Standing Firm: Workplace Solutions for Marijuana & Opiate Use and Abuse

A wider lens on workplace law
Meet the Presenter

THOMAS M. EDEN III
PARTNER AT CONSTANGY, BROOKS, SMITH & PROPHETE, LLP

Tommy Eden's law practice is principally in the areas of Management Labor and Employment Law; Drug Testing Law (DOT Regulated and Non-Regulated) throughout the United States; defense of employers in federal court in all aspects of employment litigation including claims under Title VII, ADA, FMLA, FLSA, ADEA, and retaliatory discharge actions; defense of employers in charges brought with the EEOC, Wage and Hour Division, National Labor Relations Board, and the Department of Labor; and litigation over employee benefits under ERISA and frequent speaker on Affordable Healthcare topics. He also counsels employers on Immigration compliance under the Alabama Immigration Act and conducting I-9 audits under the Federal Immigration Act.

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,
Birmingham Alabama
J.D., cum laude

Auburn University,
Auburn, Alabama B.A.,
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 workplace drug and alcohol testing.

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

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Standing Firm! Training Overview

1. Know the safety sensitive and other work-related risk associated with marijuana and opioid use;
2. Become knowledgeable with the marijuana laws and applicable cases in the states where employees report for duty;
3. How to upgrade your job descriptions to include critical essential function safety language directly applicable to marijuana and opioid use;
Standing Firm! Training Overview Continued

4. How to make it all about safety in supervisory training and safety sensitive job classifications;
5. Decide now your drug free workplace policy options when dealing with marijuana and opioid use;
6. Understand the inter-play between the ADA and workplace drug testing employer obligations; and
7. Put all the puzzle pieces into place to form a compliant legal strategy to stand firm when dealing with marijuana and opioid use in your workplace.
Opioid Painkiller Abuse Rampant

► July 1, 2014 CDC Report
► http://www.cdc.gov/media/releases/2014/p0701-opioid-painkiller.html

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New American College of Occupational and Environmental Medicine guidelines state, “Acute or chronic opioid use is not recommended for patients who perform safety-sensitive jobs. These jobs include operating motor vehicles, other modes of transportation, forklift driving, overhead crane operation, heavy equipment operation, sharps work (eg, knives, box cutters, needles), work with injury risks (eg, heights) and tasks involving high levels of cognitive function and judgment. Medications... Conclusion: Quality evidence consistently demonstrates increased risk of vehicle crashes...”
Prince dies of opioid overdose

• Prince died of accidental overdose of opioid fentanyl, medical examiner says CNN
Marijuana - Who is to Blame—Visionaries?

Cheech and Chong planted the seeds of change almost 40 years ago.
Marijuana - Or the Fact that Millennials Now Rule?

THE MILLENNIAL GENERATION RULES

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Standing Firm!
What should be an Employer’s 7 Point Focus
Recognizing the Problem and Workplace Risks
Marijuana Authoritative Sources for Studies and Statics Cited

- Whitepapers Released in 2015:
  - Workplace Drug Testing in the Era of Legal Marijuana, released in 2015 by the Institute for Behavior and Health, Inc. (IBH), a non-profit organization developing strategies to reduce drug use. Tommy Eden was a contributing panel member. Cited as IBH fn # or IBH page #
  - National Families in Action, a drug policy and education organization, also released a white paper in 2015 entitled What Will Legal Marijuana Cost Employers that examines problems employers are facing in states that have legalized marijuana for medical or retail use. Cited as NF fn # or NF page #
Shift in State Workplace Testing Drug Policy

• For three decades drug testing has been a critical part of employer efforts to maintain a drug-free workplace. IBH p. 2

• Drug use is a significant workplace threat. IBH p. 2

• Deterrence of workers from using illegal drugs has been a major goal prevention goal of drug testing. IBH p. 4
Shift in State Workplace Testing Drug Policy

• Medical Marijuana has created significant employer concern and confusion about marijuana testing specifically. *IBH p. 2; NF 12*

