



**FIFTH CIRCUIT RULES AGAINST EEOC ENFORCEMENT GUIDANCE**



**Courtney C. Hart**

*“The State of Texas argued that the Enforcement Guidance was an overstep of the EEOC’s authority ...”*

On August 6, 2019, the U.S. Court of Appeals for the Fifth Circuit, in *State of Texas v. Equal Employment Opportunity Commission*, ruled that the EEOC had overstepped its limited rulemaking and enforcement power when it issued its 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.

The Enforcement Guidance takes the position that criminal screening policies disproportionately impact groups protected under Title VII, such as Hispanic and African Americans, who tend to have arrest and

incarceration rates disproportionately higher than other non-protected groups. Thus, the Enforcement Guidance requires that an employer must be able to show that the use of criminal screening policies is job related and consistent with business necessity or be subject to liability under Title VII. In order to do this the employer needs to show that the challenged policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent on the duties of a party’s position. The Enforcement Guidance says blanket exclusions, such as the use of no-felony rules, do not pass muster because they do not focus on dangers of applicant’s crimes in relation to position in question.

Texas state law, along with the policies of many state agencies, excludes the hiring of those convicted of specified crimes and in some cases all felonies. Based upon these policies, a former Texas state job applicant filed a complaint with the EEOC, based upon a no-felon hiring policy. The State of Texas thus filed suit against the EEOC and Attorney

General in the U.S. District Court for the Northern District of Texas. The State of Texas argued that the Enforcement Guidance was an overstep of the EEOC’s authority because the agency was not authorized to promulgate substantive rules to implement Title VII and the Enforcement Guidance was an impermissible substantive rule.

The district court held that the Enforcement Guidance was a substantive rule which was issued without the opportunity for notice and comment, and therefore enjoined the EEOC and Attorney General from enforcing the Enforcement Guidance against the State of Texas until the EEOC complied with the Administrative Procedure Act’s notice and comment requirements to promulgate an enforceable substantive rule. This ruling, on it’s face, allowed for future enforcement of the Enforcement Guidance once the EEOC complied with the notice and comment requirement.

Both parties appealed the district court’s ruling. On appeal, the Fifth Circuit agreed that the Enforcement Guidance is a substantive rule subject to the Administrative Procedure Act’s notice and comment requirement and that the EEOC thus overstepped its statutory authority in issuing the Enforcement Guidance. The Fifth Circuit further held that the EEOC lacked power to promulgate the Enforcement Guidance to begin with, and the Enforcement Guidance would have been invalid even if the EEOC had complied with the Administrative Procedure Act’s notice and comment requirements. Thus, the Fifth Circuit upheld the district court’s injunction and further expanded it to prohibit the EEOC or Attorney General from enforcing the Enforcement Guidance against Texas or treating the Enforcement Guidance as binding in any respect.

This specific injunction applies only to the Fifth Circuit (Texas, Louisiana, and Mississippi), however it provides a solid basis for other employers to challenge the Enforcement Guidance in other jurisdictions. Whether other courts will adopt these findings is yet to be determined.

This case, and the ones to come, raise the question of whether rigid adherence to the EEOC’s Enforcement Guidance will soon be a thing of the past.

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# NEW JERSEY EXPANDS ITS MEDICAL MARIJUANA LAW



**L. Eric Ebbert**

“Not only are the laws [of various states] not uniform, but they continue to evolve after the initial legislation has been enacted.”

Medical marijuana laws are not only spreading across America, but they are beginning to expand after they are passed. Currently 33 states plus the District of Columbia have legalized medical use of marijuana. These states typically require patients to be certified by a physician and to register with the state. Some states provide workplace protections to employees who lawfully use marijuana for medicinal purposes.

In addition, ten states and the District of Columbia have approved recreational use of marijuana for adults who are 21 years and older. Some of these laws even allow individuals to grow their own marijuana.

Thirteen of the 17 (including Tennessee) that don't allow medical use of marijuana have passed legislation to permit the use of cannabis oil. That means that only four states still prohibit the use of marijuana in any of its forms (Idaho, South Dakota, Nebraska and Kansas).

Federal law still prohibits distribution and possession of marijuana regardless of its use.

