COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

FROM: Chairman Phil Mendelson
Committee of the Whole

DATE: April 19, 2022

SUBJECT: Report on Bill 24-109, "Cannabis Employment Protections Amendment Act of 2022"

The Committee of the Whole, to which Bill 24-109, the "Cannabis Employment Protections Amendment Act of 2022"[1] was referred, reports favorably thereon with amendments, and recommends approval by the Council.

CONTENTS

I. BACKGROUND AND NEED

On February 25, 2021, Bill 24-109, the "Prohibition on Marijuana Testing Act of 2021" was introduced by Councilmembers Trayon White, Charles Allen, Christina Henderson, Kenyan McDuffie, Brianne Nadeau, and Robert White. As introduced, the Bill would prohibit testing for cannabis use as a condition of employment, except for specific positions or if the law requires testing. The Bill was sequentially referred to the Committee on Labor and Workforce Development and the Committee of the Whole. The Bill's scope has been expanded by the Committee on Labor and Workforce Development to include general employment protections for District residents using cannabis, provided that these protections are not applicable for safety-sensitive positions or if federal law requires employees of the business to be drug-free. Additionally, the bill would allow residents to file complaints with the Office of Human Rights or pursue a private right of action should an employer violate the law. The Bill also gives the Attorney General authority to enforce the law and amends the Human Rights Act of 1977 so that employers must treat the use of cannabis

[1] Formerly titled the "Prohibition on Marijuana Testing Act of 2021."

by medical cannabis patients to treat a disability in the same way they would treat the legal use of any other controlled substance.

The Impact and Changing Landscape of Drug-Free Workplace Laws and Policies

Laws encouraging employers to adopt drug testing and other drug-free workplace policies were primarily adopted in the late 80s and early 90s, at the height of the war on drugs.[2] At the time, these policies were justified as necessary to decrease drug use and protect employers from potentially negligent and unproductive employees using drugs. However, research on the impact of these laws and policies has produced mixed results. For instance, two meta-analyses of employer-led interventions to address drug misuse found mixed results for drug testing and other drug-free employment policies on accidents, injuries, and other indicators of workplace safety.[3] A critical assessment of the research also casts doubt on the association between employee drug use and productivity, although the research that exists lacks methodological rigor.[4]

No studies could be found that directly test the impact of drug testing laws or drug-free workplace policies more generally on employment outcomes of people who use drugs, but studies show that drug users are significantly less likely to be employed.[5] Looking specifically at cannabis use, one study found that the odds of cannabis users being fired or laid off were anywhere from 27% to 50% higher than individuals who reported no cannabis use, even when controlling for demographic and work-related variables.[6]

Due to the rapidly changing status of cannabis and the lack of evidence supporting drug testing laws, jurisdictions across the country are considering or have adopted laws to protect lawful cannabis use. Table 3 shows cities and states that have passed employment protections for individually legally using cannabis. Most of these laws prohibit pre-employment testing or prohibit an employer from using the presence of cannabis metabolites in a drug test from denying someone a job. Currently, the District prohibits pre-employment drug testing for cannabis before a conditional job offer and prohibits adverse actions against District employees who are medical cannabis patients. Employees in the private sector do not have such protections despite adult use being legal in the District. This bill will change that.

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[2] Lamothe, S. (2005). State policy adoption and content: A study of drug testing in the workplace legislation. State and Local Government Review, 37(1), 25-39.

[3] Akanbi, M. O., Iroz, C. B., O'Dwyer, L. C., Rivera, A. S., & McHugh, M. C. (2020). A systematic review of the effectiveness of employer-led interventions for drug misuse. *Journal of occupational health*, 62(1), e12133; Pidd, K., & Roche, A. M. (2014). How effective is drug testing as a workplace safety strategy? A systematic review of the evidence. *Accident Analysis & Prevention*, 71, 154-165.

[4] See, for instance, Frone, M. R. (2013). *Alcohol and illicit drug use in the workforce and workplace*. American Psychological Association.

[5] See, for instance, French, M. T., Roebuck, M. C., & Alexandre, P. K. (2001). Illicit drug use, employment, and labor force participation. *Southern Economic Journal*, 68(2), 349-368; and Henkel, D. (2011). Unemployment and substance use: a review of the literature (1990-2010). *Current drug abuse reviews*, 4(1), 4-27.

[6] Okechukwu, C. A., Molino, J., & Soh, Y. (2019). Associations Between Marijuana Use and Involuntary Job Loss in US-representative longitudinal and cross-sectional samples. Journal of occupational and environmental medicine, 61(1), 21.

Table 3. Recent Drug Testing Law Reforms

	Coverage	Applicability
Atlanta, GA[7]	City government	Prohibits pre-employment drug testing
District of Columbia[8]	All employers; District government	Prohibits pre-employment drug testing for cannabis before a conditional offer of employment; prohibits adverse actions against District employees based on an employee's legal use of medical cannabis.
Montana[9]	All employers	Prohibits discrimination for the lawful use of cannabis during non-work hours
Nevada[10]	All employers	Prohibits employers from using the positive presence of cannabis metabolites in tests as a reason to deny employment
New Jersey[11]	All employers	Prohibits adverse actions against employees for the lawful use of cannabis
New York[12]	All employers	Prohibits adverse actions against employees for the lawful use of cannabis
Philadelphia, PA[13]	All employers	Prohibits the use of pre-employment drug screening for cannabis as a condition of employment

Cannabis Use, Drug Testing, and Drug-Free Workplace Policies in the District

In 2010, the Council introduced and approved the Legalization of Marijuana for Medical Treatment Initiative Amendment Act of 2010 (D.C. Law 18-210; 57 DCR 4798), kickstarting the creation of a medicinal cannabis market in the District. In the 12 years since the law was passed, over 12,000 people have become patients with the medical cannabis program, including nearly 4,000 District residents.[14] Additionally, in 2015 the District legalized possession, use, and transport of up to two ounces of cannabis by adults aged 21 and over via the passage of Initiative 71.

While we do not have precise data on cannabis use in the District, data from the National Survey on Drug Use and Health (NSDUH) suggests that approximately 30.9% of District residents ages 12 and above have used cannabis in the last year, and 18.3% have used cannabis in the previous month.[15] Over half of residents who used cannabis in the prior year or month are people

[7] City of Atlanta, Georgia. Executive Order No. 2021-08, January 19, 2021.
[8] D.C. Official Code § 32-931, and § 1-620.62.
[9] Montana Code Annotated § 39-2-313.
[10] Nevada Revised Statutes § 613.132.
[11] New Jersey Statutes, § 24:6I-52.
[12] Consolidated Laws of New York, LAB § 201-D.
[13] The Philadelphia Code, § 9-5500.
[14] Alcoholic Beverage Regulation Administration, Medical Cannabis Program Report, January 2022.
[15] National Survey on Drug Use and Health: 2-Year RDAS (2019 to 2020). Accessed on March 16, 2022.

of color, and over two-thirds are employed part-time or full-time. Demographics of residents who have used cannabis in the last month are shown in Table 1.[16]

Table 1. Past-Year and Past-Month Cannabis Use – Demographic Profile

	Past-Year Cannabis Use	**Past-Month Cannabis Use**
White	48.1%	49.2%
Black	41.8%	44.5%
Other	5.1%	3.4%
Hispanic	5%	2.9%
Employed	68.9%	67.1%
Unemployed	8.4%	6.5%
Less than $50,000	37.5%	42.5%
$50,000-$99,999	24.9%	19.9%
$100,000 or more	37.6%	37.6%
Less than 18 years old	3.4%	2.6%
18 to 34 years old	47.6%	50.7%
35 to 49 years old	22%	22.3%
50 years or older	27%	24.4%

NSDUH data also suggests that roughly 55,000 District residents or approximately 9.1% of the population aged 12 and above are frequent cannabis users.[17] Of regular cannabis users, nearly 54% are Black, 65% are employed part-time or full-time, and almost half (47.4%) have family incomes below $50,000.[18]

An analysis of job postings by the American Addiction Centers suggests that pre-employment drug testing and regular drug screening are more prevalent in government, healthcare, manufacturing, and automotive or transportation-related jobs.[19] Data from the NSDUH indicates that 30% of employed adult residents in the District—or just over 100,000 residents—work for an employer who tests employees for drug use. A disproportionate share of residents who report working at organizations that drug test employees are Black (49%). By contrast, 32% who reported working at these organizations are white. A starker pattern emerges when looking at potential penalties for a positive drug test by race. One of the questions in the NSDUH asks what happens the first time an employee is caught using drugs. Thirty-four percent (34%) of residents at an organization that tests employees for drugs report that an employee will be fired if the drug test

[16] The percentage of residents in the District who use cannabis is likely higher than the estimates produced by the NSDUH. Due to potential legal penalties and societal stigma associated with drug use, people who use drugs are often hesitant to report drug use in surveys (See, for instance, McAllister, I., & Makkai, T. (1991). Correcting for the underreporting of drug use in opinion surveys. *International Journal of the Addictions*, 26(9), 945-961; Zhang, Z., & Gerstein, D. (1999). Deviance disavowal, interviewer role, social interactions, and underreporting in a drug use survey. In *Proceedings of the Survey Research Methods Section*. Alexandria, VA: American Statistical Association (pp. 877-82)).

[17] For purposes of this report, frequent cannabis use is defined as anyone who uses cannabis at least once a week.

[18] *Supra* note 1.

[19] American Addiction Centers, An Analysis of Employer Drug Testing in the United States. Available at https://americanaddictioncenters.org/learn/analysis-employer-drug-testing/.

comes back positive. Of the roughly 30,000 residents who work for these employers, 78.9% are Black, and only 8.6% are white (Table 2).

Table 2. Employed District Residents Reporting A Positive Drug Test Will Result In Being Fired by Race

	Percent
White	8.6%
Black	78.9%
Other	7.8%
Hispanic	4.7%

Bill 24-109

Bill 24-109 includes employment protections for District residents using cannabis and mechanisms to pursue administrative enforcement or a private right of action should an employer violate the law. The Bill also gives the Attorney General authority to enforce the law and amends the Human Rights Act of 1977 so that employers must treat the use of cannabis by medical cannabis patients to treat a disability in the same way they would treat the legal use of any other controlled substance. These are important updates to existing law that provide significant protections to residents engaging in lawful behavior. The Committee on Labor and Workforce Development's report, included as an attachment to this report, speaks to each of these issues in more depth.

The Committee Print from the Committee of the Whole only makes two substantive changes to what was approved by the Committee on Labor and Workforce Development. First, the Print requires, rather than merely authorizing, the Office of Attorney General and the Office of Human Rights to enter into a memorandum of agreement (MOA). Given the enforcement authority conveyed to both agencies, it will be critical to have established processes and procedures governing complaint referrals, information sharing, and other topics to avoid duplicative enforcement activities. Second, the Print makes substantive changes to Section 108. First, by deleting a provision that authorizes the Council to issue its own rules. The Council already possesses such authority, making the language unnecessary. Second, the Print inserts language into Section 108 that will require the Mayor's rules to undergo Council review. The Council must have the ability to review regulations issued by the Mayor and disapprove of those rules if necessary.

Other changes made in the Committee Print are purely technical. For instance, the Print removes language from the definition of safety-sensitive, stating "that the employee could suffer a lapse of attention or other temporary deficit." Whether it is cannabis,[20] other drugs,[21] or alcohol,[22]

[20] Crean, R. D., Crane, N. A., & Mason, B. J. (2011). An evidence-based review of acute and long-term effects of cannabis use on executive cognitive functions. Journal of addiction medicine, 5(1), 1.
[21] Vik, P. W., Cellucci, T., Jarchow, A., & Hedt, J. (2004). Cognitive impairment in substance abuse. Psychiatric Clinics, 27(1), 97-109.
[22] Lyvers, M., & Tobias-Webb, J. (2010). Effects of acute alcohol consumption on executive cognitive functioning in naturalistic settings. Addictive Behaviors, 35(11), 1021-1028; and Garrisson, H., Scholey, A., Ogden, E., & Benson,

being under the influence can impact cognitive functions beyond attention. The Print contains a few more examples of routine tasks or duties that may be classified as safety-sensitive, but the list is not meant to be exhaustive of all potential safety-sensitive positions. The Print also makes minor technical changes to the language in Section 107 regarding enforcement by the Attorney General and language regarding impairment due to the use of cannabis.

Conclusion

The use of medical cannabis has been legal in the District since 2010, and adult use of cannabis for recreational purposes since 2015. Currently, residents employed in the private sector who are lawfully using cannabis have minimal employment protections. Bill 24-109 will change that by prohibiting employers from refusing to hire, terminating from employment, suspending, failing to promote, demoting, or penalizing employees based on their use of cannabis during off-work time or their status as a medical cannabis patient. The Print strikes a balance by including exceptions to these prohibitions for safety-sensitive positions and employers bound by federal statute, regulations, contracts, or funding agreements to provide a drug-free work environment. The Committee believes these exceptions are necessary to avoid unintended consequences and maintain safe work environments. As such, the Committee recommends Council approval of the Print.

