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BUIL

A DEFENSIBLE BREATH

Challenges or objections are going to arise after positive tests, not negative ones. In law enforcement, the most litigated offense in the United States today is Driving Under the Influence (DUI). Rigorous forensic practices are required to make sure that these cases stand up to court scrutiny. The same is true of workplace alcohol testing and it is important that we adhere to the procedures set forth in 49 CFR Part 40 when performing DOT alcohol tests.

Since the DOT implemented its alcohol testing program in 1995, I have assisted countless program managers in strengthening their breath testing program. Some seek counsel because of hard lessons learned, and others simply see the value in having a well-polished, high-performing breath-testing program that clients can rely upon.

A positive breath alcohol test can have life-changing ramifications for an employee. In an effort to avoid loss of employment and a potentially career-ending event, these positive results are often disputed through arbitration or the court systems.

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TESTING PROGRAM

Unfortunately, errors (even small ones) and inconsistent procedures can weaken a service provider's defense of their testing program, ultimately damaging their clients' trust and perception of the clinic as a reliable testing facility. A strong testing program, on the other hand, can reduce the occurrence of disputes due to the consistent strength of its defense.

To help your program become as strong and as defensible as it can be, here are some key best practices that can help. Reviewing these tips will help prepare you for that inevitable, if unfortunate, day that you will need to defend your program in arbitration.

Eliminate Bad Habits

The first step in refining your breath alcohol testing program is to eliminate common

errors in the collection process. What bad habits are out there? The following are the top five errors, in reverse order, that we see frequently in classes, as well as hear about from clients who have learned the hard way.

5. Duplicating the printed results by handwriting them

Handwriting a result that has already been printed is simply an opportunity for error, and is unnecessary. The Alcohol Testing Form (ATF) clearly states that this section is to be completed ONLY if the breath device is not designed to print.

4. Unnecessary documentation on the form

Medical professionals are often taught that if it isn't documented, it didn't happen. Remember that DOT alcohol and

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drug tests are not medical procedures so don't get carried away. You can document any "he said" / "she said" situations on a separate paper and keep it with your copy of the ATF.

For example, in the event of a positive test or an unusual circumstance, we frequently see Breath Alcohol Technicians (BATs) document "DER notified" in step 3, tear apart & distribute the copies and THEN call the DER. That is not a correct procedure; anything you write on the ATF must be accomplished BEFORE you tear apart and distribute the copies.

Though the ATF includes more space than the Custody & Control Form, it still is not an unlimited amount of space. You don't need to write a book—just briefly explain any unusual circumstances.

3. Rushing through the test process

We often see BATs rush through the test and try to start working on the next step before they have finished the current step. Proceed methodically through the process to ensure you don't leave out any steps or forget to explain something important to the donor.

The BAT must understand all the displays on the device they are using and know what to do at each point in the process. For example, some devices will prompt the BAT to mount or insert a mouthpiece—the BAT should wait for that prompt before selecting and opening the mouthpiece.

2. Referring to an Accuracy Check as a Calibration

A calibration does not prove that your instrument is accurately reading alcohol—the only procedure that verifies the accuracy of the device is a calibration check. By referring to your routine accuracy checks as calibrations, you are saying that the instrument needs to be reset frequently. An arbitrator might assume that since your device needs to be calibrated (repaired) so often, it is not reliable.

The DOT regulations require that an EBT used for confirmation testing must be capable of performing an "external calibration check". This procedure is also known as an "accuracy check" and is sometimes referred to as a "calibration check". All three terms are exactly the same process and refer to a test (check) of a device's ability to read a known alcohol standard within a specified tolerance. If the result of an accuracy check is within the acceptable tolerance as stated in the Quality Assurance Plan (QAP) for that instrument, the device is considered accurate. If the reading is outside of the acceptable tolerance, the device is not providing accurate results and therefore must be calibrated.

Calibration is a maintenance procedure that resets the instrument to a known standard and does not provide any assurance of accuracy. To perform a calibration the technician must have special training and be authorized by the manufacturer of the instrument. Calibrations are not regular, routine occurrences and should only be performed when required by the QAP for your instrument.

1. The number one bad habit... offering too much information or incorrect information to the donor

It is best to avoid long conversations with the donor. Stick to explanations of the process. Also, be sure to use correct terminology. For example, if an accuracy check is being performed do not call it a "calibration," as this can lead to confusion and ultimately to problems. It is best to say as little as possible while getting the job done.

In training, we provide BAT students with a list of scripted statements to use during the collection process. There are frequently only two answers to any question or issue the donor may bring up.

1. *The DOT rules require us to do the test in this way.*
2. *You should discuss that with your employer.*

If the subject is asking about procedural issues, for example, the proper answer is, "The DOT rules say we have to do it this way." Or, for a non-regulated test, "Your company policies say we have to do it this way."

When the rare positive result does come up, subjects sometimes want to discuss consequences of a positive test or promote theories about where the alcohol came from. The proper answer for anything related to consequences or the source of the alcohol is, "You should discuss your concerns with your employer."

Don't be afraid to sound like a broken record. If the donor keeps asking the same questions, keep giving them the same answers. Do not try to over-explain.

You only need to provide explanations related to collecting a sample with your particular breath testing device and completing the ATF. The employer is supposed to educate employees about the testing program.

Build Safeguards Into Your Testing Program

Safeguard #1:

Proper BAT training

First class training is the most important safeguard for your program. BAT mistakes open the door for challenges to the entire test process. Providing training to your staff that exceeds the DOT requirements is an investment in the future. There are some unscrupulous training

providers out there who claim to be able to provide DOT-compliant BAT training in a couple of hours. Over the phone training? Really? If it sounds too good to be true, it probably isn't true.

