

Employee Benefit ■ Plan Review

New Regulations Emphasize Discounts to Delaware Employers with Drug-Free Workplace Programs

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Delaware is reminding its employers that a safe, drug-free workplace can pay. On February 1, the state's Department of Insurance (the "Department") amended its regulations¹ to emphasize the availability of workers' compensation insurance discounts of up to 19 percent for employers who participate in the Delaware Workplace Safety Program (the "Program"),² and who implement a drug-free workplace program at their worksites. The amended regulations took effect on February 11, 2020.

THE WORKPLACE SAFETY PROGRAM

First implemented in 1989, the Program offers an opportunity for qualified, participating employers to lower their workers' compensation insurance premiums by passing Department-conducted safety inspections of their worksites and by "maintaining a safe place to work." In order to be eligible for a discount on its workers' compensation insurance premiums, an employer must have been in business for at least three years and pay an annual workers' compensation insurance premium of \$3,161 or higher.

In addition, the amended regulations require employers to submit a workplace safety program questionnaire to the Department that discloses details about the effectiveness of the

employer's health and safety program; data on the adequacy and effectiveness of the employee training program; the employer's efforts to identify and eliminate potential hazardous conditions; and workplace injury data for the previous three years.

The Department will notify each eligible employer seven months before the eligible employer's policy renewal date and provide instructions as to how to apply for a workplace safety credit. After applying for the Program, employers must initially undergo two inspections by the Department. The first is a scheduled worksite inspection. If the employer passes this scheduled inspection, and is accepted into the Program, a second, unannounced inspection will be made within the year to confirm the initial certifications of safety in the workplace. An employer is only entitled to the premium credit if each of its Delaware work locations successfully passes both inspections. Once the employer qualifies only a single, unannounced inspection is required annually to maintain participation in the Program.

DRUG-FREE WORKPLACE CONSIDERATIONS

The amended regulations direct inspectors to consider whether the employer's program

includes a written drug-free workplace policy, a Drug-Free Workplace poster certified by the Department or other vendor, and a description of the employer's Employee Assistance Program or evidence of other available drug and alcohol counseling resources, including a list of treatment centers. Inspectors will also review a description of the employer's drug-free workplace training program, which must be completed by all employees within 30 days of their start date, and the methods the employer uses to document completion of such training.

Helpfully, the regulations now provide employers with a detailed list of items that must be included in their drug-free workplace policy. Among other things, compliant policies must:

- State that the policy concerns the protection of both employees and guests;
- Describe the conduct prohibited under the policy;
- Announce the employer's intent to comply with all applicable federal and state laws and regulations;
- Describe any pre-employment testing, reasonable suspicion testing, and post-incident testing or other drug testing policy;
- Provide a list of substances prohibited at the workplace;
- Specifically note whether marijuana is a prohibited substance in the workplace;
- State the employer's policy regarding the use of prescription medications and the employee's duty to notify the testing laboratory of such substances;
- State the employer's policy on employee consumption of alcohol on premises, which must describe the when alcohol consumption is permitted and whether the employer permits alcohol use on premise outside of normal working hours;
- List any and all employee drug testing procedures, including

if the testing is conducted by an independent laboratory, whether the testing includes or is limited to urine testing, the employee's right to refuse testing and the consequences for so doing, if the employee will be compensated for their time spent testing, and whether the employer covers the cost of the drug test;

- Explain the consequences for a positive drug-test result for applicants and employees, including whether either has a right to offer an explanation for the positive result;
- Include a confidentiality statement; and
- Provide a method for ensuring and documenting that all applicants and current employees receive details of the employer's drug-free policy.

Although the new regulations appear to be onerous, the inspector's recommendation as to whether an employer should receive a workplace safety credit, and the amount of the discount, is based, in part, on a compliant drug-free workplace program.

INTERACTION WITH LEGALIZED MARIJUANA

Employers opting to take part in the Program should be aware that the regulations require compliant drug-free workplace policies to expressly state whether marijuana (cannabis) is a prohibited substance in the workplace. Thus, it is important for employers to understand how this requirement intersects with the regulation of marijuana under state law.

While the recreational use of marijuana has not been legalized in Delaware, the state has decriminalized³ the possession or private use of small (personal) quantities of marijuana. Moreover, the Delaware Medical Marijuana Act⁴ legalized the medical use of marijuana by registered cardholders (qualifying patients under the law). Neither law requires employers to permit the

use of marijuana at the workplace, but the Medical Marijuana Act does prohibit employers from discriminating against individuals based solely on the person's status as a cardholder or a positive drug test for marijuana components or metabolites. Therefore, in crafting a compliant drug-free workplace policy, employers should take this non-discrimination provision into account.

LOOKING AHEAD

To ensure eligibility and to take advantage of the potential discounts, eligible Delaware employers should begin reviewing their workplace safety programs, establish a plan for training their employees, and review existing drug testing and/or drug-free workplace policies. Reviewing these policies also offers employers an opportune time to consider how they are treating applicants and employees who use marijuana – medically or recreationally – and ensuring that their policies are both compliant with the Workplace Safety Program and the Medical Marijuana Act's prohibition of discrimination against medical marijuana users. 🌿

NOTES

1. <https://regulations.delaware.gov/register/february2020/final/23%20DE%20Reg%20676%2002-01-20.htm>.
2. <https://insurance.delaware.gov/services/workplacesafetydiscount/>.
3. <https://legis.delaware.gov/BillDetail?legislationId=23866>.
4. <https://delcode.delaware.gov/title16/c049a/index.shtml>.

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