## **A. Recent Expansion of New Jersey's Medical Marijuana Law**

In July of this year, New Jersey's Medical Marijuana Law was expanded to increase the supply of marijuana and to make it easier for registered users to obtain it. Since Governor Murphy took office in January, he has worked to expand the program, and the number of registered users has more than tripled to exceed 59,000.

The latest legislation reduces the number of doctor's visits from four to one per year to verify that the patient still qualifies under the Medical Marijuana Act. And patients can now purchase three ounces per month instead of two. In addition, terminal patients will have no limit on the quantity they can use. Nursing homes are now authorized to purchase marijuana on behalf of its residents. And registered marijuana users from other states will be permitted to purchase marijuana while visiting New Jersey. The new law will allow 24 more marijuana-producing businesses to be licensed to increase the supply. And the Act phases out sales tax on marijuana

so that it will be purchased tax-free by 2022. The Act also creates the New Jersey Cannabis Regulatory Commission to administer the new law.

## **B. Tennessee**

Tennessee permits the use of cannabis oil as long as it is derived from industrial hemp, not marijuana, and contains no more than .3% of THC. Despite the growing efforts to legalize medical marijuana, the Tennessee legislature has not enacted the required legislation. But its supporters are expected to try again next year.

## **C. Practical Tips**

### **1. Know the Law**

The evolution of the New Jersey law underscores the importance of employers keeping up with the law in the states in which they operate. Not only are the laws not uniform, but they continue to evolve after the initial legislation has been enacted. Moreover, in some jurisdictions the laws expressly create employer liability for discriminating against card-carrying marijuana users. And in some other states, courts have found similar protections even though the legislation does not expressly provide the protections. Employers, therefore, must be aware of the laws and ensure that their policies do not violate those laws.

### **2. Consider Focusing Your Policies on Impairment**

Even though the majority of states have passed medical marijuana laws, none of the laws prohibit an employer's right to discipline an employee for being impaired while at work. Unlike alcohol, a positive drug test for marijuana does not necessarily mean that the employee was impaired at the time of the test. Evidence of marijuana use remains in the human body long after its effects have dissipated. So instead of having a policy that disciplines employees for a positive marijuana drug test, consider modifying your policy to discipline employees who are impaired while at work.

These are common short-term symptoms of marijuana impairment: “panic, anxiety, poor muscle and limb coordination, delayed reaction times and abilities, an initial liveliness, increased heart rate, distorted senses, [and] red eyes.” <https://americanaddictioncenters.org/marijuana-rehab/how-to-tell-if-someone-is-high>.

By being aware of the applicable medical marijuana laws and amending policies to focus on impairment, employers can avoid a new breed of discrimination claims.



**Rosalia Fiorello**

*"The [DOL] opinion ... suggests that FMLA leave should be given for any meetings addressing the medical care, progress and well-being of children receiving special education."*

weeks of job-protected, unpaid FMLA leave per year "to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition." See 29 U.S.C. § 2612(a)(1)(C); see also 29 U.S.C. § 2611(11) (defining serious health condition); 29 C.F.R. § 825.112-.115. Care for a family member includes "both physical and psychological care" and "making arrangements for changes in care ..." 29 C.F.R. § 825.124(a)-(b).

An employee may also use FMLA leave intermittently or on a reduced leave schedule when medically necessary because of a family member's serious health condition. See 29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.202. However, an employer may require an employee to timely provide a copy of a certification—issued by a health care provider and meeting certain criteria—supporting his or her request to take such leave. See 29 U.S.C. § 2613(a)-(b); 29 C.F.R. § 825.305-.306.

Notably, the letter issued by the Department of Labor was, "based exclusively on the facts ... presented." (emphasis added) The specific facts the Department of Labor used in generating the August 8, 2019 response are in response to an employee with the following set of facts:

The employee has two children who have qualifying serious health conditions under the FMLA. The employee received a certification from their children's doctors supporting the need to take intermittent leave to care for the children and the employer has approved the employee taking FMLA leave intermittently to bring the children to medical appointments. The employer has *not*, however, approved the employee's request to take FMLA leave intermittently to attend CSE/IEP meetings.

The children receive pediatrician-prescribed

## DOL OPINION LETTER APPROVES FMLA LEAVE FOR SPECIAL EDUCATION SCHOOL MEETINGS

On August 8, 2019, the U.S. Department of Labor issued opinion letter, FMLA 2019-2-A; which states that parents of a child or children with a serious health condition may use the Family and Medical Leave Act (FMLA) to attend school meetings.

