



# IMMIGRATION CONSEQUENCES OF TEXAS ASSAULT

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Convictions can trigger a variety of immigration consequences for noncitizens, from losing immigration status to becoming ineligible for forms of immigration relief or even bond. This advisory<sup>1</sup> analyzes the consequences of a conviction for assault under Texas Penal Code § 22.01. Assault is a common charge in Texas, accounting for 16% of misdemeanor cases filed statewide in 2021.<sup>2</sup> This advisory is geared towards legal practitioners representing or advising noncitizen clients with prior or pending Texas assault charges.<sup>3</sup>

## I. The Texas Assault Statute at Tex. Penal Code § 22.01

There are three ways to violate the basic Texas assault statute, each corresponding to a separate subsection of the statute:

- (1) by causing bodily injury (“assault-bodily-injury”), Tex. Penal Code § 22.01(a)(1);
- (2) by threatening bodily injury (“assault-by-threat”), Tex. Penal Code § 22.01(a)(2);
- (3) by causing offensive or provocative contact (“assault-by-contact”), Tex. Penal Code § 22.01(a)(3).

Of these subsections, assault-bodily-injury tends to be the most commonly charged subsection. For each, the *mens rea*—the mental state—includes intentional or knowing conduct. Though, importantly, assault-bodily-injury can also be committed recklessly.

### A. Domestic Violence-Related Assault

Texas does not have a separate misdemeanor domestic violence-related assault statute. The assault-bodily-injury and assault-by-threat subsections explicitly reference that “a person’s spouse” may be a victim, but the relationship between the defendant and victim is not an element of the misdemeanor offense. Even so, state law requires the judge to enter an affirmative finding

<sup>1</sup> This advisory is not legal advice and is not a substitute for individualized case consultation and research. The law referenced in this advisory may change after publication. Many thanks to Jordan Pollock and Kathrine Russell for their review and comment.

<sup>2</sup> *Annual Statistical Report for the Texas Judiciary, Fiscal Year 2021*, Office of Court Administration, available at <https://www.txcourts.gov/media/1454127/fy-21-annual-statistical-report-final.pdf> at 16.

<sup>3</sup> This advisory assumes that the reader already understands how criminal convictions can affect noncitizens and will not cover: the definition of a conviction for immigration purposes; grounds of inadmissibility and deportability and to whom each applies; use of the categorical approach in analyzing criminal offenses; the requirements for different forms of relief from removal; or immigration consequences of other Texas assault statutes. For more information on these topics, see ILRC, *What Qualifies as a Conviction for Immigration Purposes?*, (April 5, 2019) <https://www.ilrc.org/what-qualifies-conviction-immigration-purposes>; Inadmissibility & Deportability (ILRC 2019); ILRC, *How to Use the Categorical Approach Now*, (Oct. 5, 2021) <https://www.ilrc.org/how-use-categorical-approach-now-2021>; ILRC, *Immigration Relief Toolkit for Criminal Defenders*, 2018, (Aug. 27, 2018) [https://www.ilrc.org/sites/default/files/resources/relief\\_toolkit-20180827.pdf](https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf). See also *Removal Defense: Defending Immigrants in Immigration Court* (ILRC 2020).

of “family violence” when the court determines that family violence was involved.<sup>4</sup> Family violence is involved when the defendant and victim are: individuals related by blood or marriage, including ex-spouses and unmarried parents of the same child; individuals who live together even if unrelated; or individuals who have or have had a “continuing relationship of a romantic or intimate nature.”<sup>5</sup> The State typically charges these cases as assault-bodily-injury with the charging and conviction documents reflecting “Assault Family Violence.” An “Assault Family Violence” charge can be a felony offense in certain circumstances, in which case the family relationship becomes an element of the offense, as described further below.

## B. Characterization of Offenses and Potential Sentences

Assault-bodily-injury under § 22.01(a)(1) is a Class A misdemeanor,<sup>6</sup> but the State can charge it as a second-degree or third-degree felony depending on characteristics of the victim (including the relationship with the defendant), the defendant’s prior criminal history, and the victim’s occupation.

Though a misdemeanor assault charge does not include the relationship between defendant and victim as an element, when punishable as a felony, it does. For example, assault-bodily-injury becomes a third-degree felony when committed against, generally, a family or household member *and* the defendant (1) has a prior domestic-violence related conviction, or (2) commits the offense by impeding breath (commonly referred to as assault strangulation).<sup>7</sup> And when both of those are true, it becomes a second-degree felony.<sup>8</sup> In those cases, the family or household relationship between defendant and victim is an element of the offense.<sup>9</sup>

<sup>4</sup> Tex. Code of Crim. Pro. Art. 42.013.

<sup>5</sup> Tex. Family Code § 71.0021(b), 71.003, or 71.005.

<sup>6</sup> Tex. Penal Code §§ 12.21-23; 12.33-35. The potential sentence ranges for Texas offenses referenced in this advisory are:

Second-degree felony: 2-20 years;

Third-degree felony: 2-10 years;

Class A misdemeanor: 1 year or less;

Class B misdemeanor: 180 days or less;

Class C misdemeanor: fine-only.

<sup>7</sup> Tex. Penal Code § 22.01(b)(2).

<sup>8</sup> Tex. Penal Code § 22.01(b-3).

<sup>9</sup> See *Apprendi v. New Jersey*, 530 US 466, 490 (2000) (establishing rule to differentiate between a sentencing enhancement and an offense element); *Matter of German-Santos*, 28 I&N Dec. 552, 554 (BIA 2022) (applying *Apprendi* to determine when a statute defines a separate criminal offense under federal immigration law).

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