

Office of Drug Enforcement and Program Compliance
49 CFR Part 40 Interpretation

Question: If an employee is unable to provide an amount of breath sufficient to permit a valid breath test, but does not allege that such inability is due to a medical condition, what actions must follow?

Response: Paragraph 40.69(a) "*...sets forth the procedures to be followed in any case in which an employee is unable, or alleges that he or she is unable, to provide an amount of breath sufficient to permit a valid breath test because of a medical condition.*"

The rules prohibit a covered employee from refusing to submit to required alcohol tests. Post-accident, random, reasonable suspicion, or follow-up tests must be taken when those tests are required. Section 40.69 sets forth the procedures to be followed when an employee is unable to provide an adequate amount of breath for any reason. These procedures apply to the employee who claims a particular medical condition is creating the problem to provide breath; they also apply to the employee who claims to have no idea as to the cause of the inability, or to the employee who says nothing at all.

It is imperative that the employee understands that during the required follow-on medical evaluation, the physician will concentrate solely on finding a medical condition to explain the inability. Paragraphs 40.69(d)(2)(i) and 40.69(d)(2)(ii), dictate that the only acceptable reason for an employee to be unable to provide an adequate amount of breath for testing is a medical condition. If a medical condition is not found, the employee will be deemed to have refused testing.

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