

DC Employers Take Note of the District's New Law on Off-Duty Marijuana Use

By Jessica Summers

In 2015, DC legalized possession of small amounts of marijuana. But unlike many jurisdictions which have legalized marijuana or other cannabis products, DC law was silent about whether employers could discipline employees for lawful off-duty use of the substances – until this summer. In June, D.C. Council passed the Cannabis Employment Protections Amendment Act of 2022 which prohibits employers from refusing to hire, terminating or disciplining employees for using cannabis, being a medical cannabis program patient or having a drug test detect cannabis in their system.

There are certain exceptions in the law. Employers are not prohibited from taking any of the aforementioned actions if (1) the employee involved is in a safety sensitive position, (2) the employer's actions are required by a federal law, federal regulation, federal contract or funding agreement (for example, if a federal contract requires drug testing of employees), (3) if the employee "used, consumed, possessed, stored, delivered, transferred, displayed, transported, sold, purchased, or grew cannabis at the employee's place of employment, while performing work for the employer, or during the employee's hours of work", or (4) if the employee is impaired by cannabis during work hours in a manner that "substantially decreases or lessens the employee's performance of the duties or tasks of the employee's job position" or in a way that interferes with health and safety. For the purposes of these exceptions a "safety sensitive position" is one where the employer determines that "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 law includes a number of examples of types of positions that would meet these qualifications.

In addition to the restrictions identified above, there are a few important things for employers to note about this new law:

- The law is focused on off-duty use. It does not prohibit employers from terminating or disciplining employees who use or possess cannabis products at work (or require the employer to accommodate use or possession).
- It also does not prohibit employers from taking action where an employee's off-duty use results in intoxication that interferes with health and safety or the performance of the employee's job.
- However, the law does mandate that employers consider a patient's medical marijuana use to treat a disability in the same manner as it would treat any other use of a legally controlled substance prescribed by a health care professional and it amends the District of Columbia Human Rights Act accordingly. In other words, employers must be very careful with medical marijuana users and engage in an interactive dialogue and accommodation analysis if a worker is using marijuana as prescribed by a physician. For example, an employer may need to adjust the start time for an employee who needs to use cannabis in the morning so that its impairing effects have subsided by the start of work if doing so does not impact the essential functions of the job.

This law applies to private employers as well as the D.C. government. It does not apply to the D.C. court system or the federal government. It will be administered by the District of Columbia Office of Human Rights (DC OHR) and anyone alleging a violation of the law will have to file a claim with the DC OHR prior to filing a lawsuit. Employers can be liable for payment of lost wages, reinstatement of the employee and the employee's reasonable attorneys' fees, among other things, for violating the law.

There is also a notice requirement. Employers must notify all employees of their rights under the act, specifically notify any employee who is designated as “safety sensitive status,” and notify all employees of all protocols for drug and alcohol testing (1) when the law becomes effective; (2) upon hire, and (3) annually thereafter.

In accordance with the restrictions placed on DC, the U.S. House and Senate have a 60 day period to review and enact a joint resolution to disapprove of the new law. If President Biden were to approve a joint resolution of disapproval, the law would be blocked from going into effect. While this Congressional disapproval period won't expire until August, it is unlikely that Congress and President Biden will disapprove of this law and the law is expected to become final.