

# KENTUCKY GOVERNOR SIGNS EXECUTIVE ORDER PROTECTING MEDICAL MARIJUANA USE: 6 FAQs FOR EMPLOYERS

Insights  
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In a historic move, Governor Andy Beshear just issued an executive order allowing Kentuckians diagnosed with certain medical conditions and receiving palliative care to purchase, possess, and use medical cannabis. Prior to this order, legislative efforts to legalize medical marijuana failed. In justifying his decision, Beshear noted the absence of legislation ran counter to overwhelming social support for medical marijuana from Kentucky residents and medical providers. Moreover, the Team Kentucky Medical Cannabis Advisory Committee provided the governor with extensive medical and scientific data supporting the legalization of medical marijuana as well as public feedback. Thus, the governor signed Executive Order 2022-798 on November 15 to “provide relief to Kentuckians and allow those suffering from chronic pain and other medical conditions to use medical cannabis.” What do you need to know about the order and how will it impact the workplace? Here are six answers to top questions from employers.

## 1. Who Does the Executive Order Protect?

The [Executive Order](#) — which takes effect on January 1, 2023 — grants a full, complete, and conditional pardon to any and all persons who are accused of possessing marijuana under Kentucky law (KRS 218A.142) if all four of the requirements mentioned below are met.

## 2. What Are the Requirements for Legal Protection?

1. **Must be lawfully purchased:** The medical cannabis shall have been lawfully purchased in a jurisdiction within the

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United States (excluding Kentucky).

2. **Keep your receipts:** The individual shall produce a receipt for the purchase, showing date, location, and physical place of purchase.
3. **Only enough for you:** Amount in possession shall not exceed eight ounces.
4. **Doctor's note required:** The individual or their caregiver shall produce written certification from the healthcare provider (Doctor of Medicine or Osteopathy only) that shows the individual has been diagnosed with one of 21 identified medical conditions, including cancer, epilepsy, intractable seizures, Parkinson's disease, Crohn's disease, HIV or AIDS, severe arthritis, hepatitis C, and fibromyalgia.

### 3. So, Can Employers Still Test Employees for Drug Use?

Yes. Consistent with the Americans with Disabilities Act (ADA) and Kentucky Civil Right Act (KCRA), Kentucky employers may continue to test employees for medical marijuana and make disciplinary decisions based on a positive result.

The ADA (which applies to businesses with 15 or more employees) and the KCRA (which applies to businesses with eight or more employees) contain the same stance on illegal drug use, possession, and testing.

Specifically, entitled "Illegal use of drugs and alcohol," Section 12114 of the ADA provides that a "qualified individual with a disability" shall **not** include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered employer acts on the basis of such use. Another subsection provides that a covered employer may (1) prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees; and (2) require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace.

With respect to applicant and employee testing, another ADA subsection provides that a test to determine the illegal use of drugs shall not be considered a medical examination. Moreover, the ADA states, "Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job

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applicants or employees or making employment decisions based on such test results.”

Kentucky’s Executive Order does not prohibit employer policies on employee drug use and testing. For example, an employer may discipline or fire an employee for testing positive for marijuana (including medical marijuana used by an employee consistent with this Executive Order). Marijuana or medical cannabis is still illegal under federal law and the Kentucky Legislature has not passed any legislation permitting any sort of legalized use or possession of marijuana.

#### **4. Can Employers Discipline a Caregiver in Possession of Medical Marijuana?**

Imagine your HR manager finds an employee is in possession of seven ounces of marijuana at the job site in violation of the company’s illegal drug possession policy. Can you discipline the employee? What if the employee says they are lawfully in possession of this “medical cannabis” pursuant to the Executive Order? Does that give them a pass on discipline?

The Executive Order permits a “caregiver” to be in possession of up to eight ounces of medical cannabis provided each of the four provisions mentioned in FAQ 2 are met. As stated in this Executive Order, “a ‘caregiver’ shall mean a person who is 21 years of age or older who has significant responsibility for managing the well-being of the individual on whose behalf the medical cannabis was purchased. A caregiver shall produce a written document showing that he or she is a caregiver for the individual. The caregiver shall have lawfully purchased the medical cannabis in a jurisdiction that allows a caregiver to purchase medical cannabis.”

Ostensibly, the Executive Order permits a “caregiver” to purchase medical cannabis for a covered individual, and thus be in possession of such medical cannabis to deliver to the covered individual. **Nevertheless, the Executive Order does not permit the caregiver to possess the medical marijuana in any location. Thus, you can still take disciplinary action against a caregiver employee for bringing cannabis to the worksite.**

#### **5. What About Pre-Employment Drug Testing? Can Employers Continue This Practice?**

Yes, based on the applicable laws mentioned above. The broader question is: *Should* you continue this practice? The Executive Order does not prohibit pre-employment drug testing. Nevertheless, Kentucky employers may want to reconsider pre-employment drug tests and inquiries for medical marijuana use for the following reasons:

- During the application and pre-hiring phase, questioning applicants on whether they have a medical condition for which they may be permitted to legally use or possess medical marijuana is a prohibited “disability related inquiry” under the ADA and KCRA.
- Similarly, a question regarding whether the applicant uses medical marijuana in a manner permitted by this Executive Order is a prohibited “disability related inquiry” because it is likely to illicit information about an applicant’s disability and such inquiry is akin to asking applicants if they are taking any prescription drugs or medications.
- Further, depending on the industry and the availability of qualified employees, it may not be in the company’s best interest to screen for cannabis and exclude employees who test positive.

## **6. How Should Kentucky Employers Manage Requests for Accommodation to Use Medical Marijuana?**

Let’s say it’s January 2, 2023, and Sue walks into the Human Resources office, tells you she has a medical condition covered by this Executive Order, and needs a job accommodation because she uses a medical marijuana consistent to the lawful provisions of this Executive Order. Do you have to accommodate Sue’s request for accommodation?

The EO does not require employers to accommodate an employee’s *on-site* use of medical marijuana. States across the country, however, are split as to whether employers need to reasonably accommodate an employee’s use of medical marijuana *outside of work*. Under the ADA and KCRA, employers are obligated to engage in the interactive process with the employee to determine if a reasonable accommodation can be made. At the very least, employers are required to accommodate the underlying disability associated with the use of medical marijuana.

To this end, employers can require that the employee provide medical certification similar to any other request and ensure this request does not pose a risk in the workplace. It is yet to be known how Kentucky courts will rule on this issue, but to ensure compliance with the relevant disability laws, we recommend that employers engage in the interactive process with the employee to consider whether a reasonable accommodation can be made without imposing an undue hardship.

## **Next Steps**

Kentucky employers should take time to review their current drug use and testing policies with their human resources department, address how this Executive Order will impact their practices, and discern whether any changes need to be made. It is possible that litigation will be filed to challenge this Executive Order, similar to challenges to other executive orders involving COVID-19 related matters.

We will continue to monitor the situation and provide updates as developments occur, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have questions about how to ensure that your drug testing policies comply with workplace and other applicable laws, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Louisville office](#).