II. LEGISLATIVE CHRONOLOGY (ABBREVIATED)

April 23, 2019	Bill 23-266, the "Prohibition of Marijuana Testing Act of 2019" is introduced by Councilmembers Trayon White, Anita Bonds, Mary Cheh, and David Grosso.
September 25, 2019	The Committee on Labor and Workforce Development holds a public hearing on Bill 23-266.
February 25, 2021	Bill 24-109, the "Prohibition of Marijuana Testing Act of 2021" is introduced by Councilmembers Trayon White, Charles Allen, Christina Henderson, Kenyan McDuffie, Brianne Nadeau, and Robert White.
March 3, 2022	The Committee on Labor and Workforce Development marks up Bill 24-109.
April 19, 2022	The Committee of the Whole marks up Bill 24-109.

S. (2021). The effects of alcohol intoxication on cognitive functions critical for driving: A systematic review. Accident Analysis & Prevention, 154, 106052.

III. SUMMARY OF TESTIMONY

Testimony from public witnesses on Bill 23-266, which was identical to the introduced version of Bill 24-109, was primarily supportive of the Bill. Ventris Gibson, Director of the D.C. Department of Human Resources (DCHR), testified on behalf of the Executive. Director Gibson suggested that the bill grant the Mayor the authority to designate specific private-sector jobs as safety-sensitive and stressed the importance of having a drug-free work environment, particularly for individuals working in safety-sensitive positions.

IV. IMPACT ON EXISTING LAW

Bill 24-109 prohibits employers from refusing to hire, terminating from employment, suspending, failing to promote, demoting, or penalizing individuals for the individual's lawful use of cannabis, status as a medical cannabis program patient, or the failure to pass an employer-required or requested cannabis drug test. The bill exempts employers from these requirements if the employee is in a safety-sensitive position or the employer is required by federal law, regulations, or a federal contract or funding agreement to maintain a drug-free work environment. The bill does not require employers to permit the use or possession of cannabis on the premises or during work hours. The bill vests the Office of Human Rights and the Office of Attorney General with authority to enforce the law and grants employees the ability to pursue a private right of action so long as they are not also pursuing an administrative remedy. The bill requires the Mayor to issue rules implementing the law. Finally, the bill makes technical and conforming amendments to the District's Comprehensive Merit Personnel Act of 1978.

V. FISCAL IMPACT

VI. RACIAL EQUITY IMPACT

The attached April 18, 2022 Racial Equity Impact Assessment (REIA) from the Council Office on Racial Equity concludes that the bill's main protections and the requirement to treat medicinal cannabis the same as an employee taking other prescribed drugs will likely make progress toward racial equity in the District. The REIA notes that the impact of the safety-sensitive exception is inconclusive.

VII. SECTION-BY-SECTION ANALYSIS

Title 1. Employment Protections for Cannabis Use.

Section 101 — Provides definitions for the terms "cannabis," "District government," "employee," "employer," "marijuana," "medical cannabis program," "medical cannabis program patient," "safety-sensitive," and "use of cannabis."

Section 102 (a) Prohibits employers from taking adverse actions against applicants or employees based on an individual's use of cannabis, status as a medical cannabis program patient, or the presence of cannabis metabolites in a drug test.

(b) Provides for certain exceptions to subsection (a).

Section 103 Clarifies that the law does not require employers to accommodate us or consumption during work hours and does not prohibit reasonable drug-free workplace policies.

Section 104 Requires employers to provide notice of rights to employees under the bill.

Section 105 Grants employees the right to file a complaint with the Office of Human Rights when an employer violates the law.

Section 106 Provides for a private right of action when an employer violates the law.

Section 107 Gives the Attorney General the authority to receive complaints and conduct investigations of non-governmental employers.

Section 108 Requires the Mayor to issue rules implementing the bill.

Title 2. Medical Cannabis and Disabilities.

Section 201 Requires employers to treat a qualifying patient's use of medical cannabis to treat a disability in the same manner as it would treat the legal use of any other controlled substance.

Title 3. Conforming Amendments.

Section 301 Makes conforming amendments to the Comprehensive Merit Personnel Act of 1978 and the Department of Corrections Employee Mandatory Drug and Alcohol Testing Act of 1996.

Title 4. Applicability; fiscal impact statement; effective date.

Section 401 Applicability.

Section 402 Fiscal impact statement.

Section 403 Effective date.

VIII. COMMITTEE ACTION

IX. ATTACHMENTS

1. Bill 24-109 as introduced.
2. Committee on Labor and Workforce Development report on Bill 24-109 without attachments.
3. Fiscal Impact Statement for Bill 24-109.
4. Legal Sufficiency Determination for Bill 24-109.
5. Racial Equity Impact Assessment for Bill 24-109.
6. Comparative Print for Bill 24-109.
7. Committee Print for Bill 24-109.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

MEMORANDUM

To: Members of the Council

From: Nyasha Smith, Secretary to the Council

Date: May 25, 2021

Subject: Re-Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Thursday, February 25, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Prohibition of Marijuana Testing Act of 2021", B24-0109

INTRODUCED BY: Councilmembers T. White, Nadeau, R. White, Allen, McDuffie, and Henderson

The Chairman is referring this legislation sequentially to the Committee on Labor and Workforce Development and the Committee of the Whole with comments from the Committee on Business and Economic Development.

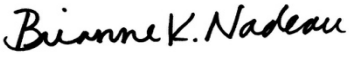
Attachment

cc: General Counsel
Budget Director
Legislative Services

Councilmember Charles Allen

Councilmember Trayon White, Sr.

Councilmember Kenyan R. McDuffie



Councilmember Brianne K. Nadeau

Councilmember Christina Henderson

Councilmember Robert C. White, Jr.

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To prohibit marijuana testing as a condition of employment, except for certain positions, and unless otherwise required by law.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Prohibition of Marijuana Testing Act of 2021".

Sec. 2. Section 2 of the Prohibition of Pre-Employment Marijuana Testing Act of 2015, effective July 22, 2015 (D.C. Law 21-14; D.C. Official Code §32-931), is amended to read as follows:

"Sec. 2. Restriction on pre-employment marijuana testing.

"(a) Except as otherwise provided by law, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee's system as a condition of employment.

"(b) The provisions of this act shall not apply to:

"(1) Police officers or special police officers, or in a position with a law enforcement function;

"(2) Positions that require a commercial driver's license;

"(3) Construction jobs that require occupational safety training;

"(4) Positions requiring the supervision or care of children, medical patients, or vulnerable persons; or

"(5) Any position with the potential to significantly impact the health or safety of employees or members of the public, as determined by the Director of the Department of Human Resources.

"(c) The provisions of this act shall not apply to:

"(1) Any regulation promulgated by the federal department of transportation that requires testing of a prospective employee in accordance with 49 CFR 40, or any rule promulgated by the District Department of Transportation for purposes of enforcing the requirements of that regulation with respect to intrastate commerce;

"(2) Any contract or grant entered into or awarded between the federal government and an employer that requires the drug testing of prospective employees as a condition of receiving the contract or grant;

"(3) Any federal or local, regulation or order that requires the drug testing of prospective employees for purposes of safety or security; or

"(4) Any applicant whose prospective employer is a party to a valid collective bargaining agreement that specifically addresses the drug testing of such applicants.

"(d) For the purposes of this act, the term "Employer" shall have the same meaning

as provided in section 2(6) of the Occupational Safety and Health Act of 1988, effective March 16, 1989. (D.C. Law 7-186; D.C. Official Code § 32-1101(6)).

"(e) Nothing in this act shall be construed to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace."

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON LABOR AND WORKFORCE DEVELOPMENT
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, D.C. 20004

TO: All Councilmembers
FROM: Councilmember Elissa Silverman
Chairperson, Committee on Labor and Workforce Development

DATE: March 3, 2022

SUBJECT: Report on B24-109, "Cannabis Employment Protections Amendment Act of 2022"

The Committee on Labor and Workforce Development, to which B24-109, "Cannabis Employment Protections Amendment Act of 2022" was referred, reports **favorably** and recommends approval, with amendments, by the Council of the District of Columbia.

CONTENTS

I. BACKGROUND AND NEED

A. Executive Summary

On February 25, 2021, Councilmember Trayon White introduced B24-109, "Prohibition on Marijuana Testing Act of 2021," which would prohibit marijuana testing as a condition of employment, except for certain positions or if testing is otherwise required by law. The bill was co-introduced by Councilmembers Christina Henderson, Charles Allen, Kenyan McDuffie, Robert White, and Brianne Nadeau. B24-109 was a re-introduction of legislation from the prior Council period, B23-266, the "Prohibition of Marijuana Testing Act of 2019." The Committee held a hearing on the 2019 legislation and is reporting on the 2021 legislation. The Committee has renamed the legislation "Cannabis Employment Protections Amendment Act of 2021" to reflect the Committee print's expanded scope and amendments to existing laws.

The purpose of this legislation is to address the disconnect between the District's legalization of cannabis and its employment laws. Even though cannabis is legal, workers can be—

and are—fired for using it in their personal time and without any causal link between cannabis use and job performance. This hurts District workers' employment prospects and livelihoods. One of the primary goals of this Committee is to ensure economic opportunity for District residents. Furthermore, in hearing testimony, there was widespread agreement, and this Committee concurs, that using legal cannabis should not have any impact on employment for most employees.

It's important to clarify the law so that both employers and employees understand what is acceptable. The print will provide rules of the road on the use of cannabis and its intersection with the workplace.

This is a very complicated issue. Cannabis is legal—and medical cannabis is used as a treatment for many conditions, often as an alternative treatment for medications like opioids that can be dangerously addictive. But cannabis also contains the chemical THC,[1] which is a psychoactive compound that causes cognitive impairment of temporary and unpredictable length.

Therefore, it's important to strike a balance between an employer's interest in a safe and healthy working environment and employees' rights as individuals and their medical needs. This print strikes that balance by providing employment protections to workers so they are not penalized for consuming a legal substance, but also provide important exceptions when safety or compliance with federal law is at issue. The print in Title I prohibits certain negative personnel actions (including firing, refusing to hire, or suspending employees) for an employee's legal use of cannabis off the clock, refusal to use cannabis if employees are pressured to use it, or status as a registered medical cannabis patient. It also prohibits negative actions for failure of a cannabis drug test (absent other reasons, such as performance), because such tests can't distinguish recency of use or current impairment. This means that most District employees will no longer be disciplined or terminated for their use of cannabis off the clock. However, employers can discipline employees who show signs of cannabis use or impairment at work if it would likely negatively affect the employee's performance or interfere with the employers' health and safety duties.

The print incorporates important exceptions. In sum, the print does not extend employment protections to workers in safety-sensitive jobs; if such protections would cause an employer to violate federal law or a federal contract; if an employee used or possessed cannabis at work; or if an employee were impaired at work in a way that negatively affected their performance or caused an unsafe work environment. The print also makes clear that employers can still have drug-free workplaces, may still prohibit impairment at work, and may still conduct drug testing (but the use of such tests' results is limited).

Additionally, in Title II, the print amends the DC Human Rights Act (HRA) to clarify how our existing law providing employment protections to workers with disabilities should be applied when a disabled worker uses medical cannabis. It would require employers to treat workers with disabilities the same whether they use medical cannabis or another prescription medication to treat the disability. This provision excludes workers in safety-sensitive roles as well as circumstances when an employer must deny an accommodation request in order to comply with a federal law or contract. However, employees in safety sensitive positions could ask for reassignment as a

[1] THC is tetrahydrocannabinol, a crystalline compound that is the main active ingredient of cannabis.

reasonable accommodation. If an employee seeks a reasonable accommodation under the HRA related to cannabis, employers may still prohibit impairment at work and do not have to accommodate cannabis that is smoked. Also, employees must have a health-care provider recommendation for the medical cannabis.

Employees whose jobs are designated "safety-sensitive" required special consideration. The Committee must strike a balance between workers' individual rights and the safety and well-being of the workers and their coworkers, any persons they supervise, and the public at large. On one hand are safety risks, which could result in serious injury or even death if an individual were to conduct their job under the influence of cannabis. On the other hand are workers who could lose their jobs if they used what is a legal substance—or who would not be able to partake of a medication that they, in consultation with a medical professional, believe is best for them. There is also a matter of liability to the District; indeed, most of the highest-risk positions, as determined by the number of workers compensation claims, are jobs that are deemed safety-sensitive.[2]

An important consideration is that there is currently no objective test to determine cannabis impairment. The lack of a suitable impairment test along with scientific research, the guidance of experts, and the analysis of injured workers' compensation claims all lead to the conclusion that it is not possible to ensure the safety of safety-sensitive employees, or the safety of those they supervise and the public, if the employees use cannabis. Therefore, the print does not extend the prohibition against adverse employment actions to employees in safety-sensitive jobs.

