

Joint Decisions: THC and CBD use in the workplace

Presented by

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Legalizing Cannabis

Half of American
have tried cannabis.

1 in 3 women over 21
consume cannabis.

Adult use of cannabis
is now legal in 24
states.

One-half of
Americans say they
have tried marijuana
at some time, which
is a new high point.

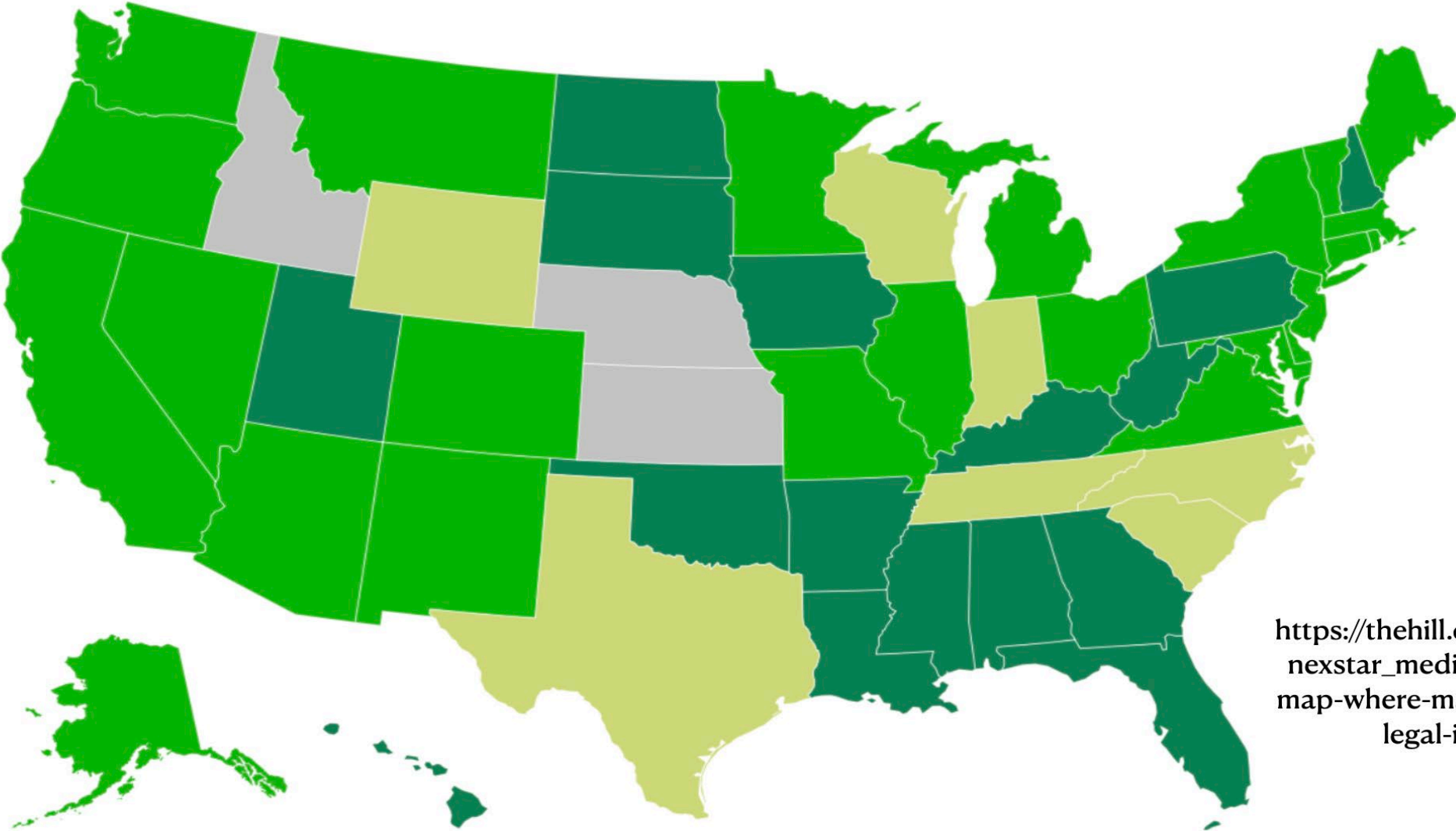
Source: Gallup

Marijuana Legalization in 2024

The Hill Map of the Current Legal Status of Cannabis in the United States

As of December 2024

Recreational & medical CBD/Low THC No public program Some form of medical cannabis



