisors. ~~Alcohol- and drug-free mine programs established prior to the effective date of this rule that include consistent policies, and alcohol- and drug-testing programs, and provide at least the same level of protection as these requirements, are in compliance with this standard.~~ This part sets minimum standards only. Any alcohol- and drug-free mine program shall be deemed to comply with this part if it is no less stringent with respect to safety and health than this part. Nothing in this part shall be construed to prohibit mine operators from imposing more stringent requirements than are set forth in this part.

§ 66.2 Applicability.

(a) The possession or misuse of prohibited substances, except when used according to a valid prescription, is prohibited for all persons on and around mine property.

(b) The alcohol- and drug-testing provisions in subpart D apply only to those miners who perform safety-sensitive job duties. Management and administrative personnel who supervise the performance of safety-sensitive job duties are also considered to hold safety-sensitive positions; however, general administrative and clerical personnel are not. Such determinations shall be made consistent with the requirements of 30 CFR parts 46 and 48 for who must take comprehensive miner training.

(c) Mine operators must inform all miners and contractors who perform work on their mine property of the requirements under this rule.

(d) Mine operators may also elect to impose alcohol- and/or drug-free mine requirements on miners who are not covered by this part. However, the requirements of this part shall apply only to miners covered by this part.

§ 66.3 Definitions.

As used in this part:

Adulterated specimen. A specimen that contains a substance that is

not expected to be present in human urine, or contains a substance expected to be present but is at a concentration so high that it is not consistent with human urine. Mine operators may elect to define this term more broadly.

Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part. This provides an indication of the blood alcohol concentration (BAC) level which is equated with impairment levels.

Breath Alcohol Technician (BAT). A person who instructs and assists miners in the alcohol-testing process and operates an evidential breath testing device. A BAT can be an employee of the mine operator. A BAT must have received qualifications training that includes training in alcohol-testing procedures and the operation of alcohol-testing devices.

Confirmed drug test. A confirmation test result received by a Medical Review Officer (MRO) from a laboratory.

Cut-off levels. The cut-off concentration of drug metabolite that is used for each drug class to call a urine specimen negative or positive. Based on the cut-off concentration used for each different drug class, a negative specimen is any specimen that contains no drug or whose apparent concentration of drug or drug metabolite is less than the cut-off concentration used for that drug or drug class.

Drug-free workplace program. A program that prohibits the possession or misuse of prohibited substances while working and includes five elements (written policy, education, training, testing, and referrals for assistance) designed to prevent impairing effects that can compromise workplace safety. This term is used interchangeably with an "alcohol- and drug-free workplace program" and "drug-free mine program."

Employee Assistance Program (EAP). A worksite-focused program designed to assist in the identification and resolution of problems associated with personal problems, such as alcohol and/or drug abuse.

Follow-up testing. A minimum of six unannounced tests performed in the first 12 months on any miner who returns to safety-sensitive job duties after violating the alcohol- and drug-free workplace policy.

Initial drug test. The test used to differentiate a negative specimen from one that requires further testing for drugs or drug metabolites.

Laboratory. A U.S. laboratory certified by the U.S. Department of Health and Human Services (HHS), Substance Abuse and Mental Health Services Administration (SAMHSA) as meeting the minimum standards of subpart C of the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs and which is also certified by the College of American

Pathologists (CAP) to perform Forensic Urine Drug Testing (FUDD).

Medical Review Officer (MRO). A licensed physician who is responsible for receiving and reviewing laboratory results generated by a mine operator's drug-testing program and evaluating medical explanations for certain drug test results. An MRO can be an employee of the mine operator or a service agent.

Persons performing safety-sensitive job duties. Those who perform job activities that are inherently dangerous on a regular and/or recurring basis and are required under 30 CFR parts 46 and 48 to take comprehensive miner training. Management and administrative personnel who supervise persons performing safety-sensitive job duties are also considered to perform safety-sensitive job duties. Therefore, throughout the rest of this part, the term "miner" is used to include such supervisors. General administrative and clerical personnel are not considered to perform safety-sensitive job duties.

Post-accident testing. Testing for the misuse of alcohol or drugs that is triggered either by an occupational injury or an accident that is done to help determine whether alcohol and/or drugs were a factor in the injury or accident.

Pre-employment testing. For alcohol: Testing of applicants after a conditional offer of employment has been made but prior to the first performance of safety-sensitive job duties. For drugs: Testing of applicants prior to the first performance of safety-sensitive job duties, irrespective of whether a conditional offer of employment has been made.