The print will apply to both public and private sector employers, including District government agencies not covered by the Comprehensive Merit Personnel Act. The print delays implementation: employers must begin complying with the bill one year after the Mayor signs the bill, and only if the bill has been funded.

The print requires an annual notice to workers of their rights under the law, as well as establishes several means of enforcement: employees may file administrative complaints to the Office of Human Rights or bring a private right of action in court, or the D.C. Attorney General may bring a case.

The legislation also makes conforming amendments to ensure all drug testing and related laws affecting District government employees are implemented in conformity with these new rights and protections.

B. Background and Need

The purpose of the print is to provide protections from adverse employment actions for District employees based on their use or non-use of cannabis, status as a medical cannabis patient, or failure of an employment-related drug test for cannabis. The Committee print will codify these rights as well as provide needed clarity on employees' rights or exclusion from those rights. The

[2] The portion of workers' compensation claims filed by safety-sensitive employees in District government was 81.8% in FY2021, 75.3% in FY2020 and 76.11% in FY2019. These figures do not include DCPS, DCHA, UDC, or MPD or FEMS sworn personnel (Source: Correspondence from the Office of Policy and Legislative Analysis, Dec. 13, 2019, and January 19, 2022).

print also provides interpretive guidance to help employers and others understand the limitations of the print's protections and certain actions or policies employers are *not* prohibited from taking. Additionally, the print clarifies the Human Rights Act's protection of employees with disabilities who utilize medical cannabis for treatment and need an associated reasonable accommodation at work.

> **Note on Terminology**
> This report and the print utilize the term "cannabis," except in provisions of the statutory language in the print that refer to or amend existing statutory language which uses the term "marijuana." This reflects the growing recognition that the term "marijuana" has historically been used in a pejorative way against some minority communities. "Cannabis" is increasingly the more commonly used, race-neutral term.

Initiative 71 and Medical Cannabis Program Establishment

In the District, both medical and recreational cannabis have been legalized. In 2010, the District passed and enacted D.C. Law 18-210 (effective from Jul 27, 2010) to legalize and regulate medical cannabis.[3] Since that time, thousands of individuals have registered with the DC Alcoholic Beverage Regulation Administration program, and as of December 2021, there were more than 12,000 registered medical cannabis patients.[4] Also, in 2015, District voters passed Initiative 71, which legalized the use or possession of recreational cannabis.

As cannabis consumption has become more common, it has posed questions and challenges related to employment and the workplace. Many employers test potential or current employees for the use of drugs, including cannabis, even though current tests do not identify impairment or how recently someone consumed it. Current law does not prohibit employers from disciplining or terminating employees who test positive for or who consume cannabis, whether medical or recreational. This means that many employees are at risk of losing their jobs, or not being hired in the first place, for their legal consumption of cannabis outside of work. Since cannabis is a legal substance in the District, medical cannabis patients and recreational users have pointed out the unfairness of this situation. Further, it can stifle economic opportunity for many workers and perpetuates stigma.

[3] Previously, in 1998, voters had passed Initiative 59 to legalize medical marijuana; however, it was not implemented when Congress passed a law restricting the ability of the District to use its local funds to implement the initiative. The federal law was later overturned, and Congress did not act in response to the 2010 Council-passed law.

[4] Alcoholic Beverage Regulation Administration, "Medical Cannabis Program Report, December 2021," available at https://abra.dc.gov/sites/default/files/dc/sites/abra/publication/attachments/MCP%20Metrics%20December%202021.pdf.

Racial disparities in cannabis-related employment policies

Drug testing disproportionately affects workers of color in the District of Columbia. For years, the Committee has been informed about the uneven distribution of drug testing in D.C.'s workplaces, with it most frequently occurring in lower-wage, in-person jobs held predominantly by Black and Latino workers. Research indicates this is not uncommon. Furthermore, there is a negative stigma about cannabis users, which is race-based. Doni Crawford of the DC Fiscal Policy Institute testified before the Council:

> The history of cannabis criminalization is rooted in racism and intentional efforts to harm Black and brown people. For many thousands of years, Eastern cultures used cannabis for a variety of purposes. Hemp fiber from the plant was used to make clothing, rope, paper, canvas, sails, and shoes. People also used cannabis during religious ceremonies, as an anesthetic for surgeries, and as a psychoactive. But early racist associations in the US connecting cannabis usage to violence in Mexican, Japanese, and Black communities laid the groundwork for cannabis prohibition and the "war on drugs"—both of which fueled unjust over policing and mass incarceration of Black and brown people. Criminalization directly harmed many Black and brown families' ability to be hired for a job, secure housing, receive federal financial aid for higher education and financial assistance to support their family, drive, own a business, vote, etc."[5] [internal citations removed]

Crawford also writes that "racist newspaper owners…drew false causations between the recreational usage of cannabis by Mexicans and an increase in crime and violence." [6] She cites federal government officials linking cannabis use to violence, targeting Black jazz musicians, Caribbean sailors, and the Japanese people. Movies in the early 1900s also drew the same racist connections, reinforcing the stigma of cannabis.

The District has more jobs that require pre-employment and regular drug screening than any other city in the country, according to a survey of jobs on Glassdoor by the American Addictions Centers.[7] Drug testing occurs more often in workplaces where racial and ethnic minorities are employed, according to a 2013 study by researchers at the Yale University of Medicine. A summary of the study reported that 63% of Black workers were employed in a workplace that performed drug testing, while only 46% of white workers were.[8] Further, "being of black race was significantly associated with employment in a workplace that performs drug testing among executive, administrative, managerial, and financial workers, as well as technicians

[5] Doni Crawford, "Testimony at the Public Hearing on the Comprehensive Cannabis Legalization and Regulation Act of 2021 and the Medical Cannabis Amendment Act of 2021," DC Fiscal Policy Institute, November 19, 2021, available at https://www.dcfpi.org/all/testimony-at-the-public-hearing-on-the-comprehensive-cannabis-legalization-and-regulation-act-of-2021-and-the-medical-cannabis-amendment-act-of-2021/.
[6] Doni Crawford, "First in Line." DC Fiscal Policy Institute, February 16, 2021, available at https://www.dcfpi.org/all/first-in-line/.
[7] American Addictions Centers, "An analysis of Employer Drug Testing in the United States, available at https://americanaddictioncenters.org/learn/analysis-employer-drug-testing/. The report notes that "government positions were the most common jobs to require a pre-employment drug test," thus the large number of government jobs in the District likely contributes to DC's high testing rate.
[8] Helen Dodson, "Racial differences exist in reports of workplace drug testing," Yale News, September 25, 2013, available at https://news.yale.edu/2013/09/25/racial-differences-exist-reports-workplace-drug-testing

and other support occupations. Hispanic ethnicity was associated with increased employment in a workplace that performs drug testing among technical and other support occupations."[9]

Moreover, people of color are more likely to be disciplined for failing a drug test, according to a survey of 1,500 workers: 9.2 percent of Black workers and 5.8 percent of biracial workers reported they were disciplined for failing a drug test, compared with 4.4 percent of white workers.[10]

Employers have begun to recognize the racial disparities of cannabis testing. For example, Amazon announced it would stop testing for cannabis in its pre-employment drug screening. Beth Galetti, senior vice president of human resources at Amazon, writes that "[p]re-employment marijuana testing has disproportionately affected communities of color by stalling job placement, and by extension, economic growth."[11] Other employers are moving in the same direction, with 9 percent of 45,000 employers surveyed in North America and Europe ending drug screenings to attract more employees.[12]

District government employees

The Council and Mayor have taken steps to align cannabis legalization with policies related to District government employees. The Mayor issued a Mayor's Order, updated regulations, and provided associated guidance to clarify the circumstances when employees might be penalized for off-hours use of cannabis, whether recreational or medical. For most employees, they are not subject to cannabis testing and thus will not be penalized for failing a test (although they may be disciplined for impairment during work hours). Notably, the policies consistently prohibit the use of cannabis by safety-sensitive employees, provide for random testing of such employees, and allow for their discipline should they test positive for cannabis.

Similarly, the Council passed L23-276 (effective from April 27, 2021), the Medical Marijuana Program Patient Employment Protection Amendment Act of 2020, which prohibited adverse employment actions against District government employees due to their status as a medical cannabis patient or failure of a cannabis metabolites drug test, with certain exceptions. This legislation greatly influenced and provided a framework for the committee print for B24-109.

Other states' laws

As more states legalize or decriminalize cannabis, more are providing employment protections to cannabis users. As of June 2021, 18 states plus the District allow small amounts of

[9] Ibid.
[10] American Addiction Centers/Detox.net, "Drugs at Work," available at https://detox.net/uncover/drugs-at-work/.
[11] Beth Galletti, "Amazon is supporting the effort to reform the nation's cannabis policy," November 24, 2021, available at https://www.aboutamazon.com/news/policy-news-views/amazon-is-supporting-the-effort-to-reform-the-nations-cannabis-policy?asc_campaign=commerce-pra&asc_refurl=https%3A%2F%2Fwww.businessinsider.com%2Famazons-labor-shortage-solution-relax-cannabis-testing-2021-9&asc_source=browser&tag=thebusiinsi-20.
[12] NORML, "Survey: Nearly One-in-Ten Employers Dropping Drug Testing Requirements to Attract Workers," November 18, 2021, available at https://norml.org/news/2021/11/18/survey-nearly-one-in-ten-employers-dropping-drug-testing-requirements-to-attract-workers/.

cannabis for personal non-medical use.[13] Of these, five protect off-duty recreational use of cannabis for employees (i.e. provide employment protections): Illinois,[14] Montana,[15] Nevada,[16] New Jersey,[17] and New York.[18] Nevada has a carveout for employees in safety-related jobs; the other states' laws speak to safety but do not specifically exclude safety-sensitive workers; no state protects employees who are impaired at work. Almost all of the 18 states still allow employers to conduct cannabis drug testing, although several limit the when the test can be administered or how it may be used.[19]

Furthermore, 36 states and the District have legalized medical cannabis.[20] Of these, at least 15 states protect medical cannabis patients from adverse employment actions. However, most of these do not extend these protections to patients with safety-sensitive positions. Of those, 11 states do not extend protections to safety-sensitive workers for risk of harm to people or property.

The states that exclude safety-sensitive jobs take different approaches to codifying the exclusion, including explicitly carving out safety-sensitive workers from employment protection statutes, prohibiting safety-sensitive employees from performing their duties with a certain blood

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[13] Michael Hartman, "Cannabis Overview," National Conference of State Legislatures, July 6, 2021, available at https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx. See also Iris Hentze, "Cannabis and Employment Laws," National Conference of State Legislatures, Nov. 1, 2021, available at https://www.ncsl.org/research/labor-and-employment/cannabis-employment-laws.aspx.

[14] Illinois Cannabis Regulation Tax Act (CRTA), establishes what an employer may do (or is not restricted from doing) regarding the workplace and employment (see Illinois Compiled Statutes, Sec. 10-50, available at https://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=041007050K10-50). Additionally, the Right to Privacy in the Workplace Act prohibits employers from terminating employment because of an employee's personal or recreational use of lawful products, including cannabis, out outside of the workplace during nonworking, off-call hours (See Compiled Statutes 55-5, available at https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2398&ChapterID=68).

[15] Elizabeth McKenna, Joe Greener, Lauren Marcus, and Michelle Gomez, "Montana Legalizes Marijuana for Recreational Use and Will Protect Lawful Off-Work Use," May 25, 2021, available at https://www.littler.com/publication-press/publication/montana-legalizes-marijuana-recreational-use-and-will-protect-lawful; Montana House Bill 701, "AN ACT GENERALLY REVISING LAWS RELATED TO THE REGULATION AND TAXATION OF MARIJUANA…" pages 56 and 98 (amending Sections 39-2-313 and 16-12-108 of the Montana State Code), available at https://leg.mt.gov/bills/2021/billpdf/HB0701.pdf.

[16] Nevada Assembly Bill 32 (2019), available at https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6191/Text; Note the law applies to drug tests prior to and during the first 30 days of employment.

[17] "New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act," approved Feb. 22, 2021, available at https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A21 (see section C.24:6I-52).

[18] New York state law, Chapter 31, Article 7, Section 201-D, available at https://www.nysenate.gov/legislation/laws/LAB/201-D.

[19] GovDocs, "Recreational Marijuana: What Employers Need to Know," April 2021, available at https://www.govdocs.com/home-page/resources/guides/recreational-marijuana-what-employers-need-to-know/. Note that this document does not reflect Montana's employment protections, which were implemented Jan. 1, 2022, and that Maine repealed its voter initiative-approved employment protections.

