



199 Main Street, 7th Floor
White Plains, NY 10601
Ph: (914) 997-2916
Fx: (914) 997-6959
www.maritimesafety.org

To All AMS-Member DERs:

This memorandum from American Maritime Safety, Inc. (AMS), is intended to address drug testing issues arising in the context of the spread of the COVID-19 virus. Because of its length, this memorandum is divided in the following four sections:

- (1) AMS communications with government entities concerning adjustments to regulatory requirements, including a proposed moratorium on testing;
- (2) Legal defenses for delayed testing supported by existing regulations;
- (3) New policies of specimen collectors and facilities designed to prevent contagion;
- (4) AMS guidance to members who are suspending drug testing.

AMS is fully functional and will continue to provide its customary services. Our administrative staff and attorneys continue their full workdays and are available to answer your questions.

I.

AMS COMMUNICATIONS WITH GOVERNMENT AGENCIES

AMS is a non-profit trade association of over 400 maritime employers dedicated to facilitating compliance with government drug and alcohol testing regulations. In terms of random test scheduling, AMS has taken advantage of its multi-employer testing pools to accommodate logistical challenges by accelerating testing for certain random selections, while deferring others.

As a non-governmental organization, AMS has no authority to modify regulatory requirements or impose a moratorium on testing. In response to AMS inquiries, we have yet to receive any assurance that the USCG will relax enforcement standards. Indeed, the USCG just last year doubled the random testing rate from 25 to 50 percent in response to the increase in substance abuse in the maritime industry.

Immediately below is a brief outline of recent AMS communications to government agencies relating to COVID-19. The referenced email communications can be found in Attachment A accompanying this memorandum.



199 Main Street, 7th Floor
White Plains, NY 10601
Ph: (914) 997-2916
Fx: (914) 997-6959
www.maritimesafety.org

A. March 9, 2020 – Exempting Quarantined Crewmembers from Random Collection

AMS has provided guidance to its members that a crewmember who has been quarantined due to the manifestation of flu-like symptoms should be exempted from random testing in the event that his/her vessel is selected for testing. In an email dated March 9, 2020, AMS sought confirmation from the USCG Alcohol Prevention and Investigation Program Manager (hereinafter, “Program Manager”) that the agency is in accord with our interpretation, but has received no response to date.

B. March 19, 2020 – Request for Testing Moratorium and Reduction of Random Rate

In an email to the USCG Program Manager, AMS cited member concerns and the decreased availability of mobile specimen collectors in requesting a 30-day moratorium on specimen collections/testing and a reduction of the annual random rate from 50 to 40 percent. We have received no reply to date.

C. March 20, 2020 – Sector New York Teleconference

In view of the issuance, on March 19, 2020, of Marine Safety Information Bulletin (MSIB) Number 08-20, which extends expiring merchant mariner credential endorsements and medical certificates for a three to six month period, AMS inquired during a USCG Section New York teleconference whether there would be any relaxation of random testing quotas and pre-employment testing requirements. Sector New York representatives advised that they had received no instructions to this effect.

D. March 20, 2020 – United States Department of Transportation

Informal inquiries with the U.S. Department of Transportation yielded a response that transportation agencies (e.g., FAA, FRA, FHWA) have no plan at this time to reduce annual drug testing rates.

E. March 21, 2020 – Renewed Request for Modification of Regulatory Requirements

Referencing the temporary relaxation/deferral of regulatory requirements provided for in MSIB No. 08-20, AMS requested that the USCG Program Manager authorize comparable adjustments, including: (1) a three month moratorium on random collections, (2) reduction of the 2020 random rate to 30 percent, and (3) a six-month extension of the pre-employment exemptions provided for in 46 CFR section 16.210(b). This most recent email, sent only last Saturday, has not been responded to as of this time.

II.

LEGAL DEFENSES

AMS wants to make its members aware of regulatory references that might be invoked in order to justify modification of normal testing procedures or delays in the implementation of testing. We know of no existing regulation that would excuse a formal moratorium on testing.



199 Main Street, 7th Floor
White Plains, NY 10601
Ph: (914) 997-2916
Fx: (914) 997-6959
www.maritimesafety.org

In the context of the random selection of a vessel on which a crewmember who has been placed in quarantine, AMS has taken the position that this crewmember should be excluded from the testing process. We believe that position is supported by regulatory references that, in certain narrow contexts, have recognized the propriety of prioritizing immediate health and safety concerns over drug testing concerns.