Prohibited substances. Alcohol, and the following controlled substances, except when used according to a valid prescription: Amphetamines (including methamphetamines), barbiturates, benzodiazepines (e.g., Valium, Librium, Xanax), cannabinoids (marijuana/THC), cocaine, methadone, opiates (e.g., heroin, opium, codeine, morphine), phencyclidine (PCP), propoxyphene (e.g., Darvon), synthetic/semi-synthetic opioids (i.e., hydrocodone, hydromorphone, oxycodone, oxycodone) and any other controlled substances designated by the Secretary. Mine operators may also elect to test for additional substances.

Random testing. Unannounced testing of miners assigned to safety-sensitive job duties for use of alcohol or drugs selected through a scientifically arbitrary process without regard to personal identifying information.

Reasonable suspicion testing. Testing for alcohol or drugs conducted when a supervisor documents observable signs and symptoms that lead the supervisor to suspect alcohol or drug use in violation of the alcohol- and drug-free workplace policy.

Return-to-duty testing. Testing performed on any miner before resuming safety-sensitive job duties after having failed to test negative for alcohol or drugs, or following admission of alcohol or drug use and after satisfactory completion of education and/or

treatment prescribed by a Substance Abuse Professional (SAP).

Safety-sensitive job duties. Any type of work activity where a momentary lapse of critical concentration could result in an accident, injury, or death.

Service agent. Any person or entity possessing the required qualifications and/or certifications, other than an employee of the mine operator, who provides services specified under this part to mine operators in connection with MSHA alcohol- and drug-testing requirements, including but not limited to collectors, laboratories, MROs, Substance Abuse Professionals, or BATs.

Split specimen. In drug-testing, a part of the urine specimen that is sent to the laboratory but not analyzed. Rather, it is retained unopened so that it can be sent to a second laboratory in the event that a miner requests that it be tested because he or she disputes the results reported by the first laboratory and verified by the MRO.

Substance Abuse Professional (SAP). A specially trained and qualified person who evaluates miners ~~who have violated a mine operator's alcohol and drug-free workplace policy~~ and makes recommendations concerning education, treatment, follow-up testing, and aftercare.

Substituted specimen. A specimen with creatinine and specific gravity values that are so diminished that they are not consistent with human urine. Mine operators may elect to define this term more broadly.

Verified test. A drug-test result or validity testing result from a laboratory that has undergone review and final determination by an MRO.

Subpart B--Prohibitions

§ 66.100 Prohibited substances.

(a) Prohibited substances, except when conditions of paragraph (b) of this section are met, shall not be permitted or used on or around mine property.

(b) Miners who possess or have used a prohibited substance will not be in violation of this part provided that an MRO has determined that the miner has a valid prescription for the substance and is using it as prescribed.

(c) Mine operators may elect to ban prohibited substances under more circumstances than are stated in this section.

§ 66.101 Prohibited behaviors.

(a) Miners determined to have used a prohibited substance and/or to be under the influence of a prohibited substance as defined by §

66.3(p) shall not be allowed to perform safety-sensitive job duties.

(b) Specifically, miners must not report for duty or remain on duty if they:

(1) Are under the influence or impaired by alcohol as verifiable by a Blood Alcohol Concentration (BAC) of 0.04 percent or greater; or

(2) Have used a prohibited substance as verifiable by a positive drug test, unless an MRO has determined that the miner has a valid prescription for the prohibited substance and is using it as prescribed; or

(3) Have refused to submit to a drug or alcohol test or have adulterated or substituted his/her specimen in any such test.

(c) Mine operators may elect to prohibit more behaviors than are stated in this section, including having a Blood Alcohol Concentration lower than 0.04 percent.

Subpart C--Alcohol- and Drug-Free Mine Program Requirement

§ 66.200 Purpose and scope.

The mine operator shall establish a written alcohol- and drug-free mine program that includes a written policy, an education and awareness program for nonsupervisory miners, a training program for supervisors, alcohol- and drug-testing, and referrals for assistance for miners ~~who as provided in § 66.204, violate this rule.~~

§ 66.201 Written policy.

(a) The alcohol- and drug-free mine program shall contain a written policy statement that shall be provided to all employees/miners and will inform them of the purpose of the policy; the prohibitions against the possession or use of prohibited substances; alcohol- and drug-testing requirements; the consequences of policy violations; and training requirements. The policy will also reference these regulations and identify which miners are subject to the alcohol- and drug-testing provisions.

