

Employment and Medical Marijuana Task Force

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Louisiana Department of Health

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Executive Summary

Although marijuana is still considered a controlled substance under federal law, there has been an upward trend of the legalization of medical marijuana and, in some cases, recreational marijuana amongst the states and U.S. territories. As of March 2022, thirty-seven states and the District of Columbia have enacted laws that allow medical marijuana usage. Louisiana law allows a physician, who is licensed and in good standing to practice medicine in this state, to recommend cannabis for therapeutic reasons if a patient has a qualifying condition. Although we have seen an increase in the legalization of medical marijuana nationwide, some states, including Louisiana, does not have protections in place for employees who utilize medical marijuana and even with employment protections in place, some employers are uncertain about how to implement policies in regards to testing marijuana usage that would not unduly discriminate against their employees who are legally recommended to use marijuana or how to accurately determine when employees are unable to perform their job duties because of over usage of medical marijuana. Page 1 of 4 HR NO. 269 ENROLLED, in addition to these known barriers, lack of employment protections, and confusion about how to successfully enforce medical marijuana policies in regards to testing, there may be other employment and workplace barriers that exist since the legalization of medical marijuana is a growing social, economic, and employment issue. Due to our state's decriminalization and legalization of marijuana for medicinal purposes, more individuals in the workplace have access to and are utilizing medical marijuana and as such there needs to be a study on medical marijuana and its impact on the workplace. Often time when there are societal changes, our state leaders are responsible for making a determination as to the best ways to implement change that would benefit residents while simultaneously ensuring there are proper policies and regulations in place to both protect and benefit those residents.

On 12/15/22, the Employment and Medical Marijuana Task Force held its final meeting. During the scheduled meeting a quorum was met and the majority of committee members voted on the following recommendations to share with legislation.

- 85% of committee members were favorable of the Recommendations for Employee Protections
- 85% of committee members were favorable of the Recommendations for Employer Protections
- 85% of committee members were favorable of the Recommendation for medical marijuana, as defined by La. Stat. Ann. 40:1046, by a board-certified Louisiana physician or authorized clinician shall be considered recommended for a legitimate medical purpose.
- Unanimous favorability for the continued research into the medical marijuana card program by the Medical Marijuana Commission established by Rep. Marino.

Purpose of Task Force

The Employment and Medical Marijuana Task Force was established to study methods on how to implement policies and regulations to resolve employment and workplace barriers concerning medical marijuana.

Subcommittee 1: Medical Marijuana Task Force Committee Recommendations

Subcommittee 1 of the HR269 Medical Marijuana Task Force was tasked with studying and making recommendations based on the following questions: (1) What other states, preferably neighboring states, if any, have done to prevent employment discrimination because of the use of medical marijuana; and (2) What other states, preferably neighboring states, if any, have policies and regulations in place that provide employment protections for both employers and employees for the use of medical marijuana. The Subcommittee researched varying neighboring states' medical marijuana provisions and presents its findings as follows:

1) What other states, preferably neighboring states, if any, have done to prevent employment discrimination because of the use of medical marijuana.

There are currently 37 states that regulate cannabis for medical use by qualified individuals. Of those, 21 states have taken steps to prevent employment discrimination against employees who use cannabis for medical purposes. These states include Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, Vermont, Virginia and West Virginia, as well as Washington DC.

Two of Louisiana's immediate neighboring states, specifically Arkansas and Oklahoma, have enacted legislation that includes specific provisions to prevent employment discrimination.

❖ **ARKANSAS**

The State of Arkansas amended its Constitution with passage of the Arkansas Medical Marijuana Amendment of 2016 (AMMA). Amendment 98, Section 3(f)(3), includes language intended to protect job applicants and employees and prevent employers from discriminating against employees who use cannabis for medical purposes. The amendment provided:

(3) An employer shall not discriminate against an individual in hiring, termination, or any term or condition of employment, or otherwise penalize an individual, based upon the individual's past or present status as a qualifying patient or designated caregiver.