[20] National Conference of State Legislatures, "State Medical Cannabis Laws," Nov. 29, 2021, available at https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx and Iris Hentze, "Cannabis and Employment Laws," National Conference of State Legislatures, Nov. 1, 2021, available at https://www.ncsl.org/research/labor-and-employment/cannabis-employment-laws.aspx (Virginia has since provided employment protections to medical cannabis users).

content of THC/ml, or not requiring accommodations for medical cannabis use if doing so would unreasonably pose a safety risk to people or property.

Generally, states' statutes are silent on how to determine impairment from cannabis while on-duty. In several states, impairment is determined by the employee's supervisor. In drafting the Committee print for L23-276, Committee staff spoke with human resources representatives of public agencies in these states. Without specifications in the statutes, implementing protections for safety-sensitive employees who cannot report to work impaired was cited as "tricky" and "unclear." Delaware and Minnesota, for example, leave it up to individual state agencies to develop policies for determining impairment; these policies usually rely on an employer's "reasonable suspicion" that an employee is under the influence. Some agencies may require a "Report of Workability" if there is reasonable suspicion that an employee is impaired.

Some cities, as well, require a Report of Workability or Fit for Duty medical examination in order for safety-sensitive employees to continue to work. The Drug-free Workplace policies of Chicago, Portland, and Seattle describe that employees may be required to provide written documentation that they can safely perform their job duties. However, since Washington state and Oregon do not have any employment protections for medical cannabis patients, Seattle and Portland employers can terminate or refuse to hire any employee simply based on their status as a cardholder if the employer believes the medical cannabis recommendation is likely to impair the performance of essential job duties.

The science of marijuana, impairment, and testing

Cannabis is legal, but it contains a mind-altering chemical. Therefore, policymakers must carefully consider how to balance employers' desire and right to maintain a safe and sober workplace with the private rights or medical needs of individual workers. The Committee carefully considered the science behind cannabis, including whether and how to test for impairment. Many advocates testified in the hearing that individuals should be judged by their work performance, rather than simply a test for whether they use a legal substance. Furthermore, current testing is severely limited in that there is no objective test that can detect impairment from cannabis.

In working to develop the legislation in L23-276, the Committee spoke with experts referred by the National Institutes of Health and reviewed research recommended and found independently. The Committee concluded at the time that it was not possible to safely permit safety-sensitive employees to use medical cannabis. Since passage of that law, testing has not advanced sufficiently, in that cannabis tests are still unable to detect current cannabis cognitive impairment, and as a result, the Committee's earlier conclusions as to appropriate policy are still relevant.

To sum up the expert advice and research shared with the Committee:[21] There is currently no reliable and objective test for cannabis impairment. While many medicines as well as alcohol

[21] For a brief overview of the matter, see, John Howard, L. Casey Chosewood, Lore Jackson-Lee, and Jamie Osborne, "Cannabis and Work: Implications, Impairment, and the need for Further Research," Centers for Disease Control and Prevention, June 15, 2020, available at https://blogs.cdc.gov/niosh-science-blog/2020/06/15/cannabis-

may be measured by level, and a certain threshold set below or above which impairment may be inferred, that is not possible for cannabis. Indeed, several hearing witnesses pointed out that a positive urinalysis result for cannabis does not indicate impairment, abuse, or addiction, or the recency, frequency or amount of use.[22] Yet cannabis stays in the body in both blood and urine up to many weeks at a time, even after cessation in a closed environment.[23] This is a key difference from alcohol, which metabolizes and exits the body usually in a matter of hours. Newer oral fluid tests can detect use within the previous 24 hours—as opposed to a urinalysis which may detect cannabis use that occurred several weeks prior—but the oral tests cannot detect impairment nor currently being under the influence, nor may they detect cannabis ingested non-orally.[24]

Furthermore, the impairment effects of cannabis and the amount of time the effects last depend on dose and potency, when it was taken, frequency of use, individual body composition, and other individual factors.[25] Thus, at this time, there is no reliable way to generalize or have a universal threshold or test. Furthermore, individuals may not be aware they are impaired,[26] and because cannabis builds up in the body of frequent users, without time to dissipate before the next

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and-work/. See also Bergamschi, et al, "Impact of Prolonged Cannabinoid Excretion in Chronic Daily Cannabis Smoker's Blood on Per Se Drugged Driving Laws," *Clinical Chemistry*, Vol. 59, No. 3, 2013, pages 519-526 (concluding "Cannabinoids can be detected in blood of chronic daily cannabis smokers during a month of sustained abstinence. This is consistent with the time course of persisting neurocognitive impairment reported in recent studies); Bosker, et al., "Psychomotor Function in Chronic Daily Cannabis Smokers during Sustained Abstinence," *PLOS one*, January 2013, Vol. 8, Issue 1 (concluding: "sustained cannabis abstinence moderately improved critical tracking and divided attention performance in chronic, daily cannabis smokers, but impairment was still observable compared to controls after 3 weeks of abstinence…"); J. Hirvonen, et al, "Reversible and regionally selective downregulation of brain cannabinoid CB_1 receptors in chronic daily cannabis smokers," *Mol Psychiatry*, June 2011, Vol. 17, No. 6, pp. 642-649 (concluding, "Chronic cannabis (marijuana, hashish) smoking can result in dependence…"); and Jennan Phillips, et al, "Marijuana in the Workplace: Guidance for Occupational Health Professionals and Employers," Joint Guidance Statement of the American Association of Occupational Health Nurses and the American College of Occupational and Environmental Medicine, *Workplace Health and Safety*, vol. 63, No. 4, April 2015 (summarizing relevant issues and research, including an appendix with summaries of dozens of studies).

[22] For example, see Tyler McFadden, Testimony of National Organization for the Reform of Marijuana Laws (NORML), before the Council of the District of Columbia Committee on Labor and Workforce Development, September 25, 2019, available in Attachment 5, page 2 of the testimony; and Queen Adesuyi, Testimony of Drug Policy Alliance, before the Council of the District of Columbia Committee on Labor and Workforce Development, September 25, 2019, available in Attachment 5, page 1 of the testimony.

[23] Bergamschi 2013.

[24] Hound Labs, "How long can marijuana be detected in drug tests?" available at https://houndlabs.com/2018/09/06/how-long-can-marijuana-be-detected-in-drug-tests/ ; Premier BioTech, "Debunking Oral Fluid Drug Testing Misconceptions," available at https://premierbiotech.com/innovation/debunking-oral-fluid-drug-testing-misconceptions/.

[25] Jennan Phillips, et al, "Marijuana in the Workplace: Guidance for Occupational Health Professionals and Employers," Joint Guidance Statement of the American Association of Occupational Health Nurses and the American College of Occupational and Environmental Medicine, *Workplace Health and Safety*, vol. 63, No. 4, April 2015.

[26] J.A. Yesavage, "Carry-over effects of marijuana intoxication on aircraft pilot performance: a preliminary report," *American Journal of Psychiatry*, Nov. 1985, Vol. 142, Nov. 11, pages 1325-9 (Abstract: "Ten experienced licensed private pilots were trained for 8 hours on a flight simulator landing task. They each smoked a cigarette containing 19 mg of delta 9-tetrahydrocannabinol (THC), and 24 hours later their mean performance on the flight task showed trends toward impairment on all variables, with significant impairment in number and size of aileron changes, size of elevator changes, distance off center on landing, and vertical and lateral deviation on approach to landing. Despite these deficits, the pilots reported no awareness of impaired performance…").

dose, it may cause impairment for weeks after last use. The National Institute on Drug Abuse (NIDA) notes that "Research has shown that marijuana's negative effects on attention, memory, and learning can last for days or weeks after the acute effects of the drug wear off, depending on the person's history with the drug. Consequently, someone who smokes marijuana daily may be functioning at a reduced intellectual level most or all of the time."[27] DC Health notes the negative impact on cognition, especially for long-term users or with fetal or adolescent exposure.[28]

Expert groups, including the National Safety Council, American Association of Occupational Health Nurses, and American College of Occupational and Environmental Medicine conclude that the only safe option is to disallow use of cannabis by safety-sensitive employees.[29]

Documenting impairment

Without an objective, biological test to rely on to determine impairment, human resources organizations as well as the District's Department of Human Resources (DCHR) rely, at least in part, on observation of likely signs of impairment. Sometimes referred to as "reasonable suspicion," these observations may be a prerequisite for a cannabis drug test or may form the basis of corrective or adverse actions.[30] For example, the Society for Human Resource Management provides information on "How to Document Reasonable Suspicion," and DCHR provides training, written guidance, and a worksheet to document observations.[31]

[27] National Institute on Drug Abuse, "How does marijuana use affect school, work, and social life?" last updated July 2020, available at https://www.drugabuse.gov/publications/research-reports/marijuana/how-does-marijuana-use-affect-school-work-social-life.
[28] DC Department of Health, "Medical Cannabis - Adverse Effects & Drug Interactions," undated, available at https://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/Medical%20Cannabis%20Adverse%20Effects%20and%20Drug%20Interactions_0.pdf.
[29] National Safety Council, "Position/Policy Statement: Cannabis Impairment in Safety-sensitive Positions," Oct. 21, 2019, available at https://www.nsc.org/getattachment/e6e02b9a-2844-4a5d-b5b3-222fc03d5b70/w-cannabis-impairment-safety-sensitive-positions-153?uh=0629bbf10dd7f5a258edb16dbc8c8794498ad89d46e324ede600b84468628796; Jennan Phillips, et al, "Marijuana in the Workplace," April 2015 ("The Joint Task Force recommends that marijuana use be closely monitored for all employees in safety-sensitive positions, whether or not covered by federal drug-testing regulations. Best practice would support employers prohibiting marijuana use at work."); Brendan Adams, MD, "Marijuana and the Safety-sensitive Worker: A Review for CLRA [Construction Labor Relations-Alberta]," (summarizing the relevant issues and research and concluding, "The only rational manner in which to proceed is to prohibit the use of the drug in safety-sensitive tasks…In summary, the use of THC in the safety-sensitive work place, based on a preponderance of evidence demonstrating significant psychomotor impairment from various sources, is unacceptable.").
[30] Strictly, "reasonable suspicion" refers to government searches and forms a standard under the Constitution's Fourth Amendment which protects against unreasonable searches. However, many private sector employers use the term colloquially.
[31] Society for Human Resource Management, "How to Document Reasonable Suspicion," available at https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/documentingreasonablesuspicion.aspx; DCHR, "Reasonable Suspicion Referral Drug & Alcohol Testing," District Personnel Instruction No. 4-39, Oct. 6, 2017, available at https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/edpm_4_39_reasonable_suspicion_referral_drug_and_alcohol_testing.pdf.

Relatedly, law firms that advise employers have by and large pointed out the difficulty for employers to determine impairment.[32] This can create untenable risks if an employee is in a safety-sensitive position. Additionally, an employee-side attorney who has handled cases related to cannabis and employment in other states and who spoke confidentially with the Committee said that clarity is very important. He advised that it would be better to explicitly exclude employees in safety-sensitive jobs rather than to leave it ambiguous, allow individual supervisors to determine impairment, or leave it to be dealt with in courts.

Workers' compensation considerations

The Committee also reviewed information regarding cannabis use and occupational injuries. A hearing witness advocating for cannabis consumers cited a National Academy of Sciences review of studies, which stated that there is insufficient or no evidence to support or refute a statistical association between cannabis use and occupational accidents or injuries.[33] Yet there is a wide range of research on this topic. NIDA cites a study showing increased occupational injuries and absenteeism among postal workers who tested positive for marijuana.[34]

Another consideration is the propensity for injury of safety-sensitive employees. According to the Executive, "Positions are designated as safety-sensitive for two reasons: danger to self and danger to others. Just because a position is designated as safety-sensitive would not mean that job class has a higher or lower injury rate. It is more about the risk of harm and liability/litigation."[35] Even so, in the District's experience, the vast majority of workers' compensation claims are filed by safety-sensitive employees: They filed 82% of claims in FY2021, 75%, in FY2020, and 76% in FY2019.[36] These figures do not include District of Columbia Public Schools, District of Columbia Housing Authority, University of the District of Columbia, Metropolitan Police Department sworn personnel, or Fire and Emergency Medical Services Department sworn personnel, which include at least some safety-sensitive personnel.