(b) A mine operator must ensure that every miner has been informed of the policy. The proposed rule requires that a mine operator must provide a copy of the written policy to the miners' representative or ~~post or distribute the policy on a bulletin board in a common area~~ in the event that the miners do not have a representative. Mine operators may also choose to distribute the policy during the alcohol- and drug-free awareness training sessions or distribute the policy in an electronic format; however, these additional means of distribution are not required.

(c) Mine operators may use the sample model policy statement available from MSHA or from the Web site at <http://www.msha.gov>.

§ 66.202 Education and awareness program for ~~nonsupervisory~~ miners.

(a) Mine operators are required to provide education and awareness programs for ~~nonsupervisory~~ miners that meet the following requirements:

(1) Each newly hired miner must receive ~~a minimum of 60 minutes of~~ training before such miner is assigned to safety-sensitive job duties.

The training must inform them of:

(i) The mine's alcohol- and drug-free mine policy, including alcohol- and drug-testing requirements;

(ii) The dangers of alcohol and drug use and the impact of such use on safety in the mine;

(iii) Actions to take when others are suspected of violating the policy; and

(iv) Information about any available drug counseling, rehabilitation, and employee assistance programs (EAPs).

(2) All ~~nonsupervisory~~ miners, on an annual basis, will receive ~~a minimum of 30 minutes of~~ training to review the elements in paragraph

(a)(1) of this section.

(3) Training must be delivered by a competent person knowledgeable about workplace substance abuse, these regulatory requirements, and the mine operator's policy. Mine operators may use the training materials available from MSHA or the Web site at <http://www.msha.gov>.

(b) Training may be supplemented by written informational materials, including a list of company or community resources that miners can contact for assistance. Videos or other audio-visual materials may be used to supplement interactive training but cannot serve as the sole means of training.

(c) The training requirements in this part can be delivered as part of other new miner and annual ~~nonsupervisory~~ miner refresher training required under parts 46 and 48 of this chapter but must be delivered in addition to the other topics required and cannot displace other existing requirements of parts 46 and 48 of this chapter.

~~§ 66.203 Training program for supervisors.~~

~~—(a) A training program for supervisors is required and must meet the following requirements:~~

~~—(1) Every supervisor authorized by the mine operator to make reasonable suspicion and post-accident testing determinations shall receive an initial two hours of training and one hour annually, that, at a minimum:~~

~~—(i) Reviews the topics covered in the nonsupervisory miner training~~

described in § 66.202 (a)(1)(i) through (iv);

—(ii) Makes them aware of their role in enforcing the alcohol and drug-free workplace policy;

—(iii) Reviews the physical, behavioral, and performance indicators of probable drug use or alcohol misuse and prepares them to recognize and adequately document their observation of these signs of alcohol or drug impairment;

—(iv) Trains them to make reasonable suspicion determinations and what procedures to follow when such determinations are made;

—(v) Trains them to make post-accident determinations and what procedures to follow when such determinations are made;

—(vi) Trains them to make referrals to Substance Abuse Professionals or Employee Assistance Professionals and/or to community resources if they suspect a miner has an alcohol or drug problem but there has not been a known violation of the policy and there is insufficient evidence to warrant a reasonable suspicion test; and

—(vii) Trains them on what constitutes safety-sensitive job duties so that they understand who is subject to drug testing.

—(2) All supervisors, on an annual basis, will receive a minimum of 60 minutes of training to review the elements in paragraph (a)(1) of this section.

—(3) Training must be delivered by a competent person knowledgeable about workplace substance abuse, these regulatory requirements, and the mine operator's policy. Mine operators may use the training materials available from MSHA or the Web site at <http://www.msha.gov>.

—(b) Training may be supplemented by written informational materials, including a list of company or community resources that miners can contact for assistance. Videos or other audio-visual materials may be used to supplement interactive training but cannot serve as the sole means of training.

§

§ 66.204 Miner assistance following admission of use of prohibited substances.

(a) Mine operators shall ~~make refer~~ miners and other employees who admit to the illegitimate and/or inappropriate use of prohibited substances ~~aware of available assistance through an employee or miner assistance program, a Substance Abuse Professional (SAP), and/or other qualified assistance when those miners voluntarily admit to a substance abuse problem and request assistance. Such admission and request shall not, itself, constitute a violation of the mine operator's alcohol- and drug-free mine policy but shall not insulate the miner from the employment consequences of any misconduct by the miner. No operator shall be required to make a referral pursuant to this section more than once for a particular miner.~~

community-based resources.