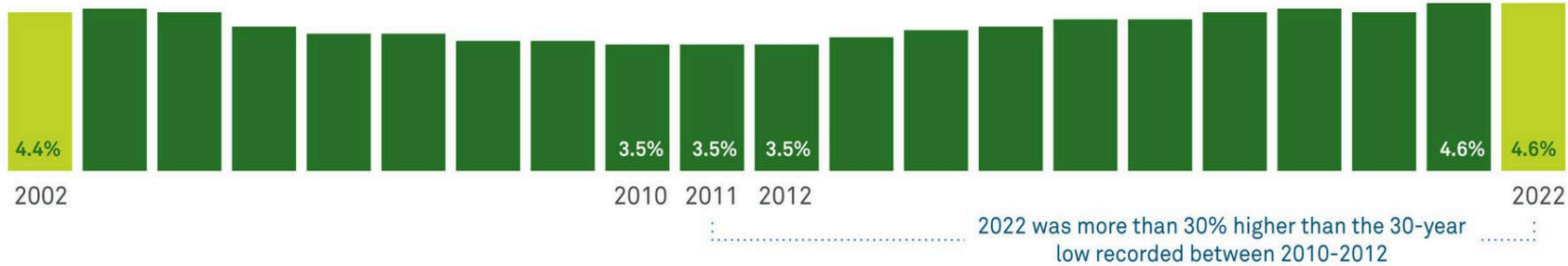
https://thehill.com/homenews/nexstar_media_wire/4371873-map-where-marijuana-will-be-legal-in-2024/

2023 Quest Diagnostics Drug Testing Index™

Based on more than 9.2 million combined U.S. workforce urine drug tests collected between January and December 2022

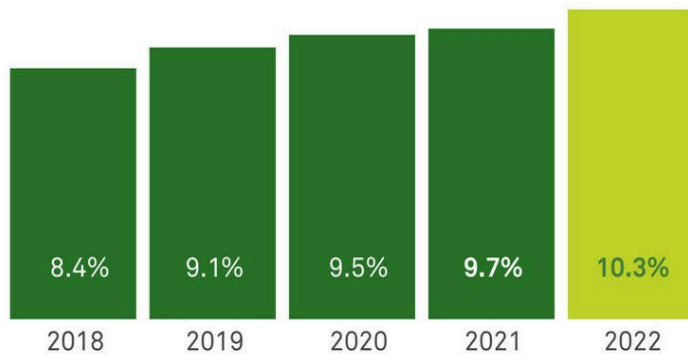


Overall positivity rate in the combined U.S. workforce continues at its highest level in 20 years



Post-accident positivity climbed over five years

For General U.S. Workforce

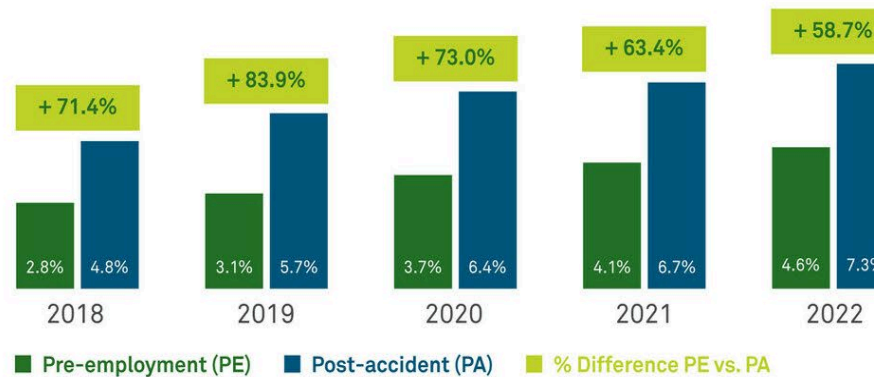


Based on more than 6.3 million tests from January to December 2022.