Because cannabis tests do not indicate impairment, when someone is injured, there is no way to objectively determine impairment or even how recently it was used. Current District law excludes from workers' compensation coverage injuries of District government workers that are "Proximately caused by the intoxication of the injured employee" (D.C. Official Code §1-

[32] See for example, "David Holmes, "Smoking Cannabis Legally in Illinois: What's an Employer to Do?" National law Review, available at https://www.natlawreview.com/article/smoking-cannabis-legally-illinois-what-s-employer-to-do; Mark Diana and Michael Riccobono, "Recreational Marijuana Is Legal in New Jersey: What Employers Need to Know," Feb. 23, 2021, available at https://ogletree.com/insights/recreational-marijuana-is-legal-in-new-jersey-what-employers-need-to-know/; David Burton, "Virginia Legalizes Marijuana and Bolsters Employee Protections: What Employers Need to Know," Williams Mullen, April 30, 2021, available at https://www.jdsupra.com/legalnews/virginia-legalizes-marijuana-and-3715741/; Scott Horton, "New York Law Protects Employee Marijuana Use," April 1, 2021, available at https://www.jdsupra.com/legalnews/new-york-law-protects-employee-1275108/.

[33] McFadden, 2019, p. 2, footnote 3. (The primary source is available at https://www.ncbi.nlm.nih.gov/books/NBK423845/pdf/Bookshelf_NBK423845.pdf, see pages 217 and 222-227.)

[34] National Institute on Drug Abuse, 2019.

[35] Correspondence from the Office of Policy and Legislative Analysis, Dec. 13, 2019.

[36] Correspondence from the Office of Policy and Legislative Analysis, Dec. 13, 2019, and Jan. 19, 2022.

623.02(a)(3)).[37] In this context, there are two possible outcomes that would not be acceptable. One possibility is that a cannabis user might be *eligible* for workers' compensation even if their impairment caused the injury. On the other hand, an employee could be *ineligible* for workers' compensation even if they were not impaired (but failed a drug test, which as noted, finds use but does not measure impairment). To forestall these possibilities, and especially to ensure that injured workers don't lose access to workers' compensation benefits and coverage, a prohibition on cannabis use by individuals in safety-sensitive (high-injury) positions is warranted.

Application of the ADA and DCHRA

At the time of this writing, there is no case law explicitly stating how the District's Human Rights Act (HRA) applies to medical cannabis patients. The HRA prohibits employment discrimination on the basis of an employee's disability, among other things, and is interpreted as providing protections largely in line with the protections found in the federal Americans with Disabilities Act (ADA). The ADA generally protects workers' use of prescription medicine to treat their disabilities; however, because cannabis is illegal under federal law, the ADA's protections do not extend to individuals with disabilities who use medical cannabis for treatment. The HRA does not explicitly prohibit protection of individuals who use medical cannabis to treat their disabilities but because courts tend to rely on interpretations of the ADA to interpret the HRA the rights of medical cannabis users with disabilities under the HRA remain uncertain. Presently, there is also no case law extending the HRA's protections to users of medical cannabis. However,at least one court has suggested that the HRA, while protecting against discrimination the basis of disability, does not protect medical cannabis users from termination under an employer's anti-drug policy if they test positive for cannabis.[38]

Before passage of L23-276, at least some DC government agencies had been providing accommodations in practice when possible.[39] That law codified such practice by requiring accommodation of the use of medical cannabis for DC government employees, provided it did not require accommodation of employees in safety-sensitive positions, the accommodation of the use or administration of cannabis at the workplace or during work hours, or impairment by the employee at work or during work hours.

[37] The private sector workers' compensation program is less strict, in that it states, "Liability for compensation shall not apply where injury to the employee was occasioned *solely* by his intoxication or by his willful intention to injure or kill himself or another" (Emphasis added) (D.C. Code § 32–1503(d)).

[38] *See Coles v. Harris Teeter, LLC*, 217 F. Supp. 3d 185, 188 (D.D.C. 2016). A pending case that may have bearing is *Barber v. District of Columbia*, filed October 4, 2019, by the American Civil Liberties Union of DC. See ACLU District of Columbia, "Barber v. District of Columbia - Defending Employment Rights of a Medical Marijuana Patient," October 2019, available at https://www.acludc.org/en/cases/barber-v-district-columbia-defending-employment-rights-medical-marijuana-patient.

[39] See discussion of DPW's handling of such requests in the Committee report on L23-276: Committee on Labor and Workforce Development, "Report on B23-309, "Medical Marijuana Program Patient Employment Protection Amendment Act of 2020," Oct. 27, 2020, p. 13, available at https://lims.dccouncil.us/downloads/LIMS/42678/Committee_Report/B23-0309-Committee_Report2.pdf.

C. Committee Print

The committee print makes several changes to the introduced legislation. The introduced bill would prohibit pre-employment testing of job applicants,[40] but it did not provide protections during employment. This meant that while employees might be hired because their employer would not know of the applicant's use of cannabis, the employee could be tested on their first day of work or any day following, and subject to termination or other penalties at that point. Rather than prohibit drug testing, the print does prohibit the *use* of such tests alone as the basis for punitive personnel actions—including refusal to hire, termination, suspension, or demotion—by employers of both job candidates and current employees. The print also prohibits such personnel actions because an employee uses cannabis, does not use cannabis, or because the employee is a medical cannabis program patient under the District's or another state's medical cannabis program.

Also, like the introduced bill, the print places limitations on employment protections by specifying that the print's employment protections do not extend to an employee who is impaired by, using, or in possession of cannabis at the employee's place of employment or during work hours. Both the introduced bill and print make sure that the District's law allows for adherence to federal laws, regulations, contracts or grants. Both the introduced bill and print specify that the employment protections do not apply to employees in jobs that could impact health or safety, termed in the Committee print as "safety-sensitive" positions. The introduced version and the print contain rules of construction to help interpret the employment protections' limitations.

Finally, the print contains additional provisions: it requires notice to employees of their rights under the law; authorizes administrative complaints to the Office of Human Rights and private causes of action, establishes remedies, and authorizes enforcement by the Office of the Attorney General. The print, in Title II, clarifies how the District's Human Rights Act is to be applied with respect to people with disabilities and treatment regimens that involve medical cannabis, which, in turn, should impact how employers must treat requests for reasonable accommodations of their disabilities. Title III contains conforming amendments, and Title IV contains standard provisions, including the effective and applicability dates and fiscal impact statement provision.

Title I: Employment Protections

Section 101: Definitions

Employee and employer coverage

Title I applies to both public and private sector employers. District government employers are defined broadly, including agencies that are exempt from the District of Columbia Government Comprehensive Merit Personnel Act (CMPA). This means that District agencies such as the Office of the Chief Financial Officer and DC Water are covered by this print. The Council is also covered, and it will have its own rulemaking authority, as is standard practice. The court system and federal government are excluded, as is the norm in District employment laws.

[40] There is an existing law that prohibits testing before a conditional offer of employment is made. *See* D.C. Code. § 32-931. The introduced B24-109 would have prohibited any pre-employment test.

On the private sector side, employers are any business or organization which employs an individual for compensation, excluding certain close family members. Furthermore, employee is defined broadly and explicitly includes unpaid interns. Both terms closely follow definitions in the Human Rights Act, to ensure that the Office of Human Rights, in enforcing the provisions of B24-109, may rely on existing policies and practices for more efficient stand-up of the enforcement program. Also, in response to hearing witness testimony, the Committee notes that "employee" is to be interpreted to include apprentices.

Sec. 102(a) Prohibition on termination and other actions

The print in Title I creates a new law, rather than amending existing law. Section 102(a) prohibits specific employment actions based on four categories: use of cannabis;[41] non-use of cannabis; status as a medical cannabis program patient; and an employee's failure to pass a cannabis drug test. The prohibited employment actions are refusal to hire, termination from employment, suspension, failure to promote, demotion, or penalization.

1. Protecting "use of cannabis"

The print specifies that in order to be covered under the first category, an individual's use of cannabis must be lawful under District law, which precludes employment protections for minor-age workers or individuals who smoke cannabis outdoors in public settings. This, of course, applies solely to use outside of work hours; employers may prohibit use of cannabis at work and during work hours.

2. Protecting "non-use of cannabis"

The print prohibits punitive personnel actions against an employee because an employee does *not* use cannabis. Such a provision is in the New Jersey employment protections law. It is included in the print, in part, in response to several witnesses at a hearing of a cannabis regulation bill (B24-118) who advocated use of cannabis. Protecting non-use ensures that employees of businesses in which cannabis consumption may be encouraged are not penalized for refusing to use it. An employee's refusal to use any substance, including cannabis, should not be the basis of any employment action.

3. Protecting "status as a medical cannabis program patient"

The print ensures that individuals who are registered medical cannabis patients are not penalized for that registration status. As a general matter, employers should not be permitted to terminate employees for their participation in a state-sponsored medical cannabis program, and the print reflects that principle with narrow exceptions. However, this provision, on its own, does not

[41] "Cannabis" under the District of Columbia Uniform Controlled Substances Act of 1981 includes both "marijuana" and "hashish" (see D.C. Code §48-901.02(3)(A)). However, only "marijuana" has been legalized in the context of the Controlled Substances Act (§48-904.01(a)(1)(A)) and "medical marijuana" under the Legalization of Marijuana for Medical Treatment Initiative of 1999 (§7-1671.01(11). Title I of this bill defines "cannabis" as "marijuana," so that the employment protections apply only to the legalized substance.

necessitate employers to accommodate the use of medical cannabis as they might do for workers with disabilities (and not all medical cannabis users are disabled within the meaning of the District's Human Rights Act). For such protections, workers and employers should look to the Human Rights Act, including the amendment proposed in Title II of this legislation; see discussion below.

4. Protecting "Failure to pass an employer-required or requested drug test for cannabis components or metabolites"

Finally, failure of a cannabis drug test, by itself, may not be the basis of a negative personnel action. The Committee sets this policy because of the limitations of cannabis testing currently. As discussed above in the Background section, cannabis tests do not detect cognitive or physical impairment. Further, some tests detect any cannabis use over the past several weeks, not just recently, let alone recent use with current and continuing impact on the individual tested. Essentially, without this provision, employers could terminate someone simply for being a user of a legal substance—even if that use was entirely on their personal time and there was no impact on them during work time or on their work performance (as employers may and do under current law). This said, employers are not prohibited in this bill from conducting tests, but the use of those test results is constrained.

Sec. 102(b) Exceptions to protections

The print in Section 102(b) provides four exceptions to the protections in subsection (a). Under these circumstances, the protections would not apply. First, the print excludes employees in safety-sensitive positions. Second, the protections won't apply if compliance with section 102(a) would cause the employer to violate a federal law, rule, contract, or funding agreement. Third, employees are not protected from the listed negative personnel actions if they use, consume, possess, or take other actions involving cannabis at the workplace or during work hours. Fourth, and finally, employees will not be protected from personnel actions if they are impaired at work or during work hours. The specifics of each of these policies are elaborated on below.

1. Safety-sensitive positions

How to treat safety-sensitive positions in the legislation has been a matter of significant consideration and discussion by the Committee. The Committee does not lightly make this recommended exclusion; however, it is the policy that is necessary to best ensure a safe working environment for workers and the public. It will ensure employers can maintain a safe environment, as discussed above in the Background section. This also comports with existing District law L23-276 applicable to District government employees who are medical cannabis patients.

As discussed above, there is no risk-free or guaranteed safe way to allow safety-sensitive employees to utilize cannabis without an objective test that can accurately detect current impairment. Cannabis binds to cells such that a chronic user may be impaired for weeks after last use. Tolerance is never complete, and daily use can affect cognitive functioning such that an employee is operating at a reduced level all the time. Further, users may not be aware they are impaired. The National Safety Council and other leading health and safety organizations

recommend that safety-sensitive employees do not use cannabis at any time. Some studies show that use of cannabis is associated with increased occupational injuries. Additionally, the Committee wants to ensure that workers' compensation is available to injured workers, but a worker is ineligible if an injury is caused by impairment. Further, safety-sensitive employees are most prone to workplace injuries: 82% of workers' compensation claims in FY2021 among most District government employees are from safety-sensitive employees.[42] Finally, business associations and the Executive universally called for an exemption of safety-sensitive jobs from the employment protections. This means the status quo –i.e., employers' right to prohibit use of cannabis by safety-sensitive workers – will continue for workers in these jobs.

Definition of "safety-sensitive"

The Committee print uses the same definition of "safety-sensitive" as in L23-276, with the notable addition of examples of jobs that *might* be safety-sensitive. The Committee previously put considerable thought and effort into shaping the definition in the context of its work into that law.[43] How to define "safety-sensitive" had been the subject of many concerns and complaints to the Committee, in particular that many District government jobs were designated safety-sensitive which jobholders did not feel was appropriate. The Committee thus conducted a very close review of the definition, previously contained only in regulations. The Committee both codified the definition within the CMPA and refined it in several ways to ensure the language of the definition met the spirit and the intent of the policy.

> "Safety-sensitive" means a position, as designated by the employer, in which it is reasonably foreseeable that, if the employee performs the position's routine duties while under the influence of drugs or alcohol, the employee could suffer a lapse of attention or other temporary deficit that would likely cause actual, immediate, and serious bodily injury or loss of life to self or others.