We note first that United States Coast Guard MSIB Number 02-20 has determined that persons who are suspected of carrying the COVID-19 virus present a hazardous condition per 33 CFR 160.216 and must be reported to the U.S. Coast Guard Captain of the Port (COTP) under 33 CFR 160.206. In view of these determinations, we have reviewed Department of Transportation and USCG regulations for guidance in analogous contexts.

With this in mind, we observe that USDOT regulation provides that:

If the employee needs medical attention (e.g., an injured employee in an emergency medical facility who is required to have a post-accident test), **do not delay this treatment** to collect a specimen.

49 CFR § 40.61(a)(2).

Similarly, USCG post-serious marine incident testing regulations acknowledge that “safety concerns” may legitimize specimen collection delays in the aftermath of a serious marine incident. 46 CFR § 4.06-3(a)(ii), (b)(iii).

AMS considers these provisions to reflect the policies of the USDOT and USCG that the health and safety of other crewmembers and the specimen collector should be prioritized over the completion of a specimen collection from a quarantined individual. Our view, therefore, is that the master of the vessel, in concert with the Designated Employer Representative, would be permitted to excuse a previously quarantined individual from participating in a specimen collection. Although these regulatory provisions may be cited to support analogous actions, again, we do not believe they support a full moratorium on testing.

The following USCG guidance may also provide some tacit support for a delay in testing:

It is not specified in the regulations, but the following should be used as a general guiding policy: **The marine employer must notify the employee of the random drug test requirement, ONLY after the employer is sure that the collection site is available and the employee schedule allows enough time for the specimen collection to take place.** Once notified, the employee must report immediately. **No more than two to four hours should lapse from the time of employee notification to the time that the employee reports to have a specimen collected.**

USCG Office of Investigations and Casualty Analysis, Drug and Alcohol Program Manager, *Marine Employers Drug Testing Guidance* at 28 (September 2009). AMS has relied on this language to defer random collections until mobile specimen collectors were available where clinics had not yet established appropriate COVID-19 protocols. As indicated by the USCG’s guidance, in all cases of delayed collection, it is critical to the integrity of the random testing program that shipboard personnel receive no notice of the anticipated specimen collections until specimen collectors are available and ready to proceed.



199 Main Street, 7th Floor
White Plains, NY 10601
Ph: (914) 997-2916
Fx: (914) 997-6959
www.maritimesafety.org

III.

SERVICE PROVIDERS DEVELOPMENT OF COLLECTION PROTOCOLS

AMS is monitoring and assisting service providers in the adoption of appropriate COVID-19 protocols. Attached is the standing policy of Quest Diagnostics, which confirms its adherence to CDC protocols as well as its exclusion of COVID-19 testing at any of its Patient Service Centers. (Attachment B).

Attached are the documents utilized by Anderson-Kelly mobile collectors designed to exclude symptomatic collectors from any participation in specimen collection. (Attachment C). Anderson-Kelly collectors are also now instructed to alternate presence, between the donor and collector, at the desk or other writing surface used to complete chain-of-custody documents in order to maintain a six-foot distance to the greatest extent possible.

Another option marine employers may follow is having shipboard personnel, who have been certified as specimen collectors in accordance with 49 CFR Part 40, conduct specimen collections. In accordance with Part 40, collections by shipboard personnel should only be conducted in the absence of other options.

IV.

MEMBERS SUSPENDING TESTING

AMS has petitioned the USCG for a moratorium on drug testing. However, at this time, we know of no legal basis for a marine employer's unilateral suspension of all testing. There are several considerations that should give a marine employer pause before such a suspension, including: (1) USCG enforcement actions, (2) rendering the vessel legally unseaworthy due to the failure to control substance abuse, and (3) giving a "green light" to substance abuse in the context of an historic increase in substance abuse that has caused the USCG to order the doubling of random testing.

To the extent that a marine employer suspends or delays its testing program, every effort should be made to prevent shipboard personnel from being advised of such action in order to prevent, to the extent possible, the loss of the deterrent effect of the random drug testing program on substance abuse.

Finally, if any participant in an AMS multi-employer random selection pool has made a determination to suspend testing, we request that you advise AMS immediately. AMS may then be required to remove that company from the multi-employer pool in order not to jeopardize the compliance efforts of those marine employers who continue to test.

Again, AMS is fully operational and available to respond to your questions as they arise. Do not hesitate to contact us.