DOT has very specific requirements regarding BAT training. These include knowledge of the Part 40 procedures, the length of time required to attain this knowledge, the DOT Model Course, and instrument proficiency.

Here are just a few of the shortcuts we see:

- Skimming over the procedural training—taking less than the required 6.5 hours (3 hours for refresher) to learn the rules & regulations in Part 40. (Source: DOT Model Course, Administrator's Guide)

- Not teaching BAT students all of the buttons and displays on the EBT device.
- Having students do mock tests that are all negative and uneventful to save time.
- Not having a means of testing students' knowledge at the end of the training.

There is a lot of information to cover in order to make sure that a BAT can go into a room alone with an employee and conduct a proper alcohol test with no mistakes. It may require more than a day to obtain thorough training. Don't take shortcuts.

Safeguard #2: Periodic proficiency training

DOT does not require ongoing, periodic proficiency training beyond the 5-year refresher requirement. However, any employer who takes an adverse personnel



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- Use a reliable, assayed control without stability issues.

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action against an employee who fails an alcohol test should be prepared to defend the training of the BAT during possible litigation proceedings that may develop as a result of that action. It is incumbent upon employers to protect themselves by requiring training programs that use competent instructors.

With a random rate of 10 percent, there are not that many alcohol tests being conducted. It is prudent for BATs to review the procedures and practice conducting tests on a regular basis to maintain an appropriate level of competence. Because positive tests and associated obstacles occur less frequently than negative tests, it is beneficial to practice these types of scenarios regularly. Once per year is a reasonable frequency for reviewing procedures.

Some of our customers require full BAT refresher training every 2 years; others do annual proficiencies.

If BATs and those who train BATs document this type of continuing education, it will go a long way toward proving that any particular BAT was competent at the time of a disputed test.

Safeguard #3: Assume every test will be positive

Most of the issues we hear about are related to confirmation tests because the BAT wasn't prepared for a positive result. BATs can go a year or longer without seeing a positive test, but they still need to know what to do. By assuming every test will be positive, it forces the BAT to think about and remember obscure procedures before a problem situation occurs.

Train your BATs to expect every test to be positive and that they (or you) will have to explain in detail how the test was performed.

Safeguard #4: Use checklists

There are many instruments on the market today that will prompt the BAT through the test process. But, what if you don't have an instrument that does that? There are some low-tech ways to accomplish the same thing. I am a big fan of check lists. Use a checklist:

- Before you start the test,
- During the test, and
- After you complete the test.

Some facilities require the BAT to actually make a check mark or initial each step of the list. Keep the checklist with the BAT copy of the testing form.

Always be Prepared for Arbitration and Testimony

Defensible test results increase client confidence in your testing program. Being proactive in protecting your program will make the program defensible in the event it is challenged. Below are a few final tips to strengthen your case:

Be consistent.

Consistency in procedures is defensible. Follow compliance guidelines to the letter and never deviate from your procedure.

Train your BATs to follow the proper testing protocol for every test—conduct each test in the same way using the same explanations. Use the same scripted statements to explain the test process for each test. That way, when asked how you know that you told the donor how to provide a sample, or how you know you showed the donor their test number, BATs can respond that they know because they tell every donor how to provide a sample in exactly the same way and they show the test number to every donor at the same point in the process. Consistency provides powerful backup for your program.

Keep a calibration logbook for each instrument.

This legal document should be kept with the instrument at all times. Be prepared to provide copies of your logbook when requested by your clients or DOT inspectors. Many DOT-covered employers will require a service provider to send a copy of the logbook with every positive test result.

Here are the things that should be documented in your logbook:

- Every accuracy check performed
- Every calibration performed
- Every time the device is removed from service for any reason, including training
- Every time you start using a new dry gas standard
- A copy of the QAP document*

*Make sure your instrument complies with the QAP

Keep detailed training records.

These records may be needed in the event of a positive test result or if you are audited by a DOT Operating Agency. It has become common practice to issue certificates stating that individuals have met the training requirements of Part 40, but the DOT Model Course is not a certification course. You may be asked for additional proof that you have

met these requirements. We suggest keeping copies of the ATFs from your mock tests or a checklist signed by your instructor.

Don't talk too much.

While in an arbitration, simply answer the question that was asked and do not volunteer unrelated information.

Know when to say you don't know.

If an employer questions you about a particular situation, don't be afraid to say, "I don't know." BATs are expected to understand the DOT procedures of 49 CFR Part 40, the basic methodology of your EBT instrument, the QAP, and how to conduct a test on the device. You do not have to know

how the device is manufactured or what is involved in factory service procedures.

Below are some examples of questions about the instrument a BAT *should* be able to answer either for the employer or an arbitrator:

- How much air does the donor have to provide for a sample to be taken?
- How does your device measure alcohol?
- How do you know your device is accurate?
- How do you know the gas standard you used is accurate?
- What are the quality assurance requirements for this device?

It's impossible to completely eliminate errors, of course, but through preparation and consistency, you can build an alcohol

breath testing program that will stand up to even the harshest scrutiny. Your clients will thank you for it. ■



Betye Bailey is the Corporate Training Manager for Intoximeters, a manufacturer of breath alcohol testing instruments. Her 18-year tenure with Intoximeters has included the training and supervision of training of over 15,000 Breath Alcohol Technicians. Betye, along with her staff, train BATs across the US, as well as at the Intoximeters headquarters and training facility in St. Louis, Missouri. Please feel free to reach out to Betye at bbailey@intox.com if you would like advice on strengthening your program

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