~~—(b) Miners who voluntarily admit to the illegitimate and/or inappropriate use of prohibited substances prior to being testing and seek assistance shall not be considered as having violated the mine~~

~~operator's policy but~~ (b) Miners referred for assistance pursuant to this section shall be subject to the return-to-duty process specified in subpart E, § 66.405-406. However, a positive test result during the return-to-duty process will be considered as a violation of the mine operator's policy.

(c) Nothing in this part shall require a mine operator to bear the cost of any assistance provided to miners pursuant to this section.

(d) Nothing in this part shall require a mine operator to refer a miner to a local SAP or other local qualified assistance if there are no such resources in the local community.

Subpart D--Alcohol- and Drug-Testing Requirements

§ 66.300 Purpose and scope.

(a) Mine operators shall implement an alcohol- and drug-testing program that is valid, reliable, and protects the privacy and confidentiality of the individual to be tested.

(b) ~~Mine~~ When testing urine for drugs or breath for alcohol, mine operators must follow the U.S. Department of Transportation's (DOT) requirements found in 49 CFR part 40, Procedures for Transportation Workplace Drug Testing Programs, in which references to "DOT" shall be read as "MSHA" with the following exceptions: the split sample method of collection shall be used, and use of "bifurcated" alcohol level for testing is ~~excluded~~ not required.

(c) ~~Mine~~ When testing urine for drugs or breath for alcohol, mine operators are subject to all the requirements and procedures incorporated by part 66 and are responsible for the actions of their officials and representatives, and agents in carrying out these requirements.

(d) Mine operators shall designate those who will be responsible for receiving test results and other communications from the MRO or BAT consistent with the requirements of this part. This designee will also be authorized by the mine operator to take immediate action(s) to remove miners from safety-sensitive job duties, or cause miners to be removed from these covered duties, and to make required decisions in the testing and evaluation processes. Mine operators cannot use contracted service agents to perform these functions.

(e) A mine operator may use service agents to perform any of the other the functions required in this rule but may not designate or use a service agent to make drug-testing decisions or to receive alcohol-or drug-test results on behalf of the mine operator.

(f) A mine operator that uses a service agent is responsible for ensuring that service agents meet all requirements and procedures set forth in DOT's requirements found in 49 CFR part 40, except as modified by paragraph (b) of this section. Only laboratories certified by CAP as well as by HHS/SAMHSA shall be used to test collected samples.

(g) Mine operators may elect to conduct substance testing by means other than urine testing for drugs and breath testing for alcohol. When testing urine for drugs or breath for alcohol, mine operators may conduct initial screenings using testing methods not referenced in 49 CFR part 40 but must confirm positive test results for miners covered by this part using methods referenced in 49 CFR part 40.

(h) The requirements of this subpart D apply only to miners covered by this part and testing required by this part.

§ 66.301 Substances subject to mandatory testing.

Tests will be conducted for the drugs listed below:

- (a) Alcohol,
- (b) Amphetamines (including methamphetamines),
- (c) Barbiturates,
- (d) Benzodiazepines (e.g., Valium, Librium, Xanax),
- (e) Cannabinoids (THC/marijuana),
- (f) Cocaine,
- (g) Methadone,
- (h) Opiates (heroin, opium, codeine, morphine),
- (i) Phencyclidine (PCP),
- (j) Propoxyphene (e.g., Darvon), and
- (k) Synthetic/Semi-synthetic Opioids (oxymorphone, oxycodone, hydromorphone, hydrocodone).

§ 66.302 Additional testing.

The Secretary of Labor shall be permitted to designate additional substances for which all mine operators must test. Mine operators may elect to test for additional substances.

§ 66.303 Circumstances under which testing will be required.

Testing will be conducted in the following circumstances: Pre-employment; ~~randomly at unannounced times;~~ post-accident if the miner

may have contributed to the accident; ~~based on reasonable suspicion that a miner has used a prohibited substance~~; and as part of a return-to-duty process for miners who have violated the rule. Mine operators may also test randomly at unannounced times or based upon reasonable suspicion that a miner has used a prohibited substance. Mine operators may also elect to require testing in additional circumstances, including but not limited to mandatory testing for all employees, for employees in particular positions, or for employees who have not been selected for random testing for a fixed period of time.

§ 66.304 Pre-employment testing.

(a) Any applicant for a safety-sensitive position must be tested for the presence of drugs before performing safety-sensitive job duties.

(b) Any applicant for a safety-sensitive position must receive an alcohol test after a conditional offer of employment has been made and before performing safety-sensitive job duties.

