

# Marijuana in the Texas Workplace

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While marijuana remains illegal under federal law, the majority of states have legalized marijuana for medical and/or recreational use in recent years. Thirty-three states and the District of Columbia have enacted comprehensive medical marijuana programs, thirteen states have enacted programs allowing the use of low-THC, high cannabidiol products for medical reasons in limited



situations and ten states and the District of Columbia have legalized recreational use of small amounts of marijuana.<sup>1</sup> With the rise in legislation allowing the use of marijuana to varying extents, employers nationwide are facing challenges in updating their workplace drug policies. Fortunately, for companies with employees in Texas, the current state of the law does not require significant changes in employment policies. However, employers must be informed about the state of the law to answer questions from employees and supervisors as they arise.

## Is Marijuana legal in Texas?

Except under very limited circumstances, no. The Compassionate Use Act permits the limited use and distribution of marijuana in Texas.<sup>2</sup> TEX. HEALTH & SAFETY CODE ANN. § 487.001, *et seq.* The use and distribution under the Compassionate Use Act is authorized only in the following circumstances:

- A qualified physician, defined as a Texas-licensed physician who

1. “dedicates a significant portion of clinical practice to the evaluation and treatment of epilepsy;” (TEX. OCC. CODE ANN. § 169.002(b)(2));
2. is certified by specified Boards in epilepsy, neurophysiology or neurology (*Id.* at § 169.002(b)(3)); and
3. registers as a low-THC Cannabis Prescriber, (*Id.* at § 169.004), may develop a detailed patient treatment plan involving the prescription of low-THC cannabis (*Id.* at § 169.005), provided a second qualified physician agrees that the use of low-THC cannabis is appropriate (*Id.* at § 169.009(3)(C)).

- A qualified physician may prescribe only “low-THC cannabis,” which contains “not more than 0.5 by weight of tetrahydrocannabinols” and “not less than 10 percent by weight of cannabidiol” (*Id.* at § 169.001(3)).
- Low-THC cannabis may only be prescribed to a qualified patient, one who
  1. is a permanent resident of Texas; and
  2. has been diagnosed by a qualified physician as having “intractable epilepsy,” “a seizure disorder in which the patient’s seizures have been treated by two or more appropriately chosen and maximally titrated antiepileptic drugs that have failed to control the seizures.” *Id.* at §§ 169.003, 169.001.

Use under the Compassionate Use Act is extremely narrow; as of December 2018, only 574 patients have been issued prescriptions under the Act.<sup>3</sup> Accordingly, the number of employees in Texas who are using low-THC cannabis legally under the Compassionate Use Act is very small. More importantly, the Compassionate Use Act does not contain any employment protection for qualified patients that would restrict an employer’s ability to discipline or terminate an employee who tests positive for marijuana.

## Can an employer discipline an employee in Texas who tests positive for marijuana and claims the result was caused by off-duty conduct in a state where that conduct is legal?

The increase in the number of states permitting recreational use of marijuana poses a challenge for employers – what to do when an employee claims that a drug test is positive for marijuana because of the employee’s off-duty use in a state where such use is legal. For employers, it is difficult, if not impossible, to refute such employee claims, as standard drug tests do not indicate exactly when an individual has used marijuana or measure an employee’s current impairment.<sup>4</sup> Texas is not one of the states that restricts the ability of employers to discipline or terminate employees for off-duty drug use, whether or not such use is legal. As a result, the exact timing or circumstances of an employee’s use of marijuana do not impact an employer’s ability to discipline or terminate that employee.

<sup>1</sup>Nat’l Conference of State Legislatures, State Medical Marijuana Laws, Jan. 23, 2019, available at <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>; Nat’l Conference of State Legislatures, Marijuana Overview, Dec. 14, 2018, available at <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

<sup>2</sup>The Compassionate Use Act also amended portions of the Texas Controlled Substances Act to exempt qualified patients and the directors, managers and employees of dispensing organizations from criminal prosecution for possession and distribution so long as those individuals comply with the Compassionate Use Act and the relevant portions of the Texas Occupations Code. TEX. HEALTH & SAFETY CODE ANN. § 481.111.

<sup>3</sup>Allie Morris, Fewer than 600 patients get medical cannabis under restrictive Texas law, SAN ANTONIO EXPRESS-NEWS, Dec. 1, 2018, available at [https://www.expressnews.com/news/politics/texas\\_legislature/article/Fewer-than-600-patients-get-medical-cannabis-13435670.php](https://www.expressnews.com/news/politics/texas_legislature/article/Fewer-than-600-patients-get-medical-cannabis-13435670.php).

