



# Proposed Texas Marijuana Laws Might Impact Workplaces In 2019

Insights

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Texas has maintained its reputation as being a conservative state despite the results of the 2018 midterm elections. But, as the surprisingly close Texas Senate election suggests, things may be a-changin'—especially when it comes to legalizing marijuana use on a medical or recreational basis. While Texas may not be a “blue” state—or even a purple one—voters’ electoral preferences and state legislators’ priorities suggest things might be loosening up a bit in the Lone Star State with regard to marijuana use. What does this mean for Texas workplaces in 2019?

## Revised Thinking On Marijuana

At least 10 bills have been filed in advance of the 2019 Texas legislative session seeking to liberalize the state’s marijuana laws. Both parties appear interested in expanding the use of low-THC medical marijuana. One proposed bill would expand the state’s current “compassionate use” law to cover a broader range of conditions, including Alzheimer’s, cancer, glaucoma, and conditions resulting in chronic pain.

Another bill in the Texas House would seek to decriminalize the possession of less than one ounce of marijuana. While the bill’s prospects are dim, district attorneys in larger metropolitan areas in Texas already have begun to exercise prosecutorial discretion in cases involving marijuana possession. For example, Harris County District Attorney Kim Ogg announced a new “misdemeanor marijuana diversion program” last year in which individuals in possession of less than four ounces of marijuana would not be arrested, receive a ticket, or otherwise be required to show up in court as long as they agreed to attend a drug education class. In announcing the new policy, Harris County officials pointed to the \$250 million spent each year on the prosecution of these possession cases, and the limited benefit to public safety resulting from that expenditure. No word yet from Houston officials on the impact the diversion policy is having locally, but the results must be encouraging given the willingness of Texas legislators to consider implementing a similar program statewide.

## Potential Impact On Texas Workplaces

Texas employers rightfully wonder whether any of these potential changes would affect their ability to maintain drug-free workplaces or test applicants and current employees for marijuana use. In states where recreational cannabis use has been made lawful (such as Colorado, [California](#), [Washington](#), [Oregon](#), and [Nevada](#)), employers already have been forced to reconcile the conflicting state and federal rules.

It has become clear that employers in these states are still allowed to test employees and applicants for THC and discipline them or refuse to hire them in the case of positive results, at least as long as the federal government continues to classify marijuana as a Schedule I controlled substance. Employers have a right to rely upon the continued prohibition at the federal level to take adverse employment action against persons testing positive, even where state law has legalized cannabis use.

The federal government has shown no signs of reconsidering its position on marijuana, at least so far. In August 2016, the U.S. Drug Enforcement Administration reaffirmed its position in the Federal Register that marijuana should remain a Class I controlled substance. Under federal law, substances that have a high potential for abuse and no therapeutic value are included in the first group of controlled substances, while drugs that have some medicinal uses are included in the “lower” classifications. (This is why cocaine, methamphetamine and opioids, despite their addictive qualities, are included in Schedule II.)

In declining to consider reclassification of cannabis, DEA officials discounted research suggesting that THC had positive therapeutic effects on conditions like epilepsy and glaucoma, concluding instead that current science does not support the use of marijuana for medical purposes. The DEA did, however, call for further research on marijuana’s therapeutic uses.

From a law enforcement perspective, former Attorney General Jeff Sessions [rescinded guidance](#) previously issued by the U.S. Department of Justice under President Barack Obama setting forth conditions for the federal government declining to intervene when a state independently passes laws legalizing marijuana use. The [January 2018 Sessions memo](#) created even more uncertainty and is still the official position of the current administration.

Adding to the uncertainty is the fact that Sessions is no longer attorney general and Acting Attorney General Matthew Whitaker has not spoken to the issue since Sessions’ departure. While presumptive AG nominee William Barr’s position is unknown, he is unlikely to revert to the Obama DOJ’s position based on the positions he took as attorney general in the first Bush administration.

Also unknown is whether there is any appetite in Congress to remove cannabis from the list of controlled substances. Lawmakers certainly have taken note that an increasing number of voters have agreed to liberalize marijuana laws in the last several years. Currently, 10 states have authorized recreational use, while 33 permit some form of medical marijuana and seven more states are likely to consider at least medical marijuana liberalization in 2019. It is possible that federal lawmakers will feel pressure from home to introduce bills designed at least to cede to the states the authority to regulate marijuana.

### **Wrapping Up: What Might 2019 Hold?**

Even if the federal law changes, it is unlikely that employers’ rights to effectively restrict marijuana usage by employees and applicants would be impacted. The only potential hiccup might be in circumstances where medical marijuana use is authorized by a physician as a “reasonable

circumstances where medical marijuana use is authorized by a physician as a “reasonable accommodation” that addresses a condition considered a disability under federal law. Employers will need guidance from the federal government if marijuana laws are changed at the federal level.

In the meantime, it will be interesting to see whether the proposed Texas legislation gains any traction. If Texas jumps on the cannabis train, there are sure to be some Texans who are opposed, while others will “suffer” from “reefer gladness.” All Texas employers should stay tuned for updates on these proposed laws and the potential impact on the workplace.

We will continue to monitor further developments, so you should ensure you are subscribed to [Fisher Phillips’ alert system](#) to gather the most up-to-date information. For help with compliance steps or to answer questions, please contact your Fisher Phillips attorney or any attorney in our [Houston](#) or [Dallas](#) offices.

*This Legal Alert provides information about specific proposed state laws. It is not intended to be, and should not be construed as, legal advice for any particular fact situation. NOTE: [A version of this article](#) was originally published on Law360 on January 1, 2019.*

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