% Difference between post-accident and pre-employment positivity rates for marijuana urine drug tests

For General U.S. Workforce, as a percentage of all tests for marijuana



Based on more than 6.3 million tests from January to December 2022.

The Texas Compassionate Use Act (SB 339)

The Texas Compassionate Use Act (SB 339) was enacted by the Texas Legislature in 2015 (84th Legislative Session).

The bill required DPS create a secure registry of physicians who can treat low tetrahydrocannabinol (THC) to patients with specific medical conditions.

The registry, called the Compassionate Use Registry of Texas (CURT), is designed to control multiple prescriptions being issued to a single patient by different providers.

“ Low THC cannabis means the plant *Cannabis sativa* L., and any part of that plant or any compound, manufacture, salt, derivative, mixture, preparation, resin, or oil of that plant that contains not more than one percent by weight of tetrahydrocannabinols. ”

Definition of Low THC Cannabis

Texas Health and Safety Code §169.001(3)

“Medical use means the ingestion by a means of administration other than by smoking of a prescribed amount of low-THC cannabis....”

Definition of Medical Use of Low THC Cannabis

Texas Health and Safety Code §169.001(4)

The Texas Compassionate Use Act (SB 339)

The registry is accessible to law enforcement agencies and dispensing organizations to verify patients of low THC cannabis.

Providers can input safety and efficacy data based on treatment information.

DPS also manages the licensing of organizations that dispense low THC-cannabis to patients in the Compassionate Use Registry of Texas.

Covered Conditions

The initial bill provided for the use of Low THC cannabis for a host of incurable neurodegenerative diseases.

The full list can be found at 25 TAC §1.61 and includes:

Muscular Dystrophy

Lewy Body Disorders

Parkinson's Disease

Epilepsy

2021 Legislative Updates

HB 1535

- ▶ Expanded eligible conditions to include:
 - ▶ Non-terminal cancer
 - ▶ Post-Traumatic Stress Disorder
 - ▶ Autism
 - ▶ When part of a designated research program
- ▶ Increases maximum THC level to 1% by weight.
- ▶ Establishes institutional review boards to evaluate and approve proposed research programs to study medical use of low THC cannabis.

Other requirements for use of Low THC

Physician must determine the risk of use is reasonable in light of the potential benefit to the patient.


Patient's data must be entered and maintained in the registry.

CBD and Industrial Hemp

2018 Farm Bill of the Agriculture Improvement Act of 2018 made significant changes to how CBD is viewed at the federal level.



Bill defines “hemp” as cannabis with a THC concentration of less than .3 percent by dry weight.



Bill removes hemp from the federal controlled substances schedules.

Cannabidiol (CBD) & Industrial Hemp

- ▶ CBD is a substances derived from the cannabis plant **that does not have the psychoactive properties** that tetrahydrocannibional (THC) does.
- ▶ Hemp means “the plant Cannabis sativa L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, **with a delta -9 tetrahydrocannabinol concentration of not more than .3 percent on a dry weight basis.** Texas Agricultural Code 121

CBD and Industrial Hemp

- ▶ Texas Agriculture Code Chapter 121 provides for the regulation of industrial hemp.
- ▶ Texas Agriculture Code Chapter 122 regulates cultivation, including licensure and testing.

Delta-8

- ▶ Texas Health and Safety Code Chapter 443 (HSC 443), established by HB 1325 (86th Legislature) allows “Consumable Hemp Products” to be sold in Texas when the products do not exceed .3% Delta-9 THC.
- ▶ All other forms of THC, including Delta-8 in any concentration, and Delta-9 exceeding .3% are considered Schedule I controlled substances.

Delta 8- Defined

- ▶ Consumable hemp products with less than 0.3% Delta-9 tetrahydrocannabinol THC are permitted under Chapter 443 of the Texas Health & Safety Code. The Texas Department of State Health Services recently updated its consumable hemp program guidance to clarify that Delta-8 is not legal by classifying Delta-8 as a Schedule I controlled substance

Delta 8-THC

Delta-8 is a substance derived from the cannabis plant. It is similar to Delta-9 THC, the psychoactive compound in marijuana.