There are multiple components to the definition: which duties may drive a safety-sensitive designation, how likely it is that impairment could result in injury, and the level of injury that could occur.

On the first point, the definition was narrowed to "routine" duties in L23-276. These are duties that are commonplace and performed as a regular course of established procedure. They are not rare or unpredictable. The Committee decided not to use the term "regular" duties, as those are performed on an established frequency or interval, which is not intended here.

Second, the likelihood that injury could occur if the routine duties are performed while impaired must not be negligible. Nor is injury entirely predictable. It is impossible to quantify a

[42] The portion of workers' compensation claims filed by safety-sensitive employees in District government was 81.8% in FY2021, 75.3% in FY2020 and 76.11% in FY2019. These figures do not include DCPS, DCHA, UDC, or MPD or FEMS sworn personnel (Source: Correspondence from the Office of Policy and Legislative Analysis, Dec. 13, 2019, and January 19, 2022).

[43] See full discussion of the definition as revised in L23-276 in the associated Committee report, pages 4-15 available at https://lims.dccouncil.us/downloads/LIMS/42678/Committee_Report/B23-0309-Committee_Report2.pdf.

general and numerical probability of the risk. The law requires injury to be both "reasonably foreseeable" and "likely".

Finally, the definition provides that the possible resulting injury would be "actual, immediate, and serious bodily injury or loss of life." The print uses the term "serious bodily injury" instead of "permanent bodily injury" because "serious bodily injury" is defined in the well-regarded legal dictionary, *Black's Law Dictionary*, and thus there exists a readily available interpretive guide.[44]

A new element in the Committee print for B24-109 is the inclusion of a non-exhaustive list of examples of jobs or job duties that *might* warrant the position to be designated as "safety-sensitive." This list is not exhaustive, nor is it definitive. A job listed there may safety-sensitive, but an employer will need to analyze each job independently, based on the legal definition, the specific job duties of that position, and a fact-based analysis of safety risk in that job, to ensure it rises to the level of safety risk incorporated in the definition. The list is intended to help guide employers who have not previously had to make job designations like this, but it is not in and of itself a defined list of safety-sensitive jobs.

The Committee stresses that determining if a job is safety-sensitive must be done on an individual job-level basis, based on the duties of the particular position, and not based solely on job title. Employers will be responsible for make these determinations.

This is different from the introduced bill, which listed jobs to be excluded full stop. The print's list is intended to assist private sector employers, particularly those without an existing program to designate jobs as safety-sensitive (termed in DC government "suitability" designations).[45] However, it's important that jobs are not designated as exempt without them meeting the definition of "safety-sensitive," to ensure employees' rights are not unduly curtailed. In development of L23-276, multiple employees from the public sector spoke to the Committee about their concern that their jobs were wrongly designated as safety-sensitive. In the current print, the list should not be interpreted as definitive: even if a job or duty appears on the list, each specific position must meet the definition provided. These jobs or duties are as follows:

- Involve the provision of security services, such as police, special police, and security officers, or the custodianship, handling, or use of weapons, including firearms;
- Require regular or frequent operation of a motor vehicle, heavy equipment, or machinery;
- Require occupational safety training, including construction work;
- Require the supervision of individuals who are unable to care for themselves or who reside in an institutional or custodial environment; or

[44] "Serious bodily injury is "A serious physical impairment of the human body; esp., bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement or protracted loss or impairment of the function of any body part or organ. Typically, the fact-finder must decide in any given case whether the injury meets this general standard. Generally, an injury meets this standard if it creates a substantial risk of fatal consequences or, when inflicted, constitutes mayhem."

[45] See for example, Lisa Nagele-Piazza, "What Is a 'Safety-Sensitive' Job Under State Marijuana Laws?" Society for Human Resource Management, October 5, 2021, available at https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/what-is-a-safety-sensitive-job-under-state-marijuana-laws.aspx.

- Require administration of medications or the provision of medical treatment or life-saving measures.

2. Federal law, contracts, and funding agreements

The second exception from the employment protections in section 102(a) is if compliance would require an employer to violate a federal law, regulation, contract, or funding agreement. Given that cannabis is illegal under federal law, many federal laws and contracts set requirements to prohibit use of cannabis by workers. For example, Department of Transportation regulations require drug testing of truck drivers, and the test must include cannabis. Also, the Federal Drug Free Workplace Act requires employers, including many state government agencies, that receive federal funding, to maintain drug-free workplaces, including by prohibiting the use or possession of cannabis (a federal controlled substance) in their workplaces (This is not a conflict with Title I of B24-109, but relevant.)[46] Note that this law does not govern off-duty use.[47] Some Federal Drug Administration regulations may apply to hospitals and their staffs. This provision of the print will ensure no employer is required to violate such laws—which District law cannot do—nor risk federal funding that may come with rules to drug test employees working on such grants or contracts.

3. Use, possession, or other actions

The Committee's intent in this legislation is to protect workers' employment; however, this does not mean that employers must accept cannabis in their workplaces in any way. As such, an employee is not protected from certain negative personnel actions if they use, consume, possess, store, deliver, transfer, display, transport, sell, purchase, or grow cannabis at the workplace or during work hours.

This language means that employees may be disciplined if they, for example, have cannabis in their locker at work, bring cannabis into work to sell it, or use it during work time (including while working remotely).

However, if an employee has a reasonable accommodation that would require the employee to use or possess medical cannabis at work or during work hours, that use or possession would be protected.[48] This print clarifies that the District's Human Rights Act (HRA) should be interpreted in terms of its protection of people with disabilities who use medical cannabis the same as if they used prescription medications; on amendments to the HRA, see further discussion in this report in the section on Title II of the print.

[46] The federal Drug Free Workplace Act applies to District agencies that are federal grantees; see 41 U.S. Code § 8103.
[47] Maynard Cooper, Medical Marijuana and the Drug-Free Workplace Act," October 17, 2019, available at https://www.maynardcooper.com/blog/medical-marijuana.
[48] Note that the CMPA, as passed in L23-276 (see D.C. Code §1-620.62), allows reasonable accommodation of an employee's medical cannabis use with limitations, but an accommodation for use at work is not required.

4. Impairment affecting job performance

Finally, employees will not be protected from personnel actions if they are impaired on the job in a way that will negatively affect their job performance. This is a critically important issue. The two most important policies here are that the employer can articulate the symptoms of cannabis use or impairment *and* that such symptoms are substantially likely to negatively affect job performance or interfere with the employer's obligation to provide a safe and healthy workplace under local and federal laws. Examples of symptoms of cannabis impairment that might affect performance are problems with memory, loss of coordination, slurred speech, and difficulty problem-solving. The Committee notes that in practical terms, this exception will be most relevant only for employees who are *not* in safety-sensitive roles: employees in safety-sensitive jobs may be disciplined for failing a drug test; for other employees, employers may take action if the employee's performance is impacted. This means that if safety is a significant issue for that employee's job, it is unlikely that an employer would need to rely on this exception to take disciplinary action.

Impact on performance is the touchstone element here and was a key point of many witnesses' testimony during the hearing. An employer should only base a personnel action on poor performance, rather than on, for example, a smell, bloodshot eyes, or other presentation that may not mean someone used cannabis or that they are actually unable to perform at their usual level. For example, an employee may pick up a scent from a roommate; they may have bloodshot eyes because of lack of sleep.

Furthermore, an employer can *always* take a negative personnel action against an employee who is performing sub-par, regardless of whether that performance is due to cannabis use or other reasons. This legislation does nothing to change that. It prevents knowledge of or conjecture about an employee's use of cannabis, a legal substance, from being the only basis for a negative personnel action, because the employer could be penalizing the employee for what they legally do in their personal time. On the other hand, if an employer observes symptoms of cannabis use that are tied to negative workplace performance, this bill's employee protections would not apply. The Committee believes this approach appropriately balances the need to combat the negative stigma associated with cannabis use that acts as a barrier to jobs and sustained employment for District residents and employers' need to maintain safe and productive workplaces.

The Committee recognizes that employee presentation may be important to an employer and acknowledges that some indicia of cannabis use, such as smell, may affect employee presentation. The Committee recommends that employers think about whether a smell alone (absent job performance effects) truly impacts performance (such as whether presentation is a key element of the employee's job such that poor presentation impacted their ability to do their job), how the employer would deal with a situation where someone was wearing bad cologne or smelled of alcohol, and what resolutions might be available that fall short of discipline that could cost an employee their livelihood.

The print makes clear how this exception would interact with the language included in Title II regarding treatment of employees with a disability who use medical cannabis. While a worker might obtain a reasonable accommodation for their disability under Title II, including potentially

using or possessing cannabis in the workplace, the print does not support such employee manifesting symptoms of cannabis impairment that negatively impact their job performance. This strikes a careful balance between employees' disability rights and medical needs, with employers' right to expect adequate performance and sober employees. See further discussion in the section below on Title II.

Sec. 103: Rules of construction

The Committee print includes "rules of construction" in Section 103 to help employers and others better understand the intended limitations and applications of the prohibitions and exceptions in Section 102, and to guide in the law's interpretation.

First, this section makes clear that employers are *not* required to permit or accommodate the use, consumption, possession, or other actions with cannabis at work or during work hours—unless an employee has a reasonable accommodation under the DCHRA.

Second, the print makes clear that employers are *not* prohibited from having a reasonable drug-free workplace policy that requires drug testing; is necessary to comply with federal laws; prohibits the use, possession, or other actions that involve cannabis at work or during work hours; or prohibits impairment during work hours.

The Committee notes that while the print does not prohibit employment-related drug testing, section 102 limits the use of such results. Furthermore, the Committee encourages employers to use drug testing judiciously. As such, the print only explicitly mentions post-accident or reasonable suspicion testing for employees other than those in safety-sensitive jobs.

The print does not prohibit drug testing altogether, but the Committee hopes that employers see that random testing of non-safety employees for cannabis is not advisable nor useful, and it should base employment decisions on employment-related matters rather than a test that cannot distinguish recent use from use days or weeks ago and cannot reveal active impairment. However, a test may be informative in some circumstances, providing one piece of information or evidence in a case that together with other information is useful. It may be, of course, that an employer conducts a test because they suspect impairment, but an employee tests negative—proving they were not impaired by cannabis. Additionally, testing may develop such that its utility increases in determining recency of use or other results.

Liability of employers to third parties

The rules of construction also include a version of language first introduced in separate legislation by Chairman Phil Mendelson.[49] The Committee received input on this proposal from business groups as well as the Trial Lawyers Association of DC.[50] The Committee print's language is intended to maintain the status quo regarding employer liability to third parties when an employee causes injury or harm. This legislation does nothing to change current statutory or

[49] See Section 8 of the Comprehensive Cannabis Legalization and Regulation Act of 2021 (B24-118), available at https://lims.dccouncil.us/Legislation/B24-0118.
[50] See memo from Trial Lawyers Association of DC to the Committee, included in Attachment 6.

common law related to employer liability; there is no cause of action (right to suit) created by this legislation nor is there employer immunity granted by this legislation. Therefore, under the proposed measure, cannabis use by an employee who causes injury or harm to a third party would be treated the same as, for example, use of alcohol.[51]

Sec. 104: Notice of rights

The print requires that employers provide to employees notice of their rights under this legislation. The notice should also include any drug testing protocols the employer uses, as well as whether the employer has designated the employee's position as safety sensitive. Employers must provide the notice within 60 days of the applicability date of Section 104 of the law, and annually thereafter.

The Committee also requires that OHR create a template notice for employees to use, which must be published 45 days after the applicability date of Section 104. The applicability date for section 104 will be the date the law is included in an approved budget and financial plan, which the Committee expects to be October 1 of the year in which the Council passes and the Mayor signs a budget and financial plan that fully account for the costs of implementing and enforcing the measure.

The Committee strongly encourages OHR to use best practices in the development of the notice's content to ensure it serves its purposes of informing employees not familiar with the law of their rights and how to access them. For instance, OHR should write the content in accessible, non-legal, language readable at no more than an 8th grade level. It should also consider testing the notice with real employees to ensure they can understand it and make improvements as necessary before publishing it. The Lab @ DC, a government office, has created guidelines for "resident-centered design."[52]

Sec. 105-107: Remedies and Enforcement

The Committee print provides for three types of enforcement of Title I of the bill:[53] administrative proceedings through the Office of Human Rights (OHR), judicial proceedings initiated by a private right of action in certain cases, and investigation and judicial proceedings brought by the District of Columbia Attorney General.

[51] Additionally, this provision should have no impact on insurance coverage, available, or premium rates. The DC Insurance Federation informed the Committee that they were not aware of any liability policy that would not cover an employer if their employee caused damage, although some policies may have an exclusion for "intentional acts" (conversation with Wayne McOwen, District of Columbia Insurance Federation Executive Director, November 30, 2021.