• Rapid changing drug abuse environment is adversely affecting the workplace. *IBH p. 2; NF 12*
Challenges of Providing Practical Advice to Employers and Drug Testing Professionals on Marijuana Testing

• Sale remains illegal under federal law. *IBH p. 3*

• Federally mandated employer drug testing programs grant no exceptions for the use of medical marijuana. *IBH p. 2*

• Conflict at multiple levels between state and federal laws creates a challenge to provide practical advice. *IBH p. 2*
Challenges of Providing Practical Advice to Employers and Drug testing Professionals on Marijuana testing

- Every state marijuana laws are different.

- Multi-state employers who do not apply a uniform policy may be accused of “discrimination” of “not compassionate.” NF p. 34
What Should Be an Employer’s 7 Point Focus about Marijuana

1) Marijuana remains illegal under federal law. IBH p. 3

2) OSHA General Duty Section 5(a) clause requires employers to keep the workplace free of recognized hazards. IBH p. 3

3) Marijuana is an impairing effect substance that is a threat to the workplace. IBH p. 5
What should be an Employer’s 7 Point Focus about Marijuana

4) All impairing effect drugs and substances pose a safety and competitive threat to the workplace. IBH p. 5

5) Treat all impairing effect medications equally to avoid discrimination/not compassionate claim.

6) Adopt consistent safety rule language and procedures.

7) Being able to work in a constant state of alertness and safe manner should be an essential function included in job descriptions.
Standing Firm! Part 1
Know the safety sensitive and other work-related risk associated with marijuana and opioid use
Marijuana - The Workplace Threat is Real!

- Employees who use drugs are more likely to ask for early dismissal or time off, to be absent, to be late for work, to be involved in workplace accidents, and to file worker’s compensation claims. IBH fn 8

- Past month illicit drug users are more likely than their non-using peers to report having worked for three or more employers in the past year. IBH fn 9

- Individuals who tested positive on pre-employment tests are 77 percent more likely to be terminated within the first three years of employment and be absent from work 6 percent more frequently. IBH fn 10
Marijuana - The Workplace Threat is Real!

- Impaired short term memory, impaired motor coordination, altered judgment are a few of the more apparent workplace threats. IBH fn 24

- Substance abusing employees are less productive, higher absenteeism and poor job performance as compared to non-users. NF P. 19

- Marijuana and alcohol pose comparable risks to productivity. NF P. 19

- Linked to less motivated and engaged workers. NF P. 19

- Less dedicated to employers. NF P. 19
Marijuana - The Workplace Threat is Real!

- Employees who test positive for marijuana have 55% more industrial accidents, 85% more injuries, and absenteeism 75% higher. NF fn 21
- Linked to increased absence, tardiness and job turnover. NF fn 22
- Global workplace productivity and competitiveness is compromised. NF P. 19
Marijuana - The Addiction Threat

• About 9 percent of all marijuana users develop addiction to the drug. IBH fn 17

• Over 60 percent of Americans age 12 and older with a substance use disorder for drugs other than alcohol are dependent on marijuana, making it by far the most prevalent illicit drug of abuse in the country, and more Americans obtain treatment for marijuana than for any other illegal drug. IBH fn 20

• Adolescents who smoke marijuana are 6 times more likely to drop out of school and more than 3 times less likely to enter college. NF fn 27
Marijuana - Diminished Lifetime Achievement

- Strong association between marijuana use and diminished lifetime achievement, motor vehicle crashes and symptoms of chronic bronchitis. IBH fn 22

- Relationship between marijuana use and abnormal brain development, progression to use of other drugs, schizophrenia, depression and anxiety. IBH fn 22

- Regular Marijuana use before age 18 results in an average diminished IQ of 6 to 8 fewer points by age 38. NF fn 31
Opiates – Work related impact of Opioid Intoxication

- Somnolence (Sleepiness, the state of feeling drowsy, ready to fall asleep, nodding off)
- Extreme Fatigue
- Decreased ability to concentrate
- Dizziness and mental confusion
- Slowed reflexes and impaired coordination
- Increased response time to stimuli