Delta-8 is typically made from CBD derived from low-THC hemp- it is less psychoactive than Delta-9 THC.

Delta 8

Current Litigation



Dispensaries have sued the state of Texas over the Delta-8 classification.



A temporary injunction has removed Delta-8 from the list of controlled substances while the case proceeds.

Huber v. Blue Cross Blue Shield of Florida, Inc. 2021 WL 1023052

- ▶ Michelle Huber was an employee of BCBS of Florida.
- ▶ For almost eight years, she worked remotely as a Customer Service Representative.

Huber v. Blue Cross Blue Shield of Florida, Inc. 2021 WL 1023052

- ▶ In 2006 she requested and received an accommodation for unmanageable migraines.
- ▶ From 2014-106 she used 11 weeks of FMLA because of recurrent hemiplegic migraines.

Huber v. Blue Cross Blue Shield of Florida, Inc. 2021 WL 1023052

- ▶ In 2017, Plaintiff's healthcare provider recommended the use of CBD oil and Plaintiff was told (presumably by HR) that it was not necessary to provide documentation of the recommendation (presumably because it was an over-the-counter substance which was not expected to impair her performance.)

Huber v. Blue Cross Blue Shield of Florida, Inc. 2021 WL 1023052

- ▶ While using the CBD oil, Huber's work performance improved, and she received a 5 out of 5 performance ratings for 2017 and 2018.
- ▶ Her FMLA use was reduced to eight weeks, and she received a promotion from Senior Technology Specialist to IT Business Analyst.

Huber v. Blue Cross Blue Shield of Florida, Inc. 2021 WL 1023052

- ▶ Huber was asked to submit to a drug test as part of a federal contract.
- ▶ She reminded her supervisor of her accommodation and CBD use and was reassured that the results would not impact her job

Huber v. Blue Cross Blue Shield of Florida, Inc. 2021 WL 1023052

- ▶ Huber was notified that she had received a positive result on her drug test.
- ▶ She submitted a copy of her doctor's recommendation of the use of the CBD Oil, was told her documentation was very thorough and ensured her job was safe.

Huber v. Blue Cross Blue Shield of Florida, Inc. 2021 WL 1023052

- ▶ She was terminated from her employment later that month and subsequently filed her EEOC complaint for disability discrimination under the Louisiana Employment Discrimination Law by terminating her for her disability and failing to accommodate the use of her hemp-based CBD oil to control her migraines.

Huber v. Blue Cross Blue Shield of Florida, Inc. 2021 WL 1023052

- ▶ BCBS argued that Huber was unqualified for accommodation under its long-standing policies prohibiting the use of illegal drugs when working or teleworking.
- ▶ The Court dismissed Huber's claim for ADA retaliation and allowed the remainder of her claims to proceed to trial.

Drug Testing





Drug Testing- Governmental Employer

- ▶ Subject to the 4th Amendment's restrictions against unreasonable search and seizure, so testing ALWAYS requires employee's consent.
- ▶ Some federal circuits find that Governmental drug testing without a warrant creates a civil rights violation, regardless of consent.

Drug Testing- Health Record

- ▶ Drug Testing is not considered a “health exam” for purposes of the American with Disabilities Act (ADA).
- ▶ Results of a drug screen are subject to HIPAA Privacy Rule- meaning results are a confidential health record.

Drug Testing By Type

Pre-Hire

Random Testing

Reasonable Suspicion

Pre-hire drug testing

- ▶ Employers should be transparent about the expectation for testing.
- ▶ Consent should be documented and explicit.
- ▶ Testing should be reserved until a conditional offer has been extended.
- ▶ Recommend asking applicants whether they require an accommodation for a disability PRIOR to testing.

