

NYC Passes Bill to Ban Pre-Employment Marijuana Drug Testing

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On April 9, 2019, a proposed bill, [Int. 1445-A](#) (“Bill”), which prohibits employers from pre-employment drug testing for marijuana and tetrahydrocannabinols (“THC,” the active ingredient in marijuana), was passed by the New York City Council, 40-4. The Bill expands the already significant list of protections for employees and job applicants under the New York City Human Rights Law.

Prohibited Practices

Under the Bill, employers, labor organizations, and employment agencies and all of their agents are prohibited from requiring a prospective employee to submit to a marijuana or THC drug test as a condition of employment. The Bill describes such pre-employment testing as an “unlawful discriminatory practice.”

Implementation

It is expected that Mayor de Blasio will sign the Bill. But if the mayor does not sign or veto the Bill within 30 days of passage, it will become law. The Bill will become effective one year after it is signed by Mayor de Blasio or after 30 days pass without action.

Exceptions

The Bill provides for a number of carve-outs and exceptions to the prohibition on marijuana and THC drug testing.

Safety-Related Positions: Excluded from coverage are positions requiring compliance with New York City’s Construction Safety Training Law or the laws concerning the New York Occupational Safety and Health Administration Construction Safety and Health Course. There is also an exception for positions “with the potential to significantly impact the health or safety of members of the public,” as determined and identified by either (i) the Commissioner of the Department of Citywide Administrative Services or (ii) the Chairperson of the New York City Commission on Human Rights. The Bill does not limit

drug testing for positions for which drug testing is required pursuant to any federal or state statute, regulation, or order for purposes of safety or security.

Transportation-Related Positions: The Bill also contains an exception for any position requiring a commercial driver's license, and the Bill's prohibitions will not apply to drug testing required by any federal Department of Transportation regulations, or any such requirements adopted by New York State or New York City.

Caregivers: The Bill includes an exception for drug testing for any position requiring the care or supervision of children, medical patients, or other vulnerable people.

Federal Contractors: The Bill does not apply to drug testing that is **mandated** pursuant to a contract with the federal government, or for which the federal government provides funding. Employers should be aware that not all federal contractors are required to perform drug testing. Many federal contractors and all federal grantees must comply with the Drug Free Workplace Act ("DFWA") and agree that they will provide a drug-free workplace as a precondition of receiving the contractor or grant. Although the covered contractors and grantees must maintain a drug-free workplace, the specific components necessary to meet the requirements vary. The basic requirements do not include drug testing. Thus, while many employers may perform drug testing in order to ensure compliance with the DFWA, it does not mean that they are required to perform that drug testing. Indeed, federal courts in [other jurisdictions](#) recently have held that the DFWA does not preempt similar state laws, noting that the DFWA does not require drug testing. Thus, in order to fall under the Bill's carve-out, an employer will need to determine what is actually required by the applicable contract.

Collective Bargaining Agreements: To the extent that a collective bargaining agreement requires the drug testing of certain applicants, the Bill will not apply to such testing. The Bill is, however, silent as to whether an employer may bargain to include such drug testing in a collective bargaining agreement.

What Employers Should Do Now

Given the growing trend of laws¹ that protect the use of medical and recreational marijuana and its derivatives, companies are increasingly reconsidering whether to require drug testing for applicants and employees. The Bill in NYC may be the first of its kind, but it is likely not the last, given the rapidly changing environment. In anticipation of this latest law by the New York City Council, employers should do the following:

- Review and consider whether to revise drug-testing requirements to ensure that they do not violate the new prohibitions and to cease pre-employment testing for marijuana and THC of NYC applicants, excluding excepted positions.

¹ For a recent analysis of how the New Jersey Appellate Division interpreted off-work use of medical marijuana under both the Compassionate Use Medical Marijuana Act and the New Jersey Law Against Discrimination, see our *Act Now* Advisory entitled "[New Jersey Appellate Division Permits Medical Marijuana User to Proceed with Disability Discrimination Claims Under LAD.](#)"

- Review job classifications, and identify those that fit into one of the Bill's exceptions for which such testing can still be required.
- Train human resources personnel, as well as supervisors and managers, on any changes made to current policies and practices pursuant to the Bill, including permissive testing requirements during the pre-employment process, and on what may or may not be included in job postings.

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