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BROOKS, SMITH &
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**The Dreaded DOT Safety Concern Letter:
5 Steps to Making a Legally Defensible
Fitness for Duty Determination**



A wider lens on workplace law

Meet the Presenter

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Bar & Court Admissions

Alabama, 1980

Georgia, 1981

U.S. District Courts, AL & GA

11th Circuit Court of Appeals

U.S. Supreme Court

Education

Cumberland School of Law,

Samford University,

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J.D., *cum laude*

Auburn University,
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Tommy Eden's law practice is principally in the areas of Management Labor and Employment Law; he concentrates in Drug Testing Law (DOT Regulated and Non-Regulated) throughout the United States; Preparation of Drug Free Workplace Policies in all 50 states which specifically deal with medical and recreational marijuana issues, recent cardholder protection cases and opioids in the workplace, ADA fit for duty compliance; Tommy is a frequent speaker and trainer on these subjects and heads up Constangy's Workplace Drug & Alcohol Testing Practice Group.



Legal Disclaimer

This presentation is for educational purposes only and is not intended as a substitute for the legal advice of an attorney knowledgeable in the field of work place drug and alcohol testing.

The presenter makes no assurances regarding the accuracy or completeness of the following information. Legislative, regulatory or case law.



"No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers."



Step 1: Build On A Firm Foundation



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- Background on recent update to DOT Regulations to include expanded Opioids
- Homework: View DATIA Webinar ***Standing Firm: Workplace Solutions for Opiate Use and Abuse***
- Preparing yourself to receive the Dreaded MRO Significant Safety Concern Letter
- Upon receipt of MRO letter, employer has divided obligations
- First, fulfill its DOT obligations to immediately remove employee from safety sensitive function



Step 1: Build On A Firm Foundation

- Process to determine if employee fit for duty has multiple measuring sticks:
 1. FMCSA Driver 49 CFR part 391
 2. Other DOT Modes - look at mode-specific medical standards governing fitness for duty
 3. Written Job Description - essential duties, essential certifications, essential mental and physical functions. Numerous court decisions have upheld an employer's right to set the job duties in a written document, which is legally presumed to be correct. Best practice is to have that document, containing a signed acknowledgement by the employee at the bottom.
 4. Utilizing a Confidential Post Offer Medical History safety Questionnaire for DOT Regulated Positions is an excellent preventative step.



Step 2: Act Immediately on MRO's Safety Concern Letter



Step 2: Act Immediately on the MRO's Safety Concern Letter

- Remove the employee from safety sensitive DOT regulatory job functions
- determine if employee violated safety rule by failing to pre-duty disclose the prescription medication for which the safety concern letter was issued (May help determine if paid or unpaid leave while evaluating fitness for duty)
- place employee on leave if non-safety sensitive functions are not available
- Also, consider options under FMLA, STD, LTD



Step 3: Direct the Employee to an Independent Medical Examiner for a Fitness for Duty Determination of the Employer's Choice



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- If FMCSA regulated – the DOT Certified Medical Examiner of the employer's choice, and paid for by the employer
- If other DOT mode, use mode specific appropriate qualified medical examiner
- For all others, use occupational physician chosen and paid for by the employer
- Engage Consulting MRO/Certified Medical Examiner/Occupational Physician



Step 3: Direct the Employee to an Independent Medical Examiner for a Fitness for Duty Determination of the Employer's Choice

- Send the following to the independent medical examiner
 1. Appointment - engagement letter (Homework: Make sure you have specimen letter ready)
 2. Employee's job description (Homework: Is it legally defensible?)
 3. MRO significant safety concern letter (Homework: Ask your MRO for specimen)
 4. State, in your engagement letter, exactly what you want back from the medical examiner in the way of a medical fitness for duty opinion, multiple choice options
 5. Confirm, in engagement letter, ability of medical examiner to consult with Consulting MRO/Certified Medical Examiner/ Occupational Physician
 6. State in your engagement letter whether the MRO conferred with the treating physician during the five-day business pause period of 40.135



Step 4: Engage Consulting MRO/Certified Medical Examiner/ Occupational Physician to Guide Company-wide Final Fitness for Duty Decisions



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- Defensible process needs medical oversight and peer-to-peer ability to guide process, forms, checklist and answer questions from independent medical examiners
- Gives employer additional level of medical expertise to make Fitness for Duty process fair, supportable, effective, and defensible decision
- MRO/Certified Medical Examiner/ Occupational Physician can either agree with, or disagree with, the independent medical examiner, consult with other medical specialists, consult with DOT agency managers, and consult with inside and outside legal counsel as necessary



Step 5: Pull it All Together
in a Final Fitness for Duty
Report from the
Consulting MRO/Certified
Medical Examiner/
Occupational Physician



Step 5: Pull it All Together in a Final Fitness for Duty Report from the Consulting MRO/Certified Medical Examiner/ Occupational Physician

- All supporting medical evidence and opinions should be attached to one document
- The consulting MRO/Certified Medical Examiner/ Occupational Physician is designated to serve as the testifying witness if necessary
- Assist in maintaining continuity across all of your operating divisions and units in arriving at fitness for duty decisions that are in harmony and legally defensible



Step 5: Pull it All Together in a Final Fitness for Duty Report from the Consulting MRO/Certified Medical Examiner/ Occupational Physician

- Allows employers to document, with medical expert opinions, all decisions on regulatory fitness for duty, job description fitness for duty, and to satisfy the ADA “job relatedness” and “business necessity” test if the employer must eventually demote or separate the employee
- Medically unqualified employees should be referred to HR to begin the ADA interactive dance steps process to determine if employee can be reasonably accommodated by moving to non-dot position, extended leave, job restructuring, etc.



Putting Your Puzzle Pieces Together

- 1) Update Job Descriptions, DOT policy, employee handbook to include “safety sensitive position” and the ability to work in a constant state of alertness and safe manner as an essential job function, etc;
- 2) Update drug free workplace policy to bring it into compliance with state laws and to include a pre-duty impairing effects disclose safety policy for safety sensitive employees;
- 3) Make sure you have all of the critical specimen notices, letters, forms, HIPAA releases, assignment letters and safety questionnaire ready to go;
- 4) Make sure you are ready with independent medical examiners, together with a Consulting MRO/ Medical Examiner/Occupational Physician, who can render an expert medical written fitness for duty opinion before you take adverse employment action; and
- 5) Finish all homework and locate someone to guide you through this process who understands all of the above steps



Constangy is Here to Help!

1. Constangy Workplace Drug & Alcohol Testing Group can help you with customized DFWP Compliant Policies in all 50 states; Pre-Duty Disclosure Safety language; job descriptions, employee handbook language, forms and sign-offs, etc.
2. Can create a customized, effective and legally defensible Fitness for Duty forms toolkit and processes for DERs and MROs that comply with DOT regulations and best practices under the ADA
3. Can advise on effective and defensible demotions and separations based upon inability to meet essential job functions
4. Can advise on Last Chance and Work Continuation Agreements.
5. Can advise on Unemployment Compensation and Workers Compensation state specific disqualifications for a positive test result.



Contact the Presenters

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