

Recent Revisions to New York Employment Laws Include the Banning of Marijuana Testing of New York City Job Applicants

The New Testing Law

In February, the New York City Council introduced a bill that would prohibit City employers from requiring job applicants to submit to testing for tetrahydrocannabinols (THC), the active ingredient in marijuana, as a condition of employment. The bill amends the New York City Fair Chance Act, which also governs pre-employment criminal background screening, to include a subdivision for “Employment; pre-employment drug testing policy.” On April 9, 2019, the City Council passed the bill by an overwhelming majority. The law will make it a discriminatory practice for any New York City employer, labor organization, employment agency, or their agent, to require testing for THC. New York City Mayor Bill De Blasio did not sign the bill but it became law on May 10, 2019, and the law will take effect one year later, on May 10, 2020.

The law continues a trend away from marijuana’s criminality at the City and State level. Even though he did not sign the bill, Mayor De Blasio’s office made public statements signaling his support for it. The Mayor also recently banned the NYPD from arresting individuals for public use of marijuana. In 2018, both Governor Andrew Cuomo and Mayor De Blasio released reports finding that the benefits of regulated recreational marijuana outweigh the potential harms. Governor Cuomo has also publicly supported legalized recreational marijuana use in New York State.

Exceptions From the Testing Law

Although the new law will impact many New York City employers, marijuana testing will be permitted for applicants for certain safety-related positions, including: (i) police officers or peace officers; (ii) positions requiring individuals to have passed OSHA 10-hour training courses to work on construction sites; (iii) positions requiring a commercial driver’s license; and (iv) positions requiring the supervision or care of children, medical patients or people with disabilities. The law also provides discretion to the Commissioner of Citywide Administrative Services or the Chairperson of the New York City Commission on Human Rights to determine and identify certain positions that require testing for THC because they have “the potential to significantly impact the health or safety of employees or members of the public.”

The law also does not prohibit applicant testing for THC in accordance with: (i) federal, state and local department of transportation regulations; (ii) any contract entered into between the federal government and an employer that requires testing as a condition of payment; (iii) any federal or state statute, regulation, or order that requires drug testing of prospective employees for purposes of safety or security; or (iv) any applicant whose prospective employer is a party to a valid collective bargaining agreement that specifically addresses the pre-employment drug testing of such applicants.

Impact of Marijuana Testing Law

New York City employers should begin reviewing their hiring and on-boarding processes now to ensure they will be compliant this time next year. If employers use outside vendors to process pre-employment drug screens, they should check with the vendor and confirm they are prepared to remove THC screening from their typical screening procedures when the new law takes effect.

The new testing law does not provide any other protection to marijuana users in New York City, and it remains lawful for employers to prohibit use of marijuana in the workplace and to forbid employees from being impaired by marijuana at the workplace.

Other Recent New York Updates

The New York City marijuana testing law is only one of numerous recent updates to New York City and State laws that impact employers.

Sexual and Reproductive Health Decisions

New York City recently revised the New York City Human Rights Law to designate employees' sexual and reproductive health decisions as a protected characteristic that must be free from discrimination. The revision protects "any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions." Examples of "sexual and reproductive health decisions" in the law include fertility-related medical procedures; sexually transmitted disease prevention, testing, and treatment; and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion. As part of the City Human Rights Law, employers may not discriminate against an employee because they engaged in any of these activities.

Lactation Rooms

Another recent revision to the New York City Human Rights Law expanded the obligations of employers with respect to lactation rooms in the workplace. Specifically, New York City employers must now provide a lactation room to nursing mothers that is "a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at a minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water." The lactation room must be in reasonable proximity to the employee's work area, and employers must provide a refrigerator suitable for breast milk storage that is also within reasonable proximity to the employee's work area. In addition, employers must now develop a written lactation room accommodation policy.

Voting Time

Finally, New York revised the State Election law to now require that employers provide employees up to three hours of leave to vote, replacing the two hour limit in effect before the revision. Employees are only allowed the time off to vote at the beginning or end of their shift, and must provide the employer at least two working days' notice of their need for the time off. The revision to the Election Law also requires that at least ten days before every election, employers post notice of employees' right to the voting leave.

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Companies with New York City employees should review and update their policies, including assessing drug testing policies and procedures to ensure compliance with the prospective new law. Revisions may be required to employee handbook and policy manuals, as well as to employment applications, offer letters, and other pre-employment documents.

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