[52] The Lab @DC, "How do we design things that work for residents?" available at https://thelabprojects.dc.gov/resident-centered-design.

[53] Note that if an employee wants to file a complaint related to the Human Rights Act, including amendments that Title II of B24-109 makes to the HRA, that complaint would follow the administrative process available under the HRA.

Sec. 105: Administrative complaints

Employees will have one year from an alleged act of noncompliance to file a complaint with the OHR. From there, OHR will manage the administrative resolution of the claim, including intake, information request, fact-finding hearing, and issuance of a final order. After intake, OHR may also attempt to reach a resolution through mediation or settlement conference. If mediation or settlement conference doesn't resolve the complaint, OHR will hold a public fact-finding hearing before a hearing examiner. The hearing examiner will submit a proposed decision and order, and a final determination will be made by the OHR director. A non-prevailing party may appeal the OHR determination to court.

The administrative remedies provided for in the print are discretionary on the part of the OHR director. They may include civil penalties, which are scaled to employer size, half of which shall be paid to the complainant. Other remedies may include payment of lost wages, employer training, limited equitable relief that would undo any adverse employment action and restore the complainant to the pre-violation status, and attorney's fees.

Sec. 106: Private Right of Action

Employees will have access to private right of action. A registered medical cannabis patient may go to court instead of OHR initially. A recreational user must first file an administrative complaint with OHR; if the complaint is not resolved within one year, the employee may withdraw their complaint before OHR and file a suit in court. The one-year statute of limitations for a private cause of action will toll while an employee's complaint is pending before OHR.

The judicial remedies provided mirror the administrative remedies before OHR except that equitable relief is not limited to restoring the employee to the status they would have been in had the employer not taken the unlawful action.

Sec. 107: Enforcement by the Attorney General

The print authorizes the District of Columbia Attorney General to investigate violations of Title I and bring suit against employers that violate Title I in local court. Remedies available are the same as for private right of action, including civil penalties, lost wages, equitable relief, and attorney's fees, which includes costs for actions to enforce investigative subpoenas issued by the AG.

Sec. 108: Rulemaking Authority

The Committee print requires the Mayor to issue rules to implement the bill. To clarify the implication of granting such rulemaking authority for employers and employees, the print states that the absence of rules will not delay enforcement. Thus, if the Mayor chooses not to issue rules, or it takes longer than anticipated, the Act will still become applicable. The Council will have independent rulemaking authority for its employees.

The Committee also strongly encourages OHR to issue detailed implementation guidance, including specific to industries or sectors that may have unique circumstances, such as the education sector. The Committee encourages OHR to provide guidance in written form, perhaps in a Frequently Asked Questions format, as well as live trainings where employers may ask questions about their responsibilities.

Title II: Intersection between the Human Rights Act and Cannabis

In an effort to ensure that the use of medical cannabis is treated as much as possible like other medications, the Committee print amends the DC Human Rights Act (HRA)in Section 211 (D.C. Code § 2-1402.11) to clarify that entities governed by the HRA (employer, employment agency, or labor organizations) shall handle the use of cannabis to treat a disability by a medical cannabis patient who is both registered with their state's medical cannabis program and who receives a recommendation for medical cannabis from a health care provider in the same manner as they would handle the employee's use of a prescription medication. This provision should also help to reduce the stigma associated with medical cannabis. As one hearing witness said, "Medical marijuana patients' health concerns are often not taken seriously due to stigma around marijuana."[54]

The obligations of employers and others under the DCHRA in relation to medical cannabis are currently unclear. The DCHRA prohibits discrimination on the basis of an individual's disability.[55] Courts in the District often look to the federal Americans with Disabilities Act to determine the protections available to disabled employees under the DCHRA.[56] Under the ADA, employers must attempt to reasonably accommodate an employee's disability, including prescription medication taken to treat the disability.[57] However, the ADA does not protect disabled employees when the basis of the otherwise prohibited employment action is the employee's "illegal use of drugs."[58] Cannabis is still a Schedule I controlled substance and cannot be prescribed by a medical provider under federal law. Thus, the ADA's protections do not extend to disabled employees who use medical cannabis to treat their condition. Indeed, several federal courts have dismissed the ADA claims of employees because their use of medical cannabis to treat their disabilities, despite being legal in their states of residence, was not protected under the ADA.[59]

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[54] Queen Adesuyi, testimony before Committee on Labor and Workforce Development, Sept. 25, 2019, p. 16, available at https://lims.dccouncil.us/downloads/LIMS/42678/Hearing_Record/B23-0309-HearingRecord1.pdf.
[55] D.C. Official Code § 2-1402.11(a).
[56] See, e.g., Hunt v. D.C., 66 A.3d 987, 990 (D.C. 2013), Strass v. Kaiser Found. Health Plan, 744 A.2d 1000, 1007–09 & n. 8 (D.C. 2000).
[57] See e.g., EEOC, USE OF CODEINE, OXYCODONE, AND OTHER OPIOIDS: INFORMATION FOR EMPLOYEES (Aug. 5, 2020) available at https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees; McAfee & Taft EmployerLINC, EMPLOYERS: USE CAUTION WHEN DEALING WITH PRESCRIPTION DRUG USERS (August 21, 2018) available at https://www.mcafeetaft.com/employers-use-caution-when-dealing-with-prescription-drug-users/#:~:text=Under%20the%20ADA%2C%20employers%20are,employee's%20use%20of%20prescription%20medication (describing cases).
[58] 42 U.S.C. §§ 12111(6), 12114(a).
[59] See, e.g., Eccleston v. City of Waterbury, No. 3:19-CV-1614 (SRU), 2021 WL 1090754, at *3 (D. Conn. Mar. 22, 2021) (collecting cases) available at https://scholar.google.com/scholar_case?case=6691571280650214 22&q=Eccleston+v.+City+of+Waterbury&hl=en&as_sdt=20006&as_vis=1.

The DCHRA does not speak to whether its protections extend to medical cannabis users. Although cannabis technically cannot be "prescribed" because it is not approved by the Food and Drug Administration, its use by medical cannabis patients is analogous to that of other prescription drugs in that patients must receive a healthcare practitioner's recommendation to use it, and the District regulates the local medical cannabis industry. The committee print would amend the DCHRA to avoid the application of the ADA's "illegal use of drugs" standard to disability discrimination cases brought under the DCHRA and ensure that medical cannabis users receive the same protections, under local law, as disabled employees who use other forms of lawfully prescribed medication to treat their disabilities.

Under the proposed standard, the Committee expects employers to engage in the interactive process to determine whether they are able to reasonably accommodate a disabled employee's need to possess or administer medical cannabis at work or during work hours or the side effects an employee may experience from using medical cannabis.

The print makes two exceptions to the general principle that medical cannabis be treated the same as prescribed medications: first, employers and other governed parties will not be required to follow the standard if doing so would cause them to violate a federal law, regulation, contract, or funding agreement. Second, employers and others will not have to make an accommodation that would permit an employee to use medical cannabis while assigned to a safety-sensitive position. These conform with the protections and exceptions in Title I of the print.

The first exception ensures that the federal Drug Free Workplace Act, which requires federal grantees and contractors to prohibit possession or use of cannabis in their workplaces, or Department of Transportation regulations related to DOT-regulated truck drivers would prevail if there were a conflict with the law or a grant agreement or contract entered into under the law.[60] That is, if an employee sought a reasonable accommodation to use or possess medical cannabis during work hours or at the workplace, but such use is prohibited under a federal contract or grant agreement with the employer or employing agency, such accommodation would not be required under the Committee print.

Second, safety would remain paramount, and the print would not require employers to provide accommodations that would result in use of medical cannabis by employees in safety-sensitive jobs. Given that employees in safety-sensitive jobs would rarely, if ever, be able to perform the essential functions of such jobs while under the influence of marijuana, it is unlikely that a "reasonable accommodation" could ever be reached for these employees. Even if employees in safety-sensitive jobs could perform the essential functions of their jobs while under the influence of cannabis, the risk of injury or harm from impairment in such jobs is significant, and therefore, the Committee expects that most employers would not be able or willing to bear it. As such, the exception draws a clear line, but even without such a line, it's unlikely there would be a practical

[60] For Drug Free Workplace Act see Substance Abuse and Mental Health Service Administration, "Federal Contractors and Grantees Drug Free Workplace Programs," available at https://www.samhsa.gov/workplace/legal/federal-laws/contractors-grantees; for DOT regulations, see USDOT Federal Motor Carrier Safety Administration, "What tests are required and when does testing occur?", available at https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/what-tests-are-required-and-when-does-testing-occur.

difference in outcome (i.e., safety-sensitive employees would be extremely unlikely to be able to reach a "reasonable accommodation" agreement that involved their use of medical cannabis). This is not to say, however, that employers may deny every reasonable accommodation request from safety-sensitive employees. It is possible that other accommodations could be reached, for example reassignment to a non-safety-sensitive role or by removing safety-sensitive duties which may not be essential to the job. However, an accommodation is not guaranteed; the feasibility of such potential accommodations would need to be assessed during the interactive process on a case-by-case basis, such as whether an alternative assignment is available and the employee is qualified.

The Committee notes that its earlier legislation applicable to the public sector, L23-276, required the District government to accommodate medical cannabis patients' *use of* medical cannabis. This is a higher standard than that proposed in the print's amendments to the HRA, which would require accommodation of the *disability*, and that in turn, *might* entail accommodation of cannabis use. However, L23-276 does not require accommodation of use or possession of medical cannabis *at work*. The law also follows existing disability law and makes clear that an accommodation would not be reasonable if it causes an "undue hardship" on the employing agency; if it would retain or place the employee in a safety-sensitive position or to perform such duties; or if would cause the employer to commit a violation of federal law, rules, or contract or to risk federal funding.

Title III: Conforming amendments

The Committee print makes conforming changes to several areas of existing law that govern District government employees and which establish drug and alcohol testing programs for specific groups of employees, including drivers of commercial motor vehicles; employees of the Department of Behavioral Health, Commission on Mental Health Services, and Department of Corrections; and employees who work with children and youth. (There is no such law governing private sector workers and thus conforming amendments are not needed.) These amendments require treatment of employees in compliance with the requirements of this new legislation.

Additionally, the print amends Title XX-E of the District of Columbia Government Comprehensive Merit Personnel Act (CMPA), added by L23-276, to conform to the protections available under Title I of the print and to clarify that the rights available to qualifying patients under Title XX-E of the CMPA are in addition to the rights available to disabled qualifying patients under section 211(b-1) of the HRA, added by Title II of the print.

Title IV: Standard Provisions

Section 401: Applicability

The print has staggered applicability. The provisions requiring rules and notice to be created by OHR (Section 104(b) and 108)) will go into effect as soon as they are funded, so that OHR can start that work. The rest of the bill will go into effect—that is, employers must begin complying—when the bill is funded and at least one year after the Mayor signs the bill, whichever is later.

II. LEGISLATIVE CHRONOLOGY

April 23, 2019	B23-266, "Prohibition of Marijuana Testing Act of 2019" was introduced by Councilmember Trayon White and co-introduced by 3 members and co-sponsored by 6 members.
April 23, 2019	B23-266 was referred to the Committee on Labor and Workforce Development.
April 26, 2019	Notice of intent to act on B23-266 was published in the *D.C. Register.*
June 21, 2019	Notice of public hearing on B23-266 was published in the *D.C. Register.*
Sept. 25, 2019	The Committee on Labor and Workforce Development held a public hearing on B23-266.
Feb. 25, 2021	B24-109, "Prohibition of Marijuana Testing Act of 2021" was introduced by Councilmember Trayon White and co-introduced by 5 members
March 2, 2021	B24-109 was referred to the Committee on Labor and Workforce Development with comments from the Committee on Business and Economic Development
March 5, 2021	Notice of intent to act on B24-109 was published in the *D.C. Register.*
March 3, 2022	Consideration and vote on B24-109 by the Committee on Labor and Workforce Development.

III. POSITION OF THE EXECUTIVE

At the hearing on Sept. 25, 2019, Ventris Gibson, Director of the DC Department of Human Resources, provided testimony. Director Gibson articulated that Bill 23-0266, the "Prohibition of Marijuana Testing Act of 2019," would impact all District employers and generally prohibit them from testing for cannabis as a condition of employment. If enacted, testing prospective employees for cannabis use would be an "unlawful discriminatory practice," except in specific circumstances. Director Gibson clarified that the District government's revised workplace drug policy is therefore consistent with the intent of this proposed law. However, she believed the Council should consider the feedback of a broad array District employers to ensure that the bill is crafted to meet the needs of employers across the city, including any appropriate exceptions.