Subsequently, the Arkansas Legislature passed Act 593 in 2017 to add clarification and guidance with respect to the AMMA for both employees and employers. Act 593 added significant content to section 3(f)(3), forbidding employee and applicant job discrimination based upon whether that person is, or was, a qualifying patient or designated caregiver. Act 593 also added additional defined terms, including "current use of marijuana," "employee," "employer," "good faith belief," "positive test result for marijuana," "safety sensitive position," and "under the influence."

Note also that Act 593 limited employment discrimination damages based on a job applicant or employee's qualifying patient or designated caregiver status to those available under the Arkansas Civil Rights Act of 1993, Ark. Code Ann. § 16-123-101 *et seq.* Further, back pay claims

are limited to two years and may be further limited by state or federal law. Finally, Act 593 states that claims involving the AMMA must be brought within 1 year of any alleged discrimination.

❖ OKLAHOMA

The Oklahoma Medical Marijuana and Patient Protection Act of 2019, Section 8(H), explicitly prohibits employment discrimination, with some notable exceptions. The law provides that unless otherwise required by federal law or required to obtain federal funding, “[n]o employer may refuse to hire, discipline, discharge or otherwise penalize an applicant or employee solely on the basis of such applicant's or employee's status as a medical marijuana licensee;” and, “[n]o employer may refuse to hire, discipline, discharge or otherwise penalize an applicant or employee solely on the basis of a positive test for marijuana components or metabolites,” unless the individual does not possess a valid medical marijuana license; possesses, consumes or is under the influence of medical marijuana while at work or performing work-related obligations; or, performing safety-sensitive job duties.

Note that other neighboring states, particularly Texas, Mississippi and Alabama, do not currently have medical marijuana anti-discrimination provisions contained within their laws.

2) What other states, preferably neighboring states, if any, have policies and regulations in place that provide employment protections for both employers and employees for the use of medical marijuana.

In 25 of the 37 states that have established a medical cannabis program, the cannabis laws include either explicit employment protections and/or decisions rendered by courts or the state Attorney General that provide for employment protections. These states include Arizona, Arkansas, California, Connecticut, Delaware, Illinois, Louisiana, Maine, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, and West Virginia. In Louisiana and Utah, however, the protections only apply to state or local governmental workers.

Taking a closer look at Louisiana’s neighboring states, Alabama recently legalized medical marijuana in 2021. The Darren Wesley “Ato” Hall Compassion Act permits the use of medical marijuana for certain specified conditions. Currently, however, Alabama has no protections for employees written into its medical marijuana laws. Nevertheless, there are numerous provisions that provide protections for employers.

Similarly, Mississippi recently passed the Mississippi Medical Cannabis Act, creating a comprehensive medical marijuana program. Yet, the Act’s lengthy provisions contain little to no protections for employees who use marijuana for medical purposes. As referenced above, both Arkansas and Oklahoma have protections in place for both employees and employers. Conversely, Texas has no comprehensive medical marijuana program in place at this time.

The aforementioned states’ medical marijuana employment protection provisions are outlined in further detail below:

❖ ALABAMA

The Darren Wesley “Ato” Hall Compassion Act of 2021 contains various protections for employers, yet none for employees. For instance, employers are not required to accommodate the use of medical cannabis, or to modify any job or working conditions of an employee who engages in the use of medical cannabis. Employers are not prohibited from refusing to hire, discharging, disciplining, or otherwise taking adverse employment action against an individual as a result of their use of medical cannabis. Employers are also not prohibited from establishing and enforcing a drug testing policy or drug-free workplace program. Further, the law does not prohibit employers from requiring employees to notify employers if the employee possesses a medical cannabis card.

❖ ARKANSAS

The Arkansas Medical Marijuana Amendment of 2016 (AMMA) not only protects job applicants and employees from discrimination but also provides employers with certain protections as well. As noted above, Act 593 of 2017 added additional defined terms and safeguards for both employees and employers. Act 593 provides that employers with 9 or more employees may not discriminate against job applicants or employees based on their past or present status as a medical marijuana cardholder or as a designated caregiver for a physically disabled medical marijuana patient. Employers may, however, take adverse action against an employee based on a “good faith belief” that the employee used, possessed, or was impaired by medical marijuana on company property or during work hours. Notably, a positive drug test alone is not sufficient grounds for a “good faith belief.” On the other hand, employers may exclude employees from safety-sensitive positions, as defined in Section 25 of Act 593.

❖ MISSISSIPPI

During its most recent legislative session, Mississippi adopted legislation authorizing the use of medical cannabis for certain patients with qualifying conditions. The Mississippi Medical Cannabis Act was signed by Gov. Reeves in 2022. Though very lengthy and detailed, the provisions of the Act do not offer many protections for Mississippi employees who qualify for medical cannabis use. There are, however, certain provisions that provide employment protections for Mississippi employers.

The Mississippi Medical Cannabis Act allows an employer to refuse to hire, discipline or fire an employee for marijuana use, even if prescribed by a medical provider. As is the case in most other states with medical marijuana programs, employers are not required to allow the medical use of cannabis on the job or to modify the job description of an employee who wants to use medical marijuana on the job. Additionally, the Mississippi law specifically states that there is no private right of action for an employee to sue his or her employer for refusing to hire, discharging or taking any other adverse employment action against an individual who used medical marijuana. Note, however, that it is unclear how the ADA may play into treating medical marijuana as a reasonable accommodation in the future.

❖ OKLAHOMA

Oklahoma legalized medical marijuana for certain medical conditions by ballot initiative in June 2018 via State Question 788, which included some provisions to protect individuals from workplace discrimination. State Question 788 provided that no employer could refuse to hire, fire or otherwise penalize an applicant or employee on the basis of their status as a medical cardholder or for a positive drug test for cannabis or its components.

Subsequently, Oklahoma passed several additional legislative instruments intended to create a workable system around the medical marijuana program for the benefit of employees and employers alike. The Unity Bill was adopted in 2019, creating the Oklahoma Medical Marijuana and Patient Protection Act. The Act added certain exceptions to medical marijuana employee protections and offered additional clarity for employers.

One such exception to Oklahoma’s anti-discrimination provisions states that employers may not discipline, fire or refuse to hire a licensed Oklahoma medical marijuana patient solely because they have an Oklahoma medical marijuana patient license, unless it is required by federal law or to obtain federal funding; the employee is in possession of or consuming medical marijuana products at work; or the position involves “safety-sensitive” job duties. The Act generally defines “safety-sensitive” as any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task or others.

Based on the research conducted, Subcommittee 1 makes the following recommendations:

Recommendations for Employee Protections

- An employer shall not discriminate against an applicant or employee based solely upon the individual’s past or present status as a qualifying medical marijuana patient
- An employer shall not refuse to hire an applicant, impose sanctions or consequences upon an employee, or deny any right, privilege, term or condition of employment to an applicant or employee based solely upon the individual’s past or present status as a qualifying medical marijuana patient
- A qualifying medical marijuana patient may not be presumed nor deemed to be impaired solely because a positive drug test detects the presence of marijuana or marijuana metabolites in the employee’s system
- An employer cannot discriminate, refuse to hire, impose sanctions or consequences, or deny any right, privilege, term or condition of employment to a qualifying medical marijuana patient based solely upon a positive drug test for marijuana

Recommendations for Employer Protections

- An employer is not prohibited from imposing sanctions or consequences upon an employee based upon the employee's use or possession of marijuana while on duty or on the employer's work premises irrespective of the employee's status as a qualifying medical marijuana patient
- An employer is not prohibited from imposing sanctions or consequences upon an employee based upon the employee's impairment while on duty or on the employer's work premises irrespective of the employee's status as a qualifying medical marijuana patient
- An employer is not required to modify the job requirements or work conditions of a medical marijuana patient to facilitate the individual's ability to perform job responsibilities
- An employer is not required to permit an employee to undertake any job-related task or assignment while using medical marijuana when such usage causes the employee to be impaired
- An employer is not required to permit an employee to undertake any job-related task or assignment while using medical marijuana when such usage constitutes negligence or professional malpractice
- The limitations upon an employer's ability to refuse to hire an applicant or impose sanctions or consequences upon an employee based upon a positive test for marijuana do not apply if the position applied for or encumbered is designated as safety-sensitive
- The limitations upon an employer's ability to refuse to hire an applicant or impose sanctions or consequences upon an employee based upon a positive test for marijuana do not apply if action is required by federal law, regulation, agreement or contract, or otherwise impacts the employer's entitlement to federal funding

NOTE: For purposes of these protections, a qualifying "medical marijuana patient" is an applicant or employee who has been clinically diagnosed as suffering from a debilitating medical condition and a licensed physician has recommended marijuana for therapeutic use by the individual in accordance with La. R.S. 40:1046.

NOTE: A "recommendation" for medical marijuana, as defined by La. R.S. 40:1046, by a board-certified Louisiana physician or authorized clinician shall be considered recommended for a legitimate medical purpose.

NOTE: A "recommendation" by a physician for the use of marijuana by a qualifying medical marijuana patient in accordance with La. R.S. 40:1046 is tantamount to a prescription for purposes of La. R.S. 23:1601 (Unemployment Insurance) and La. R.S. 23:1081 (Worker's Compensation).

Subcommittee 2: Medical Marijuana Task Force Committee Recommendations

Subcommittee 2 of the HR269 Medical Marijuana Task Force was tasked with studying and making recommendations based on the following questions: (3) How employers currently test employees for marijuana usage and how that may, if at all, present a challenge to employees who use marijuana for medicinal purposes; and, (4) Any scientific advances made concerning testing for marijuana usage.

The Subcommittee presents its findings as follows:

3) How employers currently test employees for marijuana usage and how that may, if at all, present a challenge to employees who use marijuana for medicinal purposes.

a. Types of Drug Tests

Drug tests vary, depending on what types of drugs are being tested for and what types of specimens are being collected. **Urine, hair, saliva (oral fluid), or sweat samples can be used as test specimens.**

In federally regulated programs, only urine samples are collected, although the Secretary of Health and Human Service has released guidelines for the inclusion of oral fluid specimens.

Tests are commonly used for five categories of drugs: Amphetamines; Cocaine Marijuana; Opiates; and Phencyclidine (PCP). Additional categories may include barbiturates, Benzodiazepines, ethanol (alcohol), hydrocodone, MDMA, methadone, methaqualone, or propoxyphene.

Drug testing may be used in the following set times or circumstances:

- **Pre-employment:** You can make passing a drug test a condition of employment. With this approach, all job candidates will receive drug testing prior to being hired.
- **Annual Physical Tests:** You can test your employees for alcohol and other drug use as part of an annual physical examination. Be sure to inform employees that drug testing will be part of the exam. Failure to provide prior notification is a violation of the employee's constitutional rights.
- **For-cause and Reasonable Suspicion Tests:** You may decide to test employees who show discernible signs of being unfit for duty (for-cause testing), or who have a documented pattern of unsafe work behavior (reasonable suspicion testing.) These kinds of tests help to protect the safety and wellbeing of the employee and other coworkers.
- **Post-accident Tests:** Testing employees who were involved in a workplace accident or unsafe practices can help determine whether alcohol or other drug use was a contributing factor to the incident.
- **Post-treatment Tests:** Testing employees who return to work after completing a rehabilitation program can encourage them to remain drug-free.