<sup>4</sup>See Rae Ellen Bichell, Scientists Still Seek a Reliable DUI Test for Marijuana, NPR, July 30, 2017, available at <https://www.npr.org/sections/health-shots/2017/07/30/523004450/scientists-still-look-for-reliable-dui-test-for-marijuana>.

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While it is not binding precedent, employers should be aware of a recent decision by an Administrative Law Judge (“ALJ”) that could provide a view of what is to come, in light of changing opinions regarding permitted use of marijuana. In *Texas Education Agency, Educator Leadership and Quality Division v. Maryam Roland*, the ALJ considered the proposed two-year suspension of Roland’s teacher certificate after Roland tested positive for marijuana.<sup>5</sup> Roland admitted that she had used marijuana during her winter break vacation in Colorado (where it was legal) but denied using marijuana once she returned to Texas, and her drug test results (reflecting a negative result for a short-term test and a positive result for a long-term test) were consistent with her claims. *Id.* at \*19. The ALJ found that Roland was not “unworthy to instruct because she legally consumed marijuana in Colorado,” reasoning that a teacher would not be “unworthy to instruct in Texas because she legally gambled in Nevada.” *Id.* at \*21. This decision and the ALJ’s reasoning may be cited by employees contesting discipline or termination, though there is no indication that such arguments would find traction in Texas courts in the near future.

### Are employers required to accommodate Texas employees using low-THC cannabis to treat a disability?

No. As stated above, the Compassionate Use Act does not require employers to accommodate qualified patients. Further, while the Americans with Disabilities Act (“ADA”) prohibits discrimination against people with disabilities and

requires employers to provide reasonable accommodations for such individuals, any individual who currently uses illegal drugs is excluded from the definition of qualified individual with a disability and is not entitled to protections under the ADA. 42 U.S.C. § 12114(a). Although the use of low-THC cannabis under the Compassionate Use Act is permitted by Texas law, marijuana remains illegal under the federal Controlled Substances Act. 21 U.S.C. §§ 801-904. As a result, employers are not required to accommodate marijuana use. See *James v. City of Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012). Texas law largely mirrors the ADA in this respect. TEX. LAB. CODE ANN. § 21.120. Further, as of the date of this article, a nationwide survey of case law has not identified any holding that an employee’s use of medical marijuana is protected by the ADA or that permitting employees to use marijuana on the worksite or during work hours is required as a reasonable accommodation. Accordingly, while employers must accommodate their employees’ underlying medical conditions, there is no requirement that the marijuana use of Texas employees must be accommodated at this time.

### Pending Legislation and Proposed Expansion of the Compassionate Use Act

The Texas Legislature is currently in session, and a number of bills proposing to expand the permitted use of marijuana have been filed. Of these, the bill identified as most likely to pass proposes to expand the Compassionate Use Act to allow for the use of marijuana to treat

additional medical conditions, including cancer, autism, Crohn’s disease and post-traumatic stress disorder. Tex. S.B. 90, 86th Leg., R.S. (2019). The bill would also remove the cap on the amount of THC in medical cannabis products sold under the Compassionate Use Act. *Id.* While this bill has been filed, as of January 24, 2019, no further action has been taken, and Governor Abbott indicated during a gubernatorial debate in October 2018 that he is not convinced that expansions of the Compassionate Use Act are appropriate based on abuses that he has seen in states where use is permitted.

While companies with employees in Texas are under no obligation to revise their policies at this time to accommodate use of low-THC cannabis or marijuana, this area of the law is rapidly changing and must be monitored. For those employers with employees in safety-sensitive positions, where there is a risk of injury to employees or others as a result of an impaired employees, employers should consider training for employees regarding the current policy and the fact that marijuana use, although, perhaps, legal at the time of use, is no defense to a positive test, discipline related to a positive test and/or the employer’s commitment to providing a safe work environment. In addition, because this area of the law currently varies widely from state to state, employers with employees in multiple jurisdictions should review their policies and practices frequently to ensure compliance with local laws.

<sup>5</sup>SOAH Docket No. 701-16-4719.EC, 2017 TX SOAH LEXIS 8, Jan. 10, 2017.

## Welcome New Members!

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### Weston May

TaskUs, Inc.

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