The FMLA defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider and provides, in relevant part, that an eligible employee of a covered employer may take up to twelve

occupational, speech, and physical therapy provided by their school district, and four times a year their school holds CSE/IEP meetings to review their educational and medical needs, well-being, and progress. These meetings include participation by a speech pathologist, school psychologist, occupational therapist and/or physical therapist employed or contracted by the school district to provide services to the child under the child's IEP, as well as teachers and school administrators. These participants provide updates regarding the children's progress and areas of concern; review recommendations made the children's doctors; review any new test results; and may make recommendations for additional therapy.

The Individuals with Disabilities Education Act (IDEA) requires public schools to develop an IEP for a son or daughter who receives special education and related services with input from the child and the child's parents, teachers, school administrators, and related services personnel. Under the IDEA, "related services" include such services as audiology services, counseling services, medical services, physical therapy, psychological services, speech-language pathology services, rehabilitation counseling services, among others. See A Guide to the Individualized Education Program, U.S. Department of Education (July 2000), available at <https://www2.ed.gov/parents/needs/spced/iepguide/index.html>; see also 34 C.F.R. § 300.320 (defining an IEP).

In its response, the Department of Labor opined that the employee's need to attend CSE/IEP meetings addressing the educational and special medical needs of the children (who have serious health conditions as certified by a health care provider) *qualify as a reason for taking intermittent FMLA leave*.

Specifically, the Department of Labor stated the attendance at CSE/IEP meetings, "are for a family member ... with a serious health condition." 29 C.F.R. § 825.100(a); see also 29 U.S.C. § 2612(a)(1)(C); 29 C.F.R. § 825.112(a) (3) and, "to care for" a family member with a serious health condition includes "to make arrangements for changes in care." 29 C.F.R. § 825.124(b). The Department of Labor found the employee's attendance at IEP meetings were, "essential to ... the ability to provide appropriate physical or psychological care" and stated:

Attend[ing] these meetings to help participates make medical decisions concerns the child's medically prescribed speech, physical, occupational therapy; to discuss your children's well-being and progress with the providers of such services; ensures the children's school environment is suitable to their medical, social, and academic needs.

The Department of Labor noted various examples

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wherein family members were permitted to take FMLA leave when making medical decisions on behalf of parents or children with disabilities. See [https://www.dol.gov/whd/opinion/FMLA/2019/2019\\_08\\_08\\_2A\\_FMLA.pdf](https://www.dol.gov/whd/opinion/FMLA/2019/2019_08_08_2A_FMLA.pdf)

Employers should take away a few things from the August 8, 2019 letter. First, employers should anticipate an increase in FMLA requests. According to the [U.S. Department of Health and Human Services National Survey of Children with Special Needs](https://www.dhs.gov/sites/default/files/2019/08/2019-08-08-2A-FMLA.pdf), a total of 12.8 percent of children under age 18 in the United States, or about 9.4 million children, are estimated to have special health care needs. Further, children with special health care needs are present in 20 percent of U.S. households with children. See <https://mchb.hrsa.gov/chscn/pages/prevalence.htm> for more information about the Prevalence of Children with Special Health Care Needs. In Tennessee, approximately 6.4% of students aged 3 through 5 and 8.6% of students aged 6 through 21 with disabilities made up the student

population in the 2015-2016 school year. See [https://www.tn.gov/content/dam/tn/education/special-education/sped\\_data\\_display\\_2015-16.pdf](https://www.tn.gov/content/dam/tn/education/special-education/sped_data_display_2015-16.pdf) for more information.

Second, the Department of Labor opinion, standing alone, leaves a few doors open and suggests that FMLA leave should be given for any meetings addressing the medical care, progress and well-being of children receiving special education. While IEP meetings fall under a specific federal law, employers should not blindly approve FMLA leave for any/all requests related to family care. Rather, employers should gather the requisite amount of information needed in order to make the determination as to whether the request qualifies as a reason for taking intermittent FMLA leave. This requires training the requisite personal, namely supervisors and Human Resources to recognize such requests as employees must still adhere to the FMLA certification and notice requirements when requesting leave.

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