

TEXAS EMPLOYERS SHOULD PREPARE FOR UPTICK IN CANNABIS USE AND ACCOMMODATION REQUESTS AS STATE EXPANDS MEDICAL MARIJUANA LAW

Insights
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You may be surprised to learn that Texas permits the use of low-THC medical marijuana to treat certain health conditions – and a new law will significantly expand the program starting September 1. In addition to changing the measurement of allowable THC levels, HB46 adds qualifying health conditions, authorizes more dispensaries, and expands permissible cannabis products (like lotions and some vapes). This means Texas employers will likely see an uptick in employee cannabis use and accommodation requests. Notably, the new law does not provide employment protections – but there are some key risks to note. So, now is a good time to review and potentially revise your drug testing and accommodation policies to ensure you're ready for the changes and understand the legal risks. Here's what you need to know about the Texas Compassionate-Use Program and four things you should consider doing before September 1.

Quick Download for Employers

- **The upcoming revisions to the Texas Compassionate-Use (CUA) do not create employment protections for medical marijuana patients.** Still, employers should proceed with caution when an employee fails a drug test or requests an accommodation, which we'll discuss in more detail below.
- **Cannabis use is still illegal under federal law.** While the federal government has not taken any enforcement action in recent years against adult cannabis use that complies with a state law, it remains unlawful under the Controlled Substances Act, and

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federal laws provide workplace protections. Even when states provide employment protections for cannabis use, certain professions (such as commercial drivers regulated by the Department of Transportation) still must comply with federal guidelines that prohibit regular drug testing and zero tolerance for cannabis use.

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What's Changing Under the New Law?

- **The Texas CUA** has been on the books since 2015, but it was historically too limited to be widely considered a comprehensive medical marijuana program.
- The CUA has authorized specially licensed physicians to **recommend low-THC cannabis products to patients with certain medical conditions for the past decade**. This includes epilepsy, seizure disorders, multiple sclerosis, spasticity, amyotrophic lateral sclerosis, autism, cancer, post-traumatic stress disorder, and incurable neurodegenerative diseases.
- During the latest legislative session, Texas lawmakers passed and Governor Abbott signed HB46, which **expands the qualifying medical conditions** to include conditions that cause chronic pain, traumatic brain injuries, Crohn's disease or other inflammatory bowel disease, terminal illnesses or other condition for which the patient is receiving hospice or palliative care, and medical conditions that are approved for cannabis use as part of research programs.
- The new law **changes the allowable amount of THC** from 1% by weight to 10 milligrams per dose and 1 gram per package. It also **authorizes more dispensaries**, and **permits additional cannabis products**, including lotions, patches, and certain vapes and inhalers (though smoking is not allowed).
- Although the Texas Compassionate-Use Program is still limited compared to other states, the expansion under HB46 has led some advocates to now consider Texas **[the 40th state with a comprehensive medical marijuana program](#)**.
- Still, the Texas CUA does not create employment protections for workers, and the upcoming revisions to the law will not change that. But that doesn't mean employers should ignore potential risks. For example, we expect to

see employees raise arguments under the Texas Labor Code, which says:

An employer does not commit an unlawful employment practice by adopting a policy prohibiting the employment of an individual who currently uses or possesses a controlled substance as defined in Schedules I and II of the Controlled Substances Act ... other than the use or possession of a drug taken under the supervision of a licensed health care professional or any other use or possession authorized by the Controlled Substances Act or any other federal or state law.

While employers will maintain that cannabis is still illegal under federal law and thus may continue to take the position that applicants and workers are not entitled to workplace protections for their cannabis use, we may see plaintiffs' attorneys challenge denials of accommodation under this state law.

Should You Update Your Policies?

As you decide whether to update your policies and practices in light of the new law, you should keep the following points in mind about evolving cannabis laws in Texas and beyond:

- **Drug Testing:** Texas employers are allowed to establish drug-free workplaces and drug testing procedures. The Texas Workforce Commission (TWC) regularly updates its [guidelines for such programs](#), and you may want to monitor for changes as the expanded medical marijuana program takes shape. While some jobs require drug testing, Texas employers generally may choose whether to perform such screening for others. As the TWC notes, "Drug testing is not for everyone. A company should do it only after careful consideration of many factors, including applicable statutes and regulations, contract or insurance requirements, and combating some perceived problem with substance abuse among the workers." Employers in the state will need to decide if they want to start or continue testing for cannabis and ensure practices are neutral and consistently applied.
- **Accommodations:** Federal law does not recognize cannabis use as a valid accommodation under the Americans with Disabilities Act (ADA), and the Texas CUA does not include employment protections for workers who

participate in the medical cannabis program. You should recognize, however, that the underlying issues that medical cannabis is used to treat are generally protected under federal and state disability laws – and as mentioned above, we expect to see more employees challenge cannabis-related employment decisions under the Texas Labor Code. So, it's a good idea to contact legal counsel before denying an accommodation request or taking adverse action against an employee who participates in the Texas Compassionate-Use Program.

- **State Laws Vary:** Multistate employers should note that while some states allow employers to take adverse action against job applicants or employees solely based on a positive drug test, others do not. Some states protect registered medical patients in certain situations and require employers to explore reasonable accommodations. Additionally, a growing number of states protect off-duty recreational cannabis use. However, many of these states have exceptions for safety-sensitive positions. If you are creating multistate policies, be sure to understand the nuances of the laws where you operate beyond Texas.
- **You Can Prohibit On-The-Job Cannabis Impairment:** Even in states with employment protections for off-duty cannabis use, employers are not required to tolerate cannabis use or impairment during work time.

4 Things Texas Employers Should Consider Doing Now

1. Review Drug Testing Policies

Review your drug testing policies, ensure they are up to date, and decide whether they align with your current workplace philosophy and culture. Some employers have decided to drop cannabis testing as laws and attitudes evolve, and others have decided to maintain a drug-free workplace policy. If you do choose to test for cannabis, be sure to review [Texas drug testing guidelines](#) and apply policies consistently.

2. Designate an Accommodations Contact

As cannabis legalization expands and more people participate in the medical marijuana program, be sure your HR department is ready to handle questions and accommodation request. You may want to designate a

specific contact who is prepared to respond and knows when to ask for help in complex situations. Be sure that frontline supervisors know how to reach the designated contact.

3. Consult Counsel Before Taking Action

Before terminating or disciplining an employee for cannabis use or otherwise violating a workplace drug policy, you should consider reaching out to experienced legal counsel to help you assess the risk and make the best decision for your organization.

4. Stay Informed

Employers should stay vigilant and continue monitoring workplace-related cannabis laws and court decisions. As more employees qualify for medical marijuana, we expect to see an uptick in failed cannabis tests and accommodation requests – which will inevitably lead to more employee lawsuits challenging related terminations and disciplinary action. Thus, it is important to stay informed and ensure company drug testing and accommodation policies and practices remain up to date. And there may be more news to come in the battle over cannabis in Texas. Governor Abbott vetoed a bill that would have broadly banned most hemp products that contain THC. The Texas Legislature is expected to [revisit this topic in a special session](#) this summer.

Conclusion

We'll monitor these developments and provide updates where warranted, so make sure you are subscribed to the [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have any questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in [our Texas offices](#).

[Katy Houshidari](#), a summer clerk in our Dallas office, contributed to this insight.