- **Random Tests:** Tests using an unpredictable selection process are the most effective for deterring illicit drug use.

b. Problems Facing Employees When Using Medicinal Marijuana

- All testing currently being performed in the workplace utilizes standard methods and when necessary, laboratories approved by SAMSHA (DHH). This ensures accuracy of testing, use of Chain of custody and split sample testing when necessary. Most employers will have a drug and alcohol policy outlining the process they follow.
- Currently no test is available or used to determine medicinal vs recreational that is approved by SAMSHA or the state of Louisiana.
- The medical review officer (MRO) can use medical history and other relevant information to determine positivity or negativity of the result.
- Recent use bioavailability being studied but not approved.
- THC levels in specimens cannot predict impairment.
- Federal Government still classifies Marijuana as Schedule 1.

c. Current State of Louisiana Drug Testing Procedures and Standards

Louisiana law currently provides the following:

La. RS 49:1005. Use of certified laboratories for drug testing of samples collected

A. All drug testing of individuals in residence in the state and all drug testing of samples collected in the state, including territorial waters and any other location to which the laws of Louisiana are applicable, shall be performed in SAMHSA-certified, CAP-FUDT-certified, or CAP-FDT-certified laboratories, if both of the following apply:

- (1) If, as a result of such testing, mandatory or discretionary negative employment consequences will be rendered to the individual.
- (2) Drug testing is performed for any or all of the following classes of drugs: marijuana, opioids, cocaine, amphetamines, and phencyclidine.

B. Drug testing as provided in this Subsection shall be performed in compliance with the SAMHSA guidelines except as provided in this Chapter or pursuant to statutory or regulatory authority under R.S. 23:1081 et seq. and R.S. 23:1601 et seq. The cut off limits for drug testing shall be in accordance with SAMHSA guidelines with the exception of initial testing for marijuana. The initial cut-off level for marijuana shall be no less than fifty nanograms/ML and no more than one hundred nanograms/ML as specified by the employer or the testing entity. The Louisiana Department of Health shall have the responsibility to adopt the SAMHSA guidelines for purposes of governing drug-testing

programs for specimens collected in accordance with this Chapter. The Louisiana Department of Health shall have the responsibility for adoption of any subsequent revisions of the SAMHSA guidelines as of the initial effective date of this Chapter.

4) Any scientific advances made concerning testing for marijuana usage.

On February 28th, the Department of Transportation (DOT) issued a Notice of Proposed Rulemaking (NPRM) for oral fluid drug testing, essentially endorsing a drug testing method other than urine for the first time in 30+ years.

Whether lab-based or rapid-result testing, many state drug testing laws specifically refer to federal government-approved methods and processes. For instance, many states only permit the use of FDA-cleared collection and testing devices as well as assays. Many states also require the use of laboratories that are certified by SAMHSA, or another legitimately recognized certifying organization such as the College of American Pathologists (CAP). Currently, SAMHSA only allows laboratories to be certified for urine and oral fluid testing (and oral fluid testing is still in the developmental stages). This is an important distinction if you are considering using a method that will either be screened or confirmed at a laboratory.

Breath testing for THC is not yet SAMSHA approved.

No recommendations at this time.

Subcommittee 3: Medical Marijuana Task Force Committee Recommendations

Medical Marijuana Task Force Committee Recommendations for: (5) Any other workplace barriers that employees or employers face concerning medical marijuana. (6) The statistical impact on how beneficial medical marijuana usage can be for firefighters and employed veterans.

- A recommendation for medical marijuana, as defined by La. Stat. Ann. 40:1046, by a board-certified Louisiana physician or authorized clinician shall be considered recommended for a legitimate medical purpose.
- Continue research into medical marijuana card program, by “Medical Marijuana Commission” established Rep. Marino.

Appendix

[Cannabis Legalization and Employment Protections \(mpp.org\)](https://mpp.org)

[Medical Marijuana Laws and Anti-Discrimination Provisions \(mpp.org\)](https://mpp.org)

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