All opiates are physically and psychologically addictive and can cause severe withdrawal symptoms
Workplace Related Impairing Effects of Marijuana Include:

- Inability to accurately gauge lengths of time and distance
- Impairment of hearing and vision and short term memory
- Inability to cope with sudden changes in surrounding and/or emergency situations
- Loss of balance
- Visual and/or auditory hallucinations
- Non-caring, uncommitted, unconcerned attitude
- Decreased cognitive reasoning
- Decreased motor coordination
- Inability to concentrate or remain focused on a single thought or idea
- Increased drowsiness, fatigue and lethargy
• Release Date: Tuesday, December 19, 2017
• “There were a total of 5,190 fatal work injuries recorded in the United States in 2016, a 7-percent increase from the 4,836 fatal injuries reported in 2015”

**NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2016**
• Link to BLS News release:
  https://drive.google.com/file/d/1vpAPCWNB1u5i3ERKTXzS4xpvf1J1KsXj/view?usp=sharing
Number of Fatal Work Injuries by Employee Status

Chart 1. Number of fatal work injuries by employee status, 2003–16

- Wage and salary
- Self-employed

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Types of Incidents that resulted in Workplace Fatalities

Chart 2. Fatal occupational injuries by major event, 2015-16

- Violence and other injuries by persons or animals: 866 (2016), 703 (2015)
- Contact with objects and equipment: 761 (2016), 722 (2015)
Number of Fatal Work Injuries by Employee Status - Details

- Fatal work injuries involving violence and other injuries by persons or animals increased by 163 cases to 866 in 2016. Workplace homicides increased by 83 cases to 500 in 2016, and workplace suicides increased by 62 to 291. This is the highest homicide figure since 2010 and the most suicides since CFOI began reporting data in 1992.
- Fatal work injuries from falls, slips, or trips continued a general upward trend that began in 2011, increasing 6 percent to 849 in 2016 and 25 percent overall since 2011. Falls increased more than 25 percent in 2016 for roofers, carpenters, tree trimmers and pruners, and heavy and tractor-trailer truck drivers.
- Overdoses from the non-medical use of drugs or alcohol while on the job increased from 165 in 2015 to 217 in 2016, a 32-percent increase. Overdose fatalities have increased by at least 25 percent annually since 2012.
New OSHA Penalties

- OSHA’s new maximum fines apply to all citations issued after August 1, 2016.
- Penalty amounts adjusted for inflation as of Jan. 13, 2017:
  - Serious -- $7,000 → $12,675
  - Willful/Repeat -- $70,000 → $126,749
  - Failure to Abate -- $7,000 → $12,675
- Since Aug. 1, the average initial penalty for all companies for a serious violation is $5,087, up from $3,285. For companies with more than 250 employees, the average went to $10,065.
- Note: State plan states – some appear to be waiting from guidance from the new head of OSHA regarding raising their rates.
Why Stand Firm?

- Increased workplace fatalities is the true cost of marijuana and opiate abuse in the workplace
- Increased OSHA fines should also be an incentive to Stand Firm!
Standing Firm! Part 2
Becoming knowledgeable with the marijuana laws and applicable cases in the states where employees report for duty
Impact of State – Based Marijuana Laws

• 1996 – first Medical Marijuana Initiative in California

• 2017 – 30 States, 2 U.S. Territories (Guam & Puerto Rico) and DC have comprehensive medical marijuana laws; with 16 states have low THC/CBD Oil laws.

• Promoting view that marijuana is medicine despite the fact that smoked marijuana has not been through clinical trials or received approval from the FDA.