Should the bill move forward, Director Gibson also recommended that the bill be amended to remove the grant of authority that would empower the Director of the Department of Human Resources to determine whether certain private sector jobs have "the potential to significantly impact the health or safety of employees or members of the public[.]" The personnel authority of the DCHR Director is limited to government personnel and does not extend to the private sector. Therefore, she recommended that the phrase "Director of Department of Human Resources" be

replaced with the "Mayor" to allow the Mayor to identify the appropriate agency to perform this role.

Additionally, Director Gibson noted that in accordance with the Mayor's orders, there will be no District government agencies that can designate all employees as "safety sensitive." However, she warned that should an employee with safety sensitive duties have an on-job accident and subsequently test positive, the District would face a "public relations nightmare." Furthermore, she stressed that the intent of drug testing is not to simply detect, but rather deter. The goal of deterring is the spirt and intent of having a drug-free workplace policy, according to the Director.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received comments from 4 Advisory Neighborhood Commissioners: representing ANC8B, 8E05, 8C07, and 3D. Their comments are summarized in Section V.B.1 of this report.

V. HEARING RECORD AND SUMMARY OF TESTIMONY

The Committee on Labor and Workforce Development held a public hearing on B23-266, The Prohibition of Marijuana Testing Act of 2019, on Wednesday, September 25, 2019, at 11:00 a.m.[61]

A. Opening Statement

Committee Chair Elissa Silverman made an opening statement, as prepared:

> Good morning. I am At-Large Councilmember Elissa Silverman, Chair of the Committee on Labor and Workforce Development. Today is Wednesday, September 25, and the time is now 11:07am. We are in room 500 of the John A. Wilson Building. I'm calling to order this meeting of the Committee on Labor and Workforce Development.
>
> Today we are holding a hearing to discuss two measures. B23-0266, the "Prohibition of Marijuana Testing Act of 2019," initially introduced by my Ward 8 colleague Councilmember Trayon White. This bill would prohibit pre-employment testing for marijuana in both the public and private sector, with some exceptions. I think the title of this bill has created a bit of confusion: It does not eliminate drug testing for marijuana entirely. In plain English, if this bill was enacted an employer could not drug test for marijuana use until an employee starts work, though some types of work such as in public safety and heavy machinery operation, are excepted. Currently employers can drug test for marijuana use after a job offer is made to an applicant. This measure was co-introduced by at-large colleagues Anita Bonds and David Grosso and Ward 3 Councilmember Mary Cheh. It is co-sponsored by at-large colleague Robert White and myself, as well as Ward 1 CM Brianne Nadeau, Ward 5 CM Kenyan McDuffie, Ward 6 CM Charles Allen, and Ward 7 CM Vincent Gray.

[61] The hearing also covered B23-309, "Medical Marijuana Program Patient Protection Amendment Act of 2019."

The second measure under consideration is B23-0309, the "Medical Marijuana Program Patient Employment Protection Amendment Act of 2019," initially introduced by my At-Large colleague and committee member David Grosso. L23-276 seeks to protect District government employees from discrimination due to participation in the medical marijuana program. An emergency version of this bill was enacted that again carved out exception for a category of District workers known as "safety-sensitive." These are similar jobs to the exceptions in the other bill. We'll get into the specifics in the hearing.

What is permissible when it comes to marijuana use in our city is not straightforward, and it is easy to be confused about what is allowable and what isn't. It is especially confusing for employers and employees, and I want to emphasize that this is what this hearing will focus on. You can use your three or five minutes however you wish, though I warn everyone I will reign you in to focus specifically on how marijuana use impacts employment.

In other words, please don't make me reign you in.

A big factor which makes us different from the other dozen or so states that have legalized marijuana use among adults is that Congress has prohibited us from full tax and regulation of marijuana. Whether you agree or disagree with marijuana legalization, we as a city should be able to make the decision about our public policy. This is why the cause of Statehood is so important.

Now I will attempt to correctly characterize where we are with our marijuana law. We have put in place a medical marijuana program, in which participants receive a doctor's prescription and we have regulated the participants, growers and dispensers of medical marijuana.

The District also decriminalized and legalized recreational marijuana use for adults, yet as mentioned Congress has handcuffed us in the regulation and legal sales, unlike in the other states that have done so. Decriminalization, at least in my opinion, was a very easy decision given the stark racial disparities – the high arrest rate of black residents compared to white residents for marijuana possession.

Legalization started through a voter initiative that was approved by voters and codified by the Council and signed by the mayor. Our law allows adult residents to use marijuana recreationally, to grow marijuana at home, and to exchange limited amounts. Again, as mentioned, our lack of statehood means Congress can bigfoot and block full regulation and taxation. The mayor is currently promoting a bill that would address this. My committee colleague David Grosso has also introduced similar legislation. And again, that is not the issue before us today.

The issue before us today is how to deal with marijuana use, both medicinal and recreational, when it comes to the workplace. As Labor Chair, one of the top issues I hear

from employers, union leaders, and training providers how much of a barrier marijuana testing is to employment.

Many of our residents believe that because it's legal to use, they won't be drug tested or that drug testing for marijuana is not permitted. That is not the case. There are very legitimate reasons employers drug test, even for marijuana, including public safety and insurance issues.

Many people have asked me where I stand on these bills. I am open-minded. My goal is to find the right balance to protect the health and safety of all of us and to protect people's individual rights.

I will be listening closely to everyone who testifies and reading all the written testimony as well of those who could not come in person. Not surprising, I have a lot of questions, as do employers and employees in the District.

I want to hear from industry experts. Whether you are in construction, security, hospitality, or retail, I want to hear how marijuana affects your workplaces. How would these bills affect your ability to run your business? Are there public safety concerns?

I want to hear from those that know how marijuana affects the body and mind.

I want to hear from community and labor groups about the effects of marijuana testing on the employment of DC residents.

This is a difficult issue not only for the District, but for cities and states across the county. The pre-employment testing ban introduced by my colleague CM Trayon White would be the third of its kind in the country, with neither of the other two in effect yet. We don't yet have best practices. But what we do have is a host of qualified witnesses and an opportunity to educate ourselves.

I am excited to hear from these individuals. I am excited to get informed.

Committee member and sponsor of B23-266 (and B24-109) Trayon White made an opening statement:

Good morning, everyone. I want to thank you, Chairwoman Silverman, for your leadership on this important matter. While I'm not a member of this committee officially, I'm grateful for the opportunity to speak in support of the two bills that are the subject of this hearing today. I introduced the Prohibition of Marijuana Testing Act of 2019 to support my constituents and constituents all throughout the District who are being prevented from accessing employment because of positive marijuana drug tests.

There are 34 states that have legalized the medical use of marijuana or cannabis, and 10 states plus the District of Columbia who have legalized the recreational use of marijuana. As marijuana use has increasingly been legalized in states across the country, the legal

framework needs to be updated to provide protections for job-seeking residents exorcising the legal right to use marijuana.

The bill I introduced was modeled after legislation that passed in New York City, which prohibits marijuana testing by employers even though marijuana use is not legal in New York City as it is in the District of Columbia. The state of Nevada has also recently banned marijuana testing, and as you stated, it's not in all jobs but most jobs.

Currently, our job-seeking residents are exercising their legal right to use marijuana, but then are punished by not being able to find employment; and we see the disparities especially amongst Black residents here in the District of Columbia. The residents here in D.C. passed Initiative 71 in November 2014, and the law became effective in February 2015, approving recreational use of marijuana in the District.

The Council also passed the Prohibition of Pre-Employment Marijuana Testing Act of 2015 in May, prohibiting marijuana testing until a conditional offer for employment is made. The mayor has also made an effort to bring the District agency hiring practices in line with B23-0266 through her recent order, Cannabis Policy Guidelines and Procedures. This order clarifies applicants are not disqualified based on the presence of cannabinoids unless the applicant is in possession of, or impaired by, cannabis at the time of testing. While I commend this action, we still need to do more protections to ensure job seekers to have adequately implement Initiative 71. We need to completely remove the practice of drug testing for all participants outside of those who fall under the identified exemptions. This would include those applying to work in public and private sectors.

I personally got several emails from DC Government employees stating they have been discriminated against because of their use of medical marijuana on the workplace. We need to do more to protect our workforce from unnecessary employment barriers where there are no laws being broken.

There's an added issue that the current popular mechanism for marijuana testing can yield a positive result days and sometimes weeks after actual use, and when effects have worn off. The testing can prevent someone from receiving a permanent job offer based on prior marijuana usage. This is not just, and this is not how we should treat our residents who are seeking jobs. If marijuana is decriminalized, which it is, it should not be a barrier to employment. I understand that there's room for clarity, which exceptions are narrowly crafted that prevent a broad application, including determinations by the Department of Human Resources.

Additionally, we would like to hear from witnesses today about the recommendations for … agencies that will be appropriate for enforcement. I look forward to working with Councilmember Silverman and other Councilmembers to create the best law for the District of Columbia.

I also am in support of the Medical Marijuana Program Patient Employment Amendment Act of 2019 introduced by my colleague, Councilmember David Grosso. This bill prohibits

the District of Columbia Government from discriminating in employment against individuals who are participating in the Medical Marijuana Program. Just this past week my office received a call from a constituent who was put on administrative leave for failing a random drug test at work by being a member of the Medical Marijuana Program. We need to treat our workforce better, especially when already granting them participation in the Medical Marijuana Program. How can we have a program that is administered through the government, but then not uphold it when government employees are participants? I support this bill and other positive changes that will come about in the District of Columbia. In closing, I look forward to seeing the positive impact that this would have on our residents. I look forward to hearing the testimonies of all witnesses gathered here today. Thank you.

B. Hearing testimony

1. Public Witnesses

Several witnesses provided testimony regarding B23-266. A summary of their written and/or oral remarks follows, with witness numbers referring to the witness list provided in attachment 4. (Note that the hearing covered two pieces of legislation; B23-309, the subject of this report, and B23-266. Many witnesses testified on both bills or on the topic of cannabis generally, while some testified only on one bill. Only comments applicable to B23-266 or related discussion are summarized here.)

Witness 1. James Greer, Chairman, National Drug and Alcohol Screening Association

Mr. Greer stated that he was not there to "advocate for or against the legalization or use of marijuana." In a direct request, Mr. Greer asked the committee to consider that Bill 23-0266 is "not necessary." This request stems from Greer's argument that the District already passed a bill relating to pre-employment drug testing in 2014. That law took into consideration concerns addressed by employers, job applicants and many stakeholders, resulting in a "reasonable and sensible approach which stipulated that drug testing, including THC, could only be done once a conditional offer of employment was made."

Mr. Greer's problem with the current bill being considered was that it would remove THC from being tested in any preemployment process and "may in fact prohibit THC testing in any manner." Greer argued that whenever considering protections for workforce applicants, the same and equal consideration must be given to an employer's right to be a Drug Free Workplace. Mr. Greer pointed out that many states provided by law a discount for an employer's workers compensation insurance premiums if they qualify as a Drug Free Workplace, which included testing for marijuana.

Mr. Greer strongly opposed employers being required by government "to accept conduct that violates the employer's ability to manage and control their own business." The right to be a Drug Free Workplace was something Mr. Greer felt like the government is threatening with this bill, with the argument being that there is no discrimination to be found when a Drug Free Workplace policy is known by applicants and enforced in a consistent and non-discriminatory manner.

While Mr. Greer understood that the bill under consideration exempts certain positions due to public safety and potential liability, he maintained that requiring certain, but not all, employees to be drug free will cause confusion, arbitrary enforcement, and will require employers to impose drug testing requirements that may be considered discriminatory or unfair.

Witness 3. Olivia Naugle, Legislative Coordinator, Marijuana Policy Project.

Ms. Naugle stated that "[t]here is a growing belief" that screening for cannabis is a form of workplace discrimination. Ms. Naugle pointed out that Nevada had enacted legislation that prohibits most employers from denying applicants if cannabis shows up on a drug test. In addition, she mentioned that New York City has taken similar action, with employers being prohibited from requiring future "employees to submit to a marijuana test as a condition for employment, with some exceptions."

Witness 4. Queen Adesuyi, Policy Coordinator, Drug Policy Alliance

Ms. Adesuyi supported both of the legislative bills under consideration, however she wanted to offer some "content-based feedback for B23-0266." The first reason Ms. Adesuyi provided to explain her support of the legislation was that in her view, drug testing is inefficient. Ms. Adesuyi argued that suspicion-less drug testing is a flawed, intrusive, and inefficient way of identifying individuals who are impaired at work. In addition, Ms. Adesuyi indicated that drug test results provide different results for different drugs, as well as test results failing to assess current marijuana impairment.

Ms. Adesuyi went on to voice concern about marijuana stigmas being reinforced, which could lead to a "divide across career paths." When discussing B23-0266, she pointed out that the provision will not apply to the following professions: police officers and law enforcement, construction jobs, positