

Washington, D.C. Bill Would Limit Employers' Ability to Discipline Based on Marijuana Testing

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On June 7, 2022, the Council of the District of Columbia passed [the Cannabis Employment Protections Act of 2022](#) (the "Bill"). If signed into law by D.C. Mayor Muriel Bowser, the Bill would prohibit employers, with certain exceptions, from "refus[ing] to hire, terminat[ing] from employment, suspend[ing], fail[ing] to promote, demot[ing], or penalize[ing] an individual" due to such individual's:

1. "use of cannabis,"
2. "status as a medical cannabis program patient," or
3. having "the presence of cannabinoid metabolites in [their] bodily fluids in an employer-required or requested drug test without additional factors indicating impairment." "Impairment" for purposes of the Bill is defined as where "the employee manifests specific articulable symptoms while working, or during the employee's hours of work, that substantially decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy workplace as required by District or federal occupational safety and health law."

The Bill would further mandate that employers treat a qualifying patient's use of medical marijuana to treat a disability in the same manner as it would treat the legal use of a controlled substance prescribed by or taken under the supervision of a licensed health care professional.

Employees covered by the Bill, unless subject to an exception, include any "individual employed by or seeking employment from an employer," as well as unpaid interns. The Bill applies to all private employers in D.C., defined as any person who "for compensation, employs an individual," and "any person acting in the interest of such employer, directly or indirectly," but does not apply where the person employed is "the employer's parent, spouse, or children engaged in work in and about the employer's household." Certain public employers are also covered.

The Bill's protections do not extend to employees whose "position is designated as safety sensitive." The Bill defines a "safety sensitive" position as "an employment position as designated by the employer, in which it is reasonably foreseeable that, if the employee performs the position's routine duties or tasks while under the influence of drugs or alcohol, he or she would likely cause actual, immediate and serious bodily injury or loss of life to self or others."

The Bill provides some examples of tasks and jobs that may render a position "safety sensitive," including, but not limited to: security officers, police officers, construction workers, power/gas line maintenance workers, employees handling hazardous materials, caretakers, medical practitioners, and workers whose jobs require them to frequently operate heavy or dangerous machinery.

The Bill's protections also do not extend to actions taken by employers where required by a federal statute, federal regulation or federal contract or funding agreement. Further, an employer would be permitted to take disciplinary or other adverse action against an employee – whether or not in a "safety sensitive" position – if such employee uses, consumes, possesses, stores, delivers, transfers, displays, transports, sells, purchases or grows cannabis at the employee's place of employment, while performing work for the employer, or during the employee's hours of work, or where the employee is "impaired" by the use of cannabis, as the term is defined above.

Additionally, the Bill would permit employers to adopt a reasonable drug-free workplace or employment policy that:

- requires post-accident or reasonable suspicion drug testing of employees for cannabis or other drugs;
- requires drug testing of employees in safety sensitive positions;
- is necessary to comply with federal law (including the Drug Free Workplace Act of 1988), a federal contract or funding agreement, if applicable to the employer;
- prohibits the use, consumption, possession, storage, delivery, transfer, display, transportation, sale, purchase, or growing of cannabis at the employee's place of employment, while performing work for the employer or during the employee's hours of work; or
- prohibits employees from being impaired at the employee's place of employment, while performing work for the employer or during the employee's hours of work.

Employers would be required under the Bill to notify employees of their rights under the Bill, of their status as “safety sensitive” if applicable, and/or of any protocols for drug and alcohol testing, within 60 days of the applicable date of the law and annually thereafter, as well as upon hire for new employees.

Employees claiming employer noncompliance would be permitted to file a complaint with the D.C. Office of Human Rights within one year after the alleged act of noncompliance. Employers found in violation of the Act would be subject to penalties ranging from \$1,000 to \$5,000 per violation (with double penalties if the employer is found to have violated the law’s provisions more than once in the previous year), as well as payment of lost wages and reasonable attorney’s fees. Equitable relief, including reinstatement, would also be an available remedy. Employees would also be able to bring a private cause of action against an employer for failure to abide by the law after exhausting administrative remedies. The Attorney General would also be empowered to receive and investigate complaints under the Bill.

The Bill would take effect following approval by the Mayor, a 60-day congressional review period and publication in the District of Columbia Register.

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