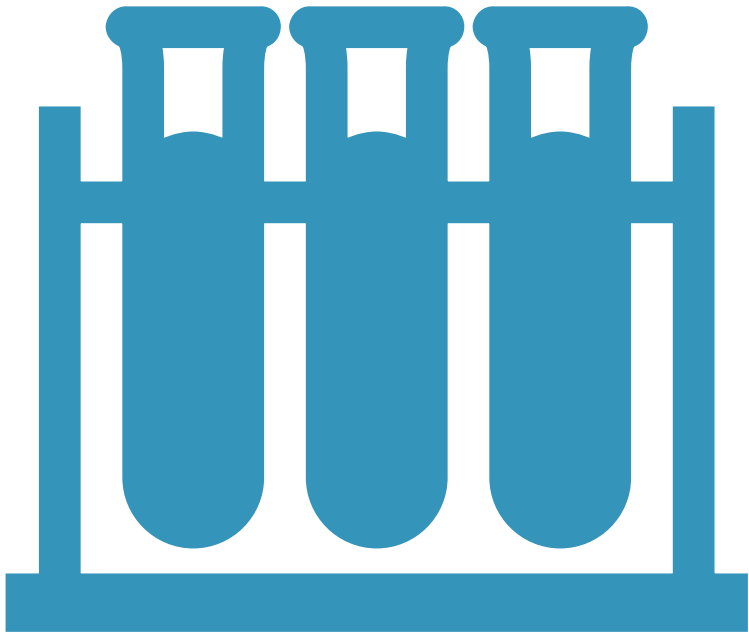


Random Drug Testing Program

Can only be administered to safety sensitive or DOT covered positions.

Ideally managed by an independent third party (Concentra, Care Now, etc.)

New programs require the employer provide at least 60 days notice prior to initiating program.



Reasonable Suspicion

- ▶ Employee has observable impairment.
- ▶ Ideally witnessed by at least two supervisors.
- ▶ Testing order stops work and employee is escorted to testing site.

Reasonable Suspicion - Post Accident

- ▶ Post accident test is the most common type of reasonable suspicion-based test.
- ▶ Review testing standard- include a preliminary determination of fault or possible negligence to require testing.
 - ▶ Backing accident versus stationary vehicle that someone else hit.

Drug Testing

- ▶ Current technology cannot generally identify THC impairment but may be inferred by levels.
- ▶ Current technology cannot accurately distinguish illegal THC use from other legally sold products containing THC.

Drug Testing

Policy decision is required to determine how an entity will treat legal use by an applicant or employee from a jurisdiction where THC use is legalized.



THC use and the American with Disabilities Act (ADA)

Disability under the ADA


- ▶ Any medical or physical impairment that affects a major life activity constitutes a disability.
- ▶ Major life activities include sleeping, dressing oneself, working, thinking, eating, walking and interacting with others.

Disability under the ADA - PTSD

- ▶ Symptoms include:
 - ▶ Being easily startled
 - ▶ Insomnia
 - ▶ Trouble concentrating
 - ▶ Irritability, angry outbursts or aggressive behavior
 - ▶ Overwhelming guilt or shame

Treating THC (or CBD) use as an accommodation

- ▶ Pre-hire: screen for needs for accommodation.
 - ▶ Treat each request on a case-by-case basis.
 - ▶ Utilize and normalize the fitness for duty process.



Treating THC (or CBD) use as an accommodation

- ▶ Assess and develop the entity's risk tolerance for first responders who use:
 - ▶ CBD - non-intoxicating, but unregulated and so can result in a positive drug screen
 - ▶ Low THC - administered by prescription but can result in a positive drug screen

Treating THC (or CBD) use as an accommodation

01

Seek out and establish relationships with subject matter experts

02

Develop a robust mental health program- both responsive and preventative

03

Synthesize job descriptions

Fitness for Duty- Civil Service Process

Texas Local Government Code 143.081 provides a process for performing a physical and mental fitness for duty.

First Responder submits his report to the Commission from his personal physician, psychiatrist or psychologist, as appropriate.


Fitness for Duty

- ▶ If the Commission, department head or firefighter or police officer “questions the report”, the commission shall appoint a physician, psychiatrist or psychologist, as appropriate, to examine the firefighter or police officer and to submit a report to the commission, the department head and the person.