• Legalization of marijuana for medical and recreational use normalizes the use of marijuana implying to many that its use is safe.
Post-November 8, 2016

- Medical marijuana is legal
- Recreational and medical marijuana are legal
* Passed 2016
Certain States have enacted Medical Marijuana Protection Laws

- The effectiveness of these laws are as follows:
  1. They may require that the employer engage in an interactive discussion with the employee and begin the reasonable accommodation consideration process.
  2. Other statutes specifically have anti-discrimination language protecting the medical marijuana “cardholder” so that a blanket prohibition policy is prohibited.
  3. Certain states have designated particular medical conditions to qualify for a medical marijuana card which are disabilities under the Federal ADA and many State ADA laws thus turning the presentation of a medical marijuana card into notice of a protected disability.
  4. Under any of these scenarios care should be taken under adverse employment action against an applicant or employee medical marijuana cardholder.
  5. The next 2 slides will give you notice of those States where care should be taken.
### Medical Marijuana Laws

*Laws with Cardholder Protections*

- Alaska
- *Arkansas
- Colorado
- Florida
- Georgia
- Iowa
- Michigan
- Montana
- New Mexico
- Oregon
- Virginia
- *Connecticut
- Hawaii
- *Maine
- *Massachusetts
- New Hampshire
- *Nevada
- North Dakota
- Ohio
- *Rhode Island
- Washington
- Washington, D.C.
- *Arizona
- California
- *Delaware
- *Illinois
- *Minnesota
- *New York
- New Jersey
- *Pennsylvania
- Vermont
- Wisconsin
Recreational Marijuana Laws

*Laws with Employment Protections

- Alaska
- *Maine
- Massachusetts
- Nevada
- Colorado
- Washington
- California
- Oregon
Arizona

STATE WITH EXPLICIT EMPLOYEE PROTECTION

Employment Protections:
• Prohibits employment discrimination based on a person’s status as registered marijuana user and/or registered users fail drug test.
• Allows discipline based on use, possession, or impairment while on premises or on the clock.
• Employer may not be penalized under state law for employing a cardholder.
Connecticut

STATE WITH EXPLICIT EMPLOYEE PROTECTION
Conn. Gen. Stat. § 21a-408 et seq.; Dept. of Consumer Protection Reg. § 21a-408-1 et seq.

Employment Protections:
• Prohibits refusing to hire, discharging, penalizing, or threatening employee solely on basis of person’s status as qualifying patient or primary caregiver
• Allow discipline based on use or impairment on the clock
Delaware

**STATE WITH EXPLICIT EMPLOYEE PROTECTION**

The Delaware Medical Marijuana Act, codified at 16 Del. Code Chapter 49A § 4901A et seq.

**Employment Protections:**

- Prohibits employment discrimination based on person status as registered medical marijuana user and/or registered users failed drug test.
- Allows discipline based on use, possession, or impairment while on premises or on the clock.
- Discrimination prohibited by school, landlord or employer, with limited exceptions.
Florida

STATE WITH EXPLICIT EMPLOYEE PROTECTION
Use of Marijuana for Debilitating Medical Conditions, Article X, Section 29

Approved Conditions:
“Debilitating Medical Condition” means cancer, epilepsy, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), post-traumatic stress disorder (PTSD), amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis, or other debilitating medical conditions of the same kind or class as or comparable to those enumerated, and for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient.
Illinois

STATE WITH EXPLICIT EMPLOYEE PROTECTION
Cannabis Control Act, codified at 720 ILCS 550 et seq.;
Compassionate Use of Medical Cannabis Pilot Program Act,
codified at 410 ILCS 130

Employment Protections:
• Prohibits employment discrimination based on person
  status as registered medical marijuana user.
• Allows discipline based on employers good – faith belief
  that registered user used or possessed marijuana while on
  the employer’s premises or on the clock. Determination
  that a medical marijuana user is impaired at work must be
  based on manifestation of a specific articulable symptoms.
Maine

STATE WITH EXPLICIT EMPLOYEE PROTECTION

Employment Protections:
Cannot refuse to employee a person “solely for his or her status”
Maine - Recreational Employee Protections

STATE WITH EXPLICIT RECREATIONAL EMPLOYEE PROTECTION

Maine Marijuana Legalization Act, codified in Sec. 1.7
MRSA c. 417 §2454

Employment Protections:

• This chapter may not be construed to require an employer to permit or accommodate the use, consumption, possession, trade, display, transportation, sale or growing of cannabis in the workplace. This chapter does not affect the ability of employers to enact and enforce workplace policies restricting the use of marijuana by employees or to discipline employees who are under the influence of marijuana in the workplace.