(c) The mine operator must treat all miners performing safety-sensitive job duties the same for the purpose of pre-employment alcohol- and drug-testing (i.e., mine operators must not test some miners and not others). If it is unclear whether an applicant will be assigned to such duties, it is at the mine operator's discretion to test all applicants; or test only when it is known that the applicant will be assigned to perform safety-sensitive job duties.

(d) The mine operator must not allow a miner to begin performing safety-sensitive job duties if the result of the miner's test indicates a blood alcohol concentration of more than 0.04 percent or if he/she has used a prohibited substance without a valid prescription.

(e) Any incumbent miner who is to be transferred from a position that does not involve the performance of safety-sensitive duties to a position involving the performance of safety-sensitive job duties must be tested for the presence of alcohol or drugs prior to beginning the performance of safety-sensitive job duties and must receive negative test results.

(f) An incumbent miner that has failed or refused a pre-employment alcohol- and drug-test administered under this part, shall not perform safety-sensitive job duties until that miner provides the mine operator proof of having successfully completed a referral, evaluation, and treatment plan, and tested negative on return-to-duty testing as described in subpart E, § § 66.405-66.406.

(g) A mine operator shall have the discretion to conduct such testing on incumbent miners who are performing safety-sensitive job duties as of the effective date of this rule as long as all such miners are tested.

(h) Nothing in this part shall require a mine operator to retain or reinstate any miner who has a verified positive test for drugs or alcohol or otherwise violates the mine operator's alcohol- and drug-free mine policy, nor shall this part be construed to limit the power of a mine operator to

take disciplinary action against miners, up to and including termination, for violation of the mine operator's policy.

§ 66.305 Random testing.

Mine operators ~~must~~^{may} randomly conduct unannounced alcohol and drug tests of their miners as described in paragraphs (a) through (e) of this section:

(a) A mine operator shall use random testing rates for alcohol and drugs of 10 percent. The random pool for unannounced alcohol and drug testing during each calendar year shall consist of miners who perform safety-sensitive job duties and their supervisors.

(b) Miners who are on leave or otherwise absent from the workplace will be tested at the next available opportunity, that is, immediately upon their return to work.

(c) Each mine operator shall ensure that random alcohol and drug tests conducted under this part are unannounced and unpredictable. The dates for administering random tests must be periodic and irregularly scheduled throughout the calendar year. The mine operator has the discretion to determine how frequently testing will occur but it must, at a minimum, meet the 10 percent floor established by this part.

(d) The selection of miners for random alcohol and drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with miners' payroll identification numbers, or other comparable unique identifying numbers. Under the selection process used, each miner shall have an equal chance of being tested each time selections are made.

(e) Each mine operator shall ensure that any miner performing a safety-sensitive duty at the time of the notification ceases to perform the safety-sensitive duty and proceeds to the testing site immediately.

§ 66.306 Post-accident testing.

(a) A mine operator is required to conduct alcohol and drug testing of certain miners after certain accidents or workplace injuries occur. Accidents and injuries requiring post-accident testing include occupational injuries requiring medical treatment beyond first aid and accidents that occur while a miner is operating a piece of equipment or performing a work activity that causes or contributes to an accident, injury, or death. Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident or to prohibit a miner from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(1) Fatal accidents. As soon as is practicable following an accident involving the loss of human life, a mine operator shall conduct alcohol and drug tests on each surviving miner involved in any work activity that could have contributed to the accident, injury, or death as determined by the mine operator, using the best information available at the time of the decision. The mine operator shall also be authorized and required to have a toxicology test conducted on the deceased that at a minimum tests for all the substances listed in § 66.301.

(2) Nonfatal accidents. As soon as is practicable following an accident or occupational injury not involving the loss of human life, the mine operator shall conduct alcohol and drug tests on each miner involved in any work activity that could have contributed to the accident or injury, as determined by the mine operator, using the best information available at the time of the decision.

(b) A mine operator shall ensure that a miner required to be tested for alcohol under this section is tested as soon as is practical but within eight hours of the accident or injury. If an alcohol test is not administered within eight hours following the accident or injury, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.

(c) A mine operator shall ensure that a miner required to be drug tested under this section is tested as soon as is practical but within 32 hours of the accident or injury. If a drug test is not administered within 32 hours following the accident or injury, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.

(d) A miner who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the mine operator of his or her location if he or she leaves the scene of the accident prior to submission to such test, must be deemed by the employer to have refused to submit to testing.

