

PUBLICATION

D.C. Council Approves the Cannabis Employment Protections Amendment Act of 2022

Authors: Donna M. Glover, Reba Letsa

July 11, 2022

The District of Columbia is on the verge of joining other states and localities that prohibit testing applicants and employees for cannabis use as a condition of employment. On June 7, 2022, the D.C. Council approved the Cannabis Employment Protections Amendment Act of 2022 (Act), now pending review and approval by Mayor Muriel Bowser by July 19, 2022. If signed, the Act will become law after a 60-day congressional review.

Which Employers are Covered by the Act?

The Act is broad in that it applies to all private employers in D.C., and it defines an employer in relevant part as "any person, who, for compensation, employs an individual [] and any person acting in the interest of [an] employer, directly or indirectly." Additionally, the Act applies to most public employers, including the D.C. government and its agencies, but excludes the D.C. court system and the federal government.

How Does the Bill Limit Employers and Protect Applicants and Employees?

Under the Act, employers cannot refuse to hire, terminate, suspend, fail to promote, demote, or otherwise penalize an applicant or employee (including *unpaid* interns) because of:

1. their cannabis use,
2. their status as a medical cannabis program patient, or
3. the presence of cannabinoid metabolites in their system (found via a drug test) *without additional factors* demonstrating impairment.

Generally, the Act provides that "impaired by use of cannabis" means the employee is showing "articulable symptoms" while working that "substantially decrease or lessen the employee's performance []." Employers also must treat medical cannabis use the same as any other legal use of a controlled substance prescribed by or taken under the supervision of a licensed health care professional.

What is the "Safety-Sensitive" Position Exception Under the Act?

Employers are permitted to test for cannabis use and discipline employees who hold "safety-sensitive" positions. A safety-sensitive position is a job, as designated by the employer, in which it is "reasonably foreseeable" that if performing the job under the influence of drugs or alcohol, the employee "would likely cause actual, immediate, and serious bodily injury or loss of life to self or others."

The Act provides that such safety-sensitive positions may include:

- security services such as police, special police, and security officers;
- operation of motor vehicles or heavy or dangerous equipment;
- regular or frequent work on an active construction site;
- regular or frequent work on or near power or gas utility lines;
- regular or frequent handling of hazardous materials;

- supervision of, or provision of routine care for, an individual or individuals who cannot care for themselves and reside in an institutional or custodial environment; and
- positions that involve administering medications, performing or supervising surgeries, or providing other medical services requiring "professional credentials."

Employers also may test applicants and employees to comply with their obligations under federal statutes, federal regulations, or federal contracts or funding agreements.

What Rights Do Employers Have Under the Act?

In addition to the safety-sensitive exception, employers may still restrict use of cannabis at work. Specifically, the Act allows employers to prohibit cannabis use, consumption, possession, growing, and sale or transfer at work.

Employers also may take action against employees who are impaired at work; however, a positive test is insufficient evidence to establish impairment under the Act. Rather, as noted above, an employer must observe symptoms exhibited by an employee while working that substantially decrease the employee's performance or interfere with the employer's ability to provide a safe and healthy workplace as required by law. Finally, employers may still maintain or adopt a "reasonable" drug-free workplace or other similar policy.

As for medical cannabis use, employers are not required to permit employees in safety-sensitive positions to use medical cannabis at work. Employers also may restrict the use of medical cannabis in a smokable form in the workplace.

What Should Employers Do Now?

Laws restricting employers from making cannabis testing a condition of employment already exist in several states and localities, including Nevada, New Jersey, New York, Philadelphia, and Rhode Island. At least 21 states provide protections for employees who are using medical marijuana. All of these laws vary in the extent of protections afforded to employees.

While the Act is pending mayoral review, employers should consider its potential impact on their workplace policies and procedures; determine which, if any, positions are safety-sensitive; and consider resources and training for managers and supervisors who may need to assess whether an employee is impaired. Notably, regulations will be forthcoming, but the Act provides that the "absence of rulemaking" will not delay enforcement. As with most D.C. statutes, applicability of the Act depends on the D.C. Council's budgeting process, which may (or may not) delay enforcement of some of its provisions.

Where Can I Learn More About the Act?

To learn more about the Act, please reach out to [Donna M. Glover](#) and [Reba Letsa](#) or attend their complimentary webinar on this topic on July 21, 2022, at 2 p.m. Eastern, where they will discuss its provisions in detail. You may register [here](#).