• A school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person 21 years of age or older solely for that person's consuming marijuana outside of the school's, employer's or landlord's property.
Massachusetts

STATE WITH EXPLICIT EMPLOYEE PROTECTION
Act for the Humanitarian Medical Use of Marijuana

Employment Protections:
• “Nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment;” (law silent on off-duty use)
• “No punishment under state law for qualifying patients;” provides “protection from state prosecution and penalties”
• “Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions”
Minnesota

STATE WITH EXPLICIT EMPLOYEE PROTECTION
Minn. Stat. § 13.3806

Employment Protections:

• “An employer may not discriminate against a person in hiring, termination or any term or condition of employment, or otherwise penalize a person,” if the discrimination is based upon the person’s status as a qualified patient or a qualified patient’s positive drug test for cannabis components or metabolites.

• “Unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.”
This protection has an exception if the failure to discriminate “would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations[.]”

Approved Conditions:
Cancer (if the underlying condition or treatment produces severe or chronic pain, nausea or severe vomiting, or cachexia or severe wasting); Glaucoma; HIV/AIDS; Tourette’s syndrome; ALS; Seizures/epilepsy; Severe and persistent muscle spasms/MS; Crohn’s disease; Terminal illness with a life expectancy of under one year.
Nevada

STATE WITH EXPLICIT EMPLOYEE PROTECTION
Nev. Const. Art. 4, Sec. 38; Nev. Rev. Stat. 453A; NAC 453A

Employment Protections:
The law explicitly states that it does not “require any employer to allow the medical use of marijuana in the workplace.” However, the law further states that it does not “require an employer to modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer but the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card.”
Nevada (cont.)

provided that such reasonable accommodation would not:

(a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or

(b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.”
New York

STATE WITH EXPLICIT EMPLOYEE PROTECTION
Compassionate Care Act, A6357

Employment Protections:
• Act expressly provides that certified medical marijuana users are deemed to have a disability under New York’s human rights law.
• Allows discipline based on possession or while on premises or on the clock.
• The law does not prohibit employers from creating or enforcing existing policies that prohibit employees from performing their employment duties while impaired by medical marijuana, and it is not intended to result in violation of federal law or cause an employer’s federal contracts or funding to be jeopardized.
New York (cont.)

- The law will create challenges for employers as it relates to drug testing policies since it is unclear whether an employer must excuse or accommodate a positive drug test where the employee is a certified patient taking marijuana in approved forms. Because covered patients are deemed “disabled” under the Human Rights Law, employers may need to engage in an interactive process with employees who reveal medical marijuana use to discuss potential accommodations.

**Approved Conditions:**
- Cancer; HIV/AIDS; ALS (Lou Gehrig's disease); Parkinson's disease, Multiple sclerosis, spinal cord damage causing spasticity; Epilepsy; Inflammatory bowel disease; Neuropathies or Huntington's disease.
- The Department of Health commissioner has the discretion to add or delete conditions and must decide whether to add Alzheimer's, muscular dystrophy, dystonia, PTSD, and rheumatoid arthritis within 18 months of the law becoming effective.
Pennsylvania

**STATE WITH EXPLICIT EMPLOYEE PROTECTION**

*Medical Marijuana Act – Enactment Act of Apr. 17, 2016, P.L. 84, No. 16*

**Employment Protections:**

- May not discharge, threaten, refuse to hire, discriminate or retaliate against employee regarding compensation, terms, conditions, location or privileges solely on basis of status to use medical marijuana.
- Not required to accommodate use on property/premises of place of employment.
- May discipline employee under the influence in workplace or for working under the influence when conduct falls below standard of care normally accepted for that job.

