Legal Update Article

District of Columbia Cannabis Employment Protections Amendment Act Goes Live July 13

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The District of Columbia is joining the increasing number of jurisdictions providing greater protections for private employees who use marijuana off duty, during non-work hours. Such development remains in contrast with federal law, which still classifies marijuana as a controlled substance, prohibiting both possession and use of marijuana.

In addition to protections for private employees, the D.C. Cannabis Employment Protections Amendment Act of 2022 (C.E.P.A.A.) imposes new obligations on private employers to inform employees of the new laws. D.C. Law 24-190 §§ 100 *et seq.;* tentatively D.C. Code §§ 32-921.01 through .08. The portions of the C.E.P.A.A. not tied to budget impacts go into effect July 13, 2023 (one year from the mayor's signature), but, under D.C.'s unique Congressional-supervised legislative process, enforcement awaits budgetary funding for the D.C. Office of Human Rights. For now, only the definitional section of the law will be effective.

Highlights for D.C. Employers

Under C.E.P.A.A., employers will be prohibited from taking personnel actions against an individual for cannabis or marijuana use off-premises during non-work hours.

Employers are permitted to take action related to such use, however, if the employee is designated as safety sensitive, a federal contract or statute prohibits marijuana use, or the employee used or possessed marijuana at the employer's premises or during work hours.

Drug-Testing

The presence of cannabinoid metabolites in an employer-required or requested drug test may be used to justify adverse action if the employee is impaired by the use of cannabis at the place of employment or during work hours.

Cannabis impairment is exemplified by the employee manifesting specific, articulable symptoms that substantially decreases or lessens the employee's performance of duties or such symptoms interfere with the employer's ability to maintain a safe and healthy workplace. This will alter the availability of pre-employment drug testing for many private employers in the District of Columbia.

Safety Sensitive-Designated Positions

Employers must provide notice to their employees of the new protections within 60 days of employment protections being enforceable or upon hire.

The notice requirement includes informing employees if their position has been designated as safety sensitive, among other requirements. Safety-sensitive positions are those reasonably foreseeable that, if the employee performs the position under the influence of drugs or alcohol, the person could cause actual, immediate, and serious

bodily injury or loss of life to themself or others. The following are statutory examples of safety sensitive positions:

(A) Security services such as police or security that involves the custody, handling, or use of weapons;
(B) Regular or frequent operation of a motor vehicle or other heavy or dangerous machinery;
(C) Regular or frequent work on an active construction site;
(D) Regular or frequent work near gas or utility lines;
(E) Regular or frequent work involving hazardous material;
(F) Supervision of those who reside in an institutional or custodial environment; or
(G) Administration of medication, performance or supervision of surgeries, or other medical treatment requiring professional credentials.

Notice of Reporting Requirements

Employees may report alleged noncompliance with the C.E.P.A.A. within one year to the D.C. Office of Human Rights.

Administrative requirements for recreational and medical marijuana users differ under the new law. Recreational marijuana users are required to exhaust their administrative remedies under the C.E.P.A.A. before bringing private cause of action. Medical marijuana patients are not required to exhaust administrative remedies, but they cannot bring a private cause of action directly to the court if they have initiated an administrative complaint with the D.C. Office of Human Rights alleging the same noncompliance.

Employer Penalties for Noncompliance

If the employer if found to have violated the C.E.P.A.A., the director of the D.C. Office of Human Rights may order the employer to do any of the following:

- Pay civil penalties, half of which awarded to complainant and half deposited to the General Fund of D.C.;
    - 1–30 employees: up to $1,000 per violation
    - 31–99 employees: up to $2,500 per violation
    - 100+ employees: up to $5,000 per violation
- Pay double the civil penalties listed above if the employer is found to be noncompliant in the past year;
- Pay the employee's lost wages;
- Undergo training or any other equitable relief to undo the adverse employment action; and
- Pay reasonable attorneys' fees and costs.

In a private cause of action, a court may institute the civil penalties above and:

- Payment of lost wages;
- Payment of compensatory damages;
- Equitable relief as appropriate; and
- Payment of reasonable attorneys' fees and costs.

D.C. employers should amend their workplace designations and policies in accordance

with the changes mandated by the D.C. Cannabis Employment Protections Amendment Act. Jackson Lewis attorneys are happy to assist in navigating the changes required to remain compliant with new laws in the District of Columbia.

(Summer law clerk Heather Kemp contributed significantly to this article.)