

# D.C. Prohibits Pre-Employment Drug Testing for Marijuana

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**Employer Summary: Under a new law, employers hiring in D.C. may not test applicants for marijuana usage until after the applicant receives a conditional offer of employment for the position. Along with D.C.'s recent "ban the box" law on criminal background checks, this new enactment may require employers to adjust their application and hiring processes.**

On August 14, 2015, the District of Columbia "Prohibition of Pre-Employment Marijuana Testing Act of 2015" was published in the District of Columbia Register and formally went into effect. This legislation – which makes permanent a temporary measure enacted on an emergency basis in late 2014 – further emphasizes the need for employers to review their personnel policies in response to the nationwide movement to legalize marijuana for medicinal and recreational use. Paley Rothman's Employment Law Group has previously written about some of the issues that the increasing legalization of marijuana poses for employers.

The new act prohibits employers from requiring prospective employees to submit to a drug test for marijuana usage as part of the employer's application process until after a conditional offer of employment has been extended. The act's prohibition is unequivocal and does not provide for any exceptions. Accordingly, even if the position that an applicant is seeking involves safety (i.e., the operation of heavy machinery) or security (i.e., the need to obtain a security clearance) concerns for which the applicant's usage of marijuana might be a disqualifying factor, the applicant cannot be tested for marijuana use as part of the application process until the conditional offer is extended.

The act does not provide for any penalty (whether administrative or through a private cause of action) for an employer's violation of the prohibition, however, so it is unclear what recourse an applicant would have if an employer continued to require applicants to submit to marijuana testing. The text of the act is also unclear regarding what positions are covered by the prohibition. Paley Rothman's Employment Law Group has obtained unofficial guidance from the City Council that positions in the District for which the employee would be eligible for D.C. unemployment benefits are covered, while positions outside of the District, even if filled by a D.C.-based employer, are not covered.

The act also provides for some notable caveats that will limit its impact to the pre-employment application process. First, the act explicitly states that it does not affect employees' compliance with an employer's workplace drug policies, meaning that employers may still maintain drug-free workplaces and terminate employees who use drugs. Second, the act provides that it does not require an employer to permit or accommodate an employee's use of marijuana in the workplace. Finally, the act makes clear that if an applicant fails a drug test conducted after a conditional offer of employment is extended, the employer may revoke the conditional offer and deny the applicant the position. Given these caveats, it appears that the main effect of the act will be to push the timing of any pre-employment drug testing back until later in the hiring process. Instead of testing applicants for marijuana usage at the beginning or an early stage of the hiring process, employers will have to wait until they have tentatively selected a candidate for the position and extended an offer of employment conditional on the drug test's result.

This law comes on the heels of D.C.'s "ban the box" legislation, which prohibits employers from undertaking criminal background checks or asking applicants about their criminal record until after the conditional offer of employment is extended. Together, these two enactments may require D.C. employers to review their application processes to ensure that they comply with the new laws. Paley Rothman's Employment Law Group is experienced in assisting employers in crafting personnel policies – including those applicable to the application and hiring stages – that will reduce or eliminate the potential for liability under these constantly-changing employment laws.