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Pennsylvania (cont.)

Approved Conditions:
- ALS (Lou Gehrig’s disease)
- Autism
- Cancer
- Crohn’s disease
- Epilepsy
- Glaucoma
- HIV/AIDS
- Huntington’s disease
- Inflammatory bowel disease
- Intractable seizures
- Intractable spasticity
- Multiple Sclerosis
- Neuropathies
- Parkinson’s disease
- Post-traumatic stress disorder
- Sickle cell anemia
- Severe chronic or intractable pain
- Terminal illness (defined as 12 months or fewer to live)
Rhode Island

STATE WITH EXPLICIT EMPLOYEE PROTECTION

Medical Marijuana Act, codified at R.I. Gen. Laws Chapter 21-28.6; R21-28.6-MMP(5923)

Employment Protections:

• Cardholder not subject to arrest, prosecution, criminal or other penalties and property forfeiture. No school, employer or landlord may refuse to enroll, employ or lease, or otherwise penalize solely for his/her status as a registered, qualified patient or registered primary caregiver.

• Prohibits employment discrimination based on person’s status as registered medical marijuana user.

• Does not require any employer to accommodate medical use of marijuana in the workplace.
Standing Firm! Part 3

How to upgrade your job descriptions to include critical essential function safety language directly applicable to marijuana and opiates
What Language Should Be in Every Job Description?

- Add as an “essential job function” the scarecrow language – the ”ability to work in a constant state of alertness and safe manner.”
- This essential job function makes alertness “job related” under the ADA & OSHA General Duty Section 5(a);
- Safety issue if the employee works in a safety sensitive position so then prohibition becomes a “business necessity.”
- MRO supporting letter most helpful to support the job relatedness and business necessity defenses as expert justification
Standing Firm! Part 4
How to make it all about safety in supervisory training
As part of your “business necessity” justification don’t forget to refer to an employer’s OSHA General Duty Rule Section 5 obligation:

- Each Employer: (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
- A recognized hazard in a medical or recreational marijuana state would be employees coming to work impaired. The same could be said for opiates based on the latest epidemic numbers.
Standing Firm! Part 5

Decide now on your drug free workplace policy options when dealing with marijuana and opiates
Drug Free Workplace Policy Options

1. Just Say NO to Marijuana & Impairing Effect Prescription Medications
2. Just Give UP
3. Make it all about pre-duty disclosure of impairing effect prescription medications and substances as a safety policy (read again OHSA Section 5 obligation)
4. Option 3 allows you to Stand Firm by treating all impairing effect medications equally to avoid discrimination; i.e. there is no discrimination again medical marijuana card holders, only maintaining a safe workplace free of impairing effect substances
Standing Firm! Part 6
Understand the inter-play between the ADA & emerging court cases and workplace drug testing employer obligations

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Interactive Process – Prudent Risk Reduction

- Currently only ten Medical Marijuana states currently contain some type of anti-discrimination statutory protections for Marijuana cardholders: Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Massachusetts, Nevada, New York, Pennsylvania and Rhode Island.

- Expect more states in the future to include some kind of protective language process will give employer defensible/compassionate position if challenged.
Initial Inquiry? Is Employee or Applicant a Marijuana Cardholder Due State Law Protection?

- **Qualifying Patient or Caregiver**: A person diagnosed as having a debilitating medical condition or caring for someone who does
  - Diagnosis procedure and application requirements vary by state
  - Debilitating medical condition under state act may be ADA notice to employer of disability
  - Right to request confirmation with that employee is actual cardholder
  - Each state law is different so this is a case by case determination and there is no current database to verify the legitimacy of a medical marijuana card.
Types of Reasonable Accommodations

• Leave of Absence beyond FMLA

• Work Continuation Agreement (based on an interactive discussion with the cardholder and follow up testing)

• Modified work schedules

• Based on an individualized assessment
The DON’Ts of Prescription Drug Disclosure