Tex. Loc. Gov't Code §143.081(c)



Fitness for Duty

- 
- ▶ If the report of the appointed physician, psychiatrist, or psychologist, as appropriate, disagrees with the report of the fire fighter's or police officer's personal physician, psychiatrist, or psychologist, as appropriate, the commission **shall appoint a three-member board** composed of a physician, a psychiatrist, and a psychologist, or any combination, as appropriate, to examine the fire fighter or police officer.
 - ▶ The board's findings as to the person's fitness for duty shall determine the issue.

Tex. Loc. Gov't Code §143.081(d)

Fitness for Duty

- ▶ The fire fighter or police officer shall pay the cost of the services of the person's personal physician, psychiatrist, or psychologist, as appropriate. The municipality shall pay all other costs.

Tex. Loc. Gov't Code Ann. § 143.081

Fitness for Duty

- ▶ The FFD report should be treated as a confidential health record.
- ▶ The process must be synthesized with the fitness for duty processes under the **Family Medical Leave Act** (condition of restoration to job following leave) and the **ADA** (assessment of ability to perform essential functions with or without restrictions).

Fitness for Duty

- ▶ Under the ADA, to justify the Fitness for Duty exam, the exam must be **job related** and **consistent with business necessity**.
 - ▶ The employer reasonably believes the employee's condition may prevent him or her from performing the essential functions of the job, or
 - ▶ The employee poses a direct threat to his or her own safety or the safety of others.

Workplace restrictions and Accommodation

- ▶ When an employee requests an accommodation, it triggers an obligation by the employer to engage in the “**interactive process**” to assess the request.
- ▶ Employers should not wait for the employee to trigger the process but can engage the employee when it is clear an accommodation may be necessary.

The Interactive Process

- ▶ Analyze the job to determine its purpose within the organization and essential functions.
- ▶ Consult with the individual and use the FDD process to determine workplace restrictions and limitations, if any.





The Interactive Process

- ▶ Working with the individual (or healthcare providers), identify potential accommodations which would enable the employee to continue working.
 - ▶ Mental Health accommodations may include a schedule change or different supervisor.
 - ▶ Consider implementing the accommodation as a trial period to allow for adjustment.

The interactive process

- ▶ Employee is not entitled to requested accommodation—rather reasonable accommodation. (The accommodation, however, does not have to be the “best” accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated [T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier for it to provide.

E.E.O.C. v. Agro Distribution, LLC, 555 F.3d 462, 471 (5th Cir. 2009)



Undue Hardship

- ▶ EEOC regulations promulgated to implement the ADA define “reasonable accommodation” as “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position.” 29 C.F.R. § 1630.2(o)(1)(ii).

E.E.O.C. v. Chevron Phillips Chem. Co., LP, 570 F.3d 606, 620–21 (5th Cir. 2009)

Reasonable Accommodation

- ▶ Employee who rejected reasonable accommodations offered by employer would no longer be considered a qualified individual with a disability.

Hagood v. El Paso, 408 S.W. 3d 515 (Tex. El Paso 2013).

Undue Hardship

- ▶ Employers may reject requests for accommodation which would impose an **undue hardship** on the operation of the business.

E.E.O.C. v. Chevron Phillips Chem. Co., LP, 570 F.3d 606, 620–21 (5th Cir. 2009)

Undue Hardship

- ▶ Employer not required to accommodate an employee who struggled with tardiness and absenteeism because of opioid use prescribed for covered disabilities. *See Darius Young v. UOP LLC* 2024 WL 288985 (January 25, 2024)

Undue Hardship

- ▶ In a recent religious accommodation case applying the undue hardship standard under Title VII, the court held that it requires showing “*more than a de minimus cost.*” Undue hardship must be demonstrated by “*substantial burdens.*”

Groff v. DeJoy, 600 U.S. 447 (2023).

The Interactive Process

- ▶ Communicate the accommodation (but not necessarily the restriction) to supervisors on a need-to-know basis.
- ▶ Establish a plan for monitoring the accommodation.

The Interactive Process

- ▶ Document each step of the process, including decision making.
- ▶ Consider other leave options such as Line of Duty or Disability.
- ▶ Review termination decisions with HR and Counsel in advance.

Thank you!

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