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Construction Among Occupations Allowed to Conduct Pre-Employment Drug Testing for Marijuana in New York City

New York City Has Banned Pre-Hire Marijuana Testing for Many Other Occupations

Effective May 10, 2020, the City of New York enacted a law prohibiting most public and private employers from testing prospective employees for marijuana pursuant to a pre-employment drug test. The prohibition was added as a new basis of unlawful employment discrimination pursuant to the New York City Human Rights Law (“NYCHRL” - Section 8-107, paragraph 31).

Construction employees, in many situations, are exempt from that prohibition. Testing is therefore permitted of many employees on most larger projects, in particular laborers, workers, mechanics and safety personnel. There are also important limitations to pre-employment marijuana testing that employers need to carefully consider when developing these policies and procedures.

The law specifically prohibits employers, labor organizations, and employment agencies from requiring a “prospective employee to submit to testing for the presence of any tetrahydrocannabinols [THC] or marijuana in such prospective employee’s system as a condition of employment.” A violation of this prohibition is now considered an “unlawful discriminatory practice” under the NYCHRL, which carries with it stiff penalties and the potential for punitive damages.

As stated above, the new law contains an exception which permits employers in the construction industry to perform such pre-employment drug screening, but the way it is worded creates some possible limitations.

The new law does not refer to or define construction workers, and instead does so by referencing positions requiring compliance with Section 3321 of the NYC Building Code or Article 8 Section 220-h of the New York Labor Law. Section 3321 establishes Site Safety Training (“SST”) requirements and Section 220-h refers to public construction work for the State or the City of New York where the cost of all work to be performed under the contract is at least \$250,000.

As a result, the following categories of construction workers can be tested under the new law:

- [construction](#) or [demolition](#) workers on projects that require a SST card,
- [site](#) safety managers, [site](#) safety coordinators, [concrete](#) safety managers, [construction superintendents](#) or other [competent persons](#) at such [site](#), who are required to hold an SST supervisor card, and
- laborers, workers, and mechanics employed in the performance of the contract on the public work site in excess of 250,000.

For contractors operating in the City of New York, now is an important time to reconsider your company's policies and procedures relating to pre-employment drug testing, including the possible addition of such testing.

The law also permits testing of other employees, including:

- Police or peace officers;
- Positions requiring a commercial driver's license;
- Caregivers for children, medical patients or other "vulnerable persons" (as defined by the social services law), which includes teachers, day care center employees, nursing home staff, emergency responders, and doctors, among other positions;
- Positions subject to a valid collective bargaining agreement that provides for drug-testing policies of its members;
- Federal or state employees that are not subject to New York City's jurisdiction;
- Positions for employers required to drug test pursuant to federal law or government contract; and
- Positions with potential to significantly impact health or safety of other employees and/or the public.

Notably, the last category is a bit vague and may further expand the scope of construction related testing that is permitted in the construction setting. The New York City Commission on Human Rights has proposed (but not yet issued), certain amendments to the Official Compilation of the Rules of the City of New York that illuminate the meaning of this catchall exception.

An employer's right to perform pre-employment marijuana testing under the proposed amendments highlight work at an active construction site, the operation of heavy machinery, work on power/gas utility lines, and the daily operation of motor vehicles, among other examples. Since the amendments may impact the reach of testing on construction projects, we will be tracking the proposed amendments.

It is important to note that the law is prospective in the sense that it applies only to pre-employment testing; random and post-accident drug testing of current employees remains undisturbed. Employers can drug test in the pre-employment context for drugs other than marijuana and THC.

In order to avoid conflicts with federal, state and city requirements, as well as those agreed upon in collective bargaining agreements, the law also permits pre-employment marijuana testing for the following reasons:

- The testing is required by the U.S. Department of Transportation;
- The testing is required as a condition of receiving a federal contract or grant;
- The testing is required pursuant to a federal or state statute;
- The testing is required by a collective bargaining agreement; or
- The position has a "potential to significantly impact health or safety of employees or members of the public," as identified by specified City authorities.



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Peckar & Abramson, P.C., suggests that employers consider the impact of this law on its operations, and, as applicable:

- Cease pre-employment drug screening for marijuana and THC where not permitted;
- Determine how your employment policies, procedures, job advertisements, and employment application materials need to be amended;
- Assess the extent to which you may be permitted to test for marijuana and THC when hiring new employees and how testing may continue with those groups;
- Review pertinent contractual language as well as other statute and regulations impacting employment;
- Incorporate language into your collective bargaining agreements which clearly states that you have the contractual right to require all bargaining unit employees, including those sent from the union hiring hall, to undergo pre-employment marijuana screening as a condition of employment;
- Train human resource and supervisory personnel on all changes to company policies and procedures; and
- Seek legal guidance when necessary.

Please feel free to contact us with any questions.

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