• **DON’T** condition an employee's continued employment upon the employee's discontinuing use of a legally prescribed medication - unless, after an individualized medical assessment, a physician concludes in a written report that discontinuance is job-related and consistent with business necessity and a direct threat to safety.
“Interactive Process” How-to

• Face-to-face, with two employer representatives participating
• Address only the medical condition and affected work issue
• About the nature, extent, severity and duration of any impairment or leave
• Entitled to seek medical documentation about an employee’s disability and functional limitations (if not obvious)
• Use your MRO and Occupational Physician wisely to advise employer with a written clearance opinion
Standing Firm! Part 7

How to put all the puzzle pieces into place to form your compliant legal strategy to effectively stand firm when dealing with marijuana and opiates in your workplace
Putting Your Puzzle Pieces Together

1) Update Job Descriptions to include “safety sensitive position” and the ability to work in a constant state of alertness and safe manner as an essential job function;

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) Treat all impairing effect medications equally to avoid a medical marijuana discrimination/not compassionate claim;

4) Engage in the interactive process in risky states;

5) Obtain a written fitness for duty opinion from an Occupational/MRO Physician before you take adverse employment action; and

6) Use someone to guide you through this process who understands all of the above steps.
Constangy is Here to Help you **Stand Firm!**

1. Constangy Workplace Drug & Alcohol Testing Group can help you with customized DFWP Compliant Policies in all 50 states that will cover OSHA Post Accident language and forms; Pre-Duty Disclosure Safety language; all forms and sign-offs, etc.

2. Can train your supervisors on reasonable possibility and reasonable suspicion with customized checklist.

3. Can advise you on OSHA inspections, risk reduction steps to avoid OSHA retaliation claims, OSHA citation responses, etc.

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.
BREAKING NEWS: OSHA Softens on Post-Incident Drug Testing

• In May 2016, the Occupational Safety and Health Administration amended 29 CFR § 1904.35 to prohibit employers from retaliating against employees for reporting work-related injuries or illnesses.

• On October 11 OSHA issued a Memorandum to Regional Administrators, which the Agency represents is a clarification of its position on safety incentive policies and post-incident drug testing.

• In the OSHA guidance issued on October 19 to the general public, OSHA included a warning.

• Constangy Blog Post
OSHA’s Safe Harbor Drug Testing Guidelines

OSHA lists the following safe harbors for employee drug testing:

- Random drug testing.
- Drug testing unrelated to the reporting of a work-related injury or illness.
- Drug testing under a state workers’ compensation law.
- Drug testing under other federal law, such as U.S. Department of Transportation regulations.
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.
OSHA’s Warning in October 19 Guidance

“drug testing an employee whose injury could not possibly have been caused by drug use would likely violate section 1904.35(b)(1)(iv). For example, drug testing an employee for reporting a repetitive strain injury would likely not be objectively reasonable because drug use could not have contributed to the injury. And, section 1904.35(b)(1)(iv) prohibits employers from administering a drug test in an unnecessarily punitive manner regardless of whether the employer had a reasonable basis for requiring the test.”
WEEDING OUT CANDIDATES: HOW TO REDUCE LEGAL RISK IN MARIJUANA STATES

PRESENTED BY
Thomas M. Eden, Ill
Other Constangy Webinars

1. DRUG-RELATED TERMINATIONS: Top 10 mistakes and how to avoid them
2. Dreaded DOT Safety Concern Letter: 5 steps to making a legally defensible fitness for duty determination
3. Top 5 DOT policy fixes for 2018
4. Getting ready for the new DOT drug testing rule
5. Drug Testing Landmines for Public Employers
Contact the Presenters

THOMAS M. EDEN III
PARTNER AT CONSTANGY, BROOKS, SMITH & PROPHETE, LLP

Constangy, Brooks, Smith & Prophete, LLP
3120-D Frederick Road
Opelika, AL 36801

Direct 334-246-2901
Cell 205-222-8030
teden@constangy.com