(e) The results of blood, urine, or breath tests for the use of prohibited substances conducted by federal, state, or local officials having independent authority for the test, shall be considered to meet the requirements of this section provided such tests conform to the applicable federal, state, or local testing requirements, and that the test results are obtained by the mine operator. Such test results may be used only when the tests have been performed within the applicable time limits (eight hours for alcohol and 32 hours for drugs) and the mine operator has been unable to perform separate post-accident tests within those time periods.

(f) Mine operators shall determine when post-accident testing will be ordered and which miners will be tested. ~~Those making such determinations must have received the necessary training (as specified~~

~~in subpart C) needed to make such determinations prior to doing so.~~

(g) If MSHA investigators arrive at the scene of an accident within the 32-hour window and determine that miners not originally given a post-accident test may have contributed to the accident, the MSHA investigator can so order the mine operator to have such testing done at the mine operator's expense.

§ 66.307 Reasonable suspicion testing.

(a) A mine operator ~~shall~~may conduct an alcohol and/or drug test when the mine operator has reasonable suspicion to believe that the miner has misused a prohibited substance.

(b) A mine operator's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the miner. ~~A supervisor, or other company official who is trained in, or other facts and circumstances sufficient to persuade the mine operator that there is a reasonable basis to suspect that the miner has violated the mine operator's alcohol- and drug-free mine policy, detecting the signs and symptoms of the misuse of alcohol and/or drugs, must make the required observations.~~

(c) ~~Testing is authorized under this section only if the observations required by paragraph (b) of this section are made during, immediately preceding, or just after the shift. A mine operator may~~ direct a miner to undergo reasonable suspicion testing immediately before, during, or after the miner is to perform safety-sensitive job duties.

(d) A mine operator shall ensure that a miner required to be tested for alcohol under this section is tested as soon as is practical but within eight hours of the mine operator's determination that reasonable suspicion exists. If an alcohol test is not administered within eight hours, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.

(e) A mine operator shall ensure that a miner required to be tested for drugs under this section is tested as soon as is practical but within 32 hours of the mine operator's determination that reasonable suspicion exists. If a drug test is not administered within 32 hours, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.

(f) Those authorized to make decisions on behalf of the mine operator as to when reasonable suspicion testing will be ordered and which miners will be tested will receive the ~~necessary training needed to make such determinations prior to doing so as specified~~described in subpart C. The mine operator will determine who is authorized to make these

decisions.

(g) If the collection site is not on the mine property, miners being tested because of reasonable suspicion should not be allowed to drive themselves to the site, but rather shall be accompanied by authorized mine personnel.

Subpart E--Operator Responsibilities, Actions, and Consequences

§ 66.400 Consequences to miner for failing an alcohol or drug test or refusal to test.

(a) A mine operator, upon a miner's verified positive drug test result, an alcohol test with a result indicating a blood alcohol concentration of 0.04 percent or greater, a refusal to test (including by adulterating or substituting a urine specimen), or any other violation of the mine operator's policy prohibiting possession, impairment from or use of alcohol or drugs must not return the miner to the performance of safety-sensitive job duties until or unless the miner successfully completes the return-to-duty process of §§ 66.405 and 66.406 of this part. The miner may be assigned to duties that are not safety-sensitive at the mine operator's discretion.

~~(b) Mine operators shall not terminate miners who violate the mine operator's policy for the first time (e.g., by testing positive for alcohol or drugs). Rather, those miners testing positive for the first time, who have not committed some other separate terminable offense, shall be provided job security while the miner seeks appropriate evaluation and treatment. The miner will be able to be reinstated and allowed to resume performance of safety-sensitive job duties provided the miner complies with return to duty requirements outlined in §§ 66.405 and 66.406.~~ (c) For subsequent violations of the mine operator's alcohol- and drug-free mine policy, the mine operator shall specify appropriate disciplinary steps, up to and including termination. At a minimum, miners shall not be allowed to perform safety-sensitive job duties until such time that they have satisfactorily complied with the return-to-duty process as specified in §§ 66.405 and 66.406 of this rule.

(c) The requirements of this subpart E apply only to miners covered by this part and testing required by this part.

§ 66.401 Operator actions pending receipt of test results.

(a) Miners who have been selected for random testing shall be returned to duty immediately following the test and while awaiting the results.

(b) Miners who have been tested for alcohol and/or drugs based on reasonable suspicion or because the mine operator has determined that they may have contributed to an accident may be suspended from performance of safety-sensitive job duties until the verified test results have been received.

