

NYC COUNCIL BANS PRE-EMPLOYMENT TESTING FOR CANNABIS USE, WITH EXCEPTIONS

Hemp & Medical Cannabis Alert
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On April 9, 2019, the New York City Council approved a bill that prohibits employers in New York City from testing prospective employees for the presence of THC as a condition of employment. The bill, Int. No. 1445-A, amends Title 8 of the Administrative Code, which defines an “employer” as an employer with four or more employees.

The language of the bill contains a number of limitations and exceptions which may substantially dampen its effect. Most prominently, the bill is limited to “pre-employment drug testing,” of “prospective employees,” and does not address testing of existing employees as a condition of continued employment. Moreover, there are several broad exceptions to the bill’s testing prohibition, including testing for positions in law enforcement, positions governed by a collective bargaining agreement which addresses pre-employment testing, positions involving construction work or requiring a commercial driver’s license, and positions involving care or supervision of children, medical patients, or vulnerable persons. The exception for children, medical patients, or vulnerable persons could be problematic. For example, it is unclear whether the exception would apply to persons applying for administrative positions in medical offices with no direct patient care responsibilities. These questions may be cleared up by the NYC Commission on Human Rights, which is directed to promulgate regulations implementing the bill.

The bill also anticipates some issues concerning federal preemption. For example, the bill contains an exception for testing required by U.S. Department of Transportation regulations, or similar regulations of state and city transportation departments. It also carves out a broad exception for testing required by state or federal law for purposes of “safety or security.” However, preemption issues remain for testing required by federal law which is not covered by these exceptions.

Advocates have argued that pre-employment cannabis screening is more harmful than cannabis itself and prevents an otherwise qualified pool of applicants from advancing their careers. The bill still requires the approval of Mayor Bill de Blasio and would take effect one year after final enactment.

Attorneys

Luisa Bostick
Joseph Braccio
Arielle Doolittle
Christopher Doyle
Andrew Drilling
Ryan Everhart
Patrick Fitzsimmons
Andrew Freedman
Peter Godfrey
John Godwin
Joseph Goldberg
Patrick Hines
Elizabeth McPhail
Lindsay Menasco
Kinsey O'Brien
Gary Schober
Daniel Spitzer
Melissa Subject
Jeffrey Swiatek
Amy Walters

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The Council's action is in line with cannabis legalization proposals currently working their way through the New York State legislature. Governor Andrew Cuomo's proposal, as well as an alternative proposal headed by Assembly Majority Leader Crystal Peoples-Stokes, would each prevent employers from taking "adverse employment action" based on THC testing. Both proposals also contain exceptions similar to the New York City Council's bill, and neither protects an employee who is under the influence or possesses cannabis in the workplace.

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