(c) All miners suspended from performing safety-sensitive job duties pending results should be treated in the same manner with respect to this rule and no action adversely affecting the miner's pay and benefits shall be taken pending the verified outcome of the testing process.

(d) In the event that a miner does not work at all during the suspension period (i.e., the miner is not assigned non-safety-sensitive job duties) and the test result is verified positive, mine operators may choose to withhold pay for the suspension period in accordance with mine operator policy and/or any existing labor-management agreement.

§ 66.402 Substantiating legitimate use of otherwise prohibited substances.

Although mine operators shall not receive test results until after an MRO has verified them, mine operators must ensure miners have adequate opportunity to demonstrate that their use of prescription drugs is legitimately authorized. However, possession of a valid prescription from a medical professional in and of itself may not constitute sufficient proof of legitimate and appropriate use. It is the responsibility of the MRO to make this determination. If the miner asserts that the presence of a drug or drug metabolite in his/her specimen results from taking prescription medication, the MRO must review and take all reasonable and necessary steps to verify the authenticity of all medical records the miner provides. The MRO may contact the miner's physician or other relevant medical personnel and/or direct the miner to undergo further medical evaluation.

§ 66.403 Operator actions after receiving verified test results.

(a) A mine operator who receives a verified positive drug test result or a verified adulterated or substituted drug test result must immediately remove the miner involved from performing safety-sensitive job duties and ~~refer the miner to a qualified SAP~~ must not return the miner to the performance of safety-sensitive job duties until or unless the miner successfully completes the return-to-duty process of § § 66.405 and 66.406 of this part. Action must be taken upon receiving the initial report of the verified test result. A mine operator must not wait to receive the written report or the result of a split specimen test.

(b) A mine operator who receives a blood alcohol concentration test result of 0.04 percent or higher must immediately remove the miner involved from performing safety-sensitive job duties and refer the miner to a qualified SAP. A mine operator must not wait to receive the written report of the result of the test.

(c) A mine operator must not alter an alcohol or drug test result transmitted by a MRO or BAT.

(d) In the event that the MRO verifies that a test is negative or cancels the test:

(1) The miner will be immediately returned to the performance of safety-sensitive job duties if he/she has been removed based on reasonable suspicion;

(2) The miner will suffer no adverse personnel consequences or loss in pay; and

(3) No individually identifiable record that the employee had a confirmed laboratory positive, adulterated, or substituted test result will be retained. The record of the test will reflect that it was a negative test.

(e) Nothing in this part shall require a mine operator to retain or reinstate any miner who has a verified positive test for drugs or alcohol or otherwise violates the mine operator's alcohol- and drug-free mine policy, nor shall this part be construed to limit the power of a mine operator to take disciplinary action against miners, up to and including termination, for violation of the mine operator's policy.

§ 66.404 Evaluation and referral.

(a) A miner who has failed a test for prohibited substances or refused or adulterated a test cannot perform safety-sensitive job duties until a SAP evaluation has been completed and the miner successfully complies with the SAP's recommendations for education and/or treatment.

(b) Mine operators must provide to each such miner (including an applicant or new miner) a listing of SAPs available to the miner and acceptable to the mine operator. This listing should include the names, addresses, and telephone numbers of the available SAPs. The miner may avail himself or herself of the services of the SAP to receive an evaluation and referral for treatment. ~~The miner shall be allowed to return to performance of safety-sensitive job duties following a first-violation violation and provided the miner complies with the return-to-duty and follow-up testing provisions found in §§ 66.405 and 66.406.~~

(c) The SAP's recommendation for assistance will serve as a referral source to assist the miner's entry into an education and/or treatment program.

(d) Miners who have failed or refused an alcohol or drug test may

not seek a second SAP's evaluation in order to obtain a different recommendation, nor may a mine operator do so if the miner has already been evaluated by a qualified SAP. If the miner, contrary to this paragraph, has obtained a second SAP evaluation, mine operators may not rely on it for any purpose under this part. Only the SAP who made the initial evaluation may modify his or her initial evaluation and recommendations based on new or additional information (e.g., from an education or treatment program).

~~—(e) While the SAP's referral shall always be made at the miner's first offense, employers may choose to offer additional opportunities for treatment and return to work, but must do so in a way that is uniform and consistent.~~

(e) Nothing in this part shall require a mine operator to bear the cost of any referral, evaluation, treatment or education provided pursuant to this part.

§ 66.405 Return-to-duty process.

~~(a) After miners~~If the mine operator elects to allow a miner to return to safety-sensitive job duties after testing positive for drugs or alcohol or drugs are refusing or adulterating a test, the miner may return to such duties only after being assessed by a SAP and follow that SAP's educational or treatment recommendations, they may return to safety-sensitive job duties upon, following that SAP's education and treatment requirements, and submitting to return-to-duty and follow-up testing as described in ~~§ §~~ §§ 66.406.

(b) SAPs must re-evaluate the miner to determine if the miner has successfully carried out the recommended education and/or treatment so that the mine operator can decide whether to return the miner to safety-sensitive job duties.

(c) Should a SAP provide written notice that the miner has not successfully complied with the SAP's recommendations, the mine operator must not return the miner to the performance of safety-sensitive job duties and may take action consistent with company policy and/or labor-management agreements.

(d) Although the SAP can verify completion of or compliance with recommended treatment, it is the mine operator who decides whether to put the miner back to work in a safety-sensitive position or any other position. ~~However a miner who has successfully completed the recommended treatment and passed the return to duty tests may not be discharged for his/her first offense.~~

§ 66.406 Return-to-duty and follow-up testing.

(a) Miners must have an alcohol test with a blood alcohol concentration of less than 0.04 percent and a negative return-to-duty drug-test result before resuming performance of safety-sensitive job duties. The mine operator may specify a lower limit in its alcohol- and drug-free mine policy.

(b) A mine operator shall conduct follow-up testing of each miner

who returns to duty is returned to safety-sensitive duties after failing or refusing a drug or alcohol test, as follows:

(1) A SAP is the sole determiner of the number and frequency of follow-up tests needed for a particular miner and whether these tests will be for alcohol, drugs, or both. If the miner had a positive drug test, but the SAP evaluation or the treatment program professional determines that the miner also has an alcohol problem, a SAP shall require that the miner have follow-up tests for both alcohol and drugs.

(2) A SAP must establish a written follow-up testing plan for each miner who has committed a violation of this rule, and who seeks to resume the performance of safety-sensitive job duties only after the miner has successfully complied with recommendations for education and/or treatment.

(3) At a minimum, a miner will be subject to ~~six~~two unannounced follow-up tests in the first 12 months of resuming safety-sensitive job duties. It is possible, however, that the SAP may require more than ~~six~~two unannounced follow-up tests, and that the testing be continued for up to 24 months after the miner resumed his/her safety-sensitive job duties.

(4) The mine operator may ~~not~~elect to impose additional testing requirements (e.g., under company authority) on the miner that go beyond the SAP's follow-up testing plan.

(5) The mine operator ~~must carry out the SAP's follow-up testing requirements and~~ may not allow the miner to continue to perform safety-sensitive job duties unless follow-up testing is conducted as directed by the SAP. Mine operators failing to do so will be in violation of this rule.

(6) Mine operators have discretion in scheduling follow-up tests but must ensure that the tests are unannounced with no discernable pattern as to their timing, and that the miner is given no advance notice.

(7) Other tests conducted (e.g., those carried out under the random testing program) cannot substitute for this follow-up testing requirement.

Subpart F--Recordkeeping and Reporting

§ 66.500 Recordkeeping requirements.

(a) Protection of employee records.

(1) Records of drug- or alcohol-test results received are confidential communications between the mine operator and the miner.

(2) If records are stored electronically, a mine operator must ensure that the records are secured.

(b) Mine operators must keep and retain the following test records for at least three years:

- (1) The number of workers in safety-sensitive positions;
- (2) The total number tested;
- (3) The number of positive alcohol and drug tests for each substance; and
- (4) A record of which miners were tested, the dates of their tests, their test results, and return-to-duty and follow-up test results; these records should be retained separately from aggregate data on violations and violation rates.

(c) In addition, mine operators are required to:

~~(1) Include post-accident test results in accident reports regardless of whether the test(s) are positive or negative.~~ (2) ~~Annually~~annually compute and retain records of the percentage of positive random alcohol and drug tests.

(d) MSHA inspections:

(1) Mine operators' alcohol- and drug-free workplace policies and program descriptions should be made available to MSHA inspectors upon their request; however, this rule does not require routine review of alcohol- and drug-free workplace programs by MSHA inspectors.

(2) Any and all alcohol- or drug-test results will be made available upon request of MSHA inspectors or investigators and will be used in assessing overall compliance with safety regulations as well as in determining the cause of accidents.

(e) The requirements of this subpart F apply only to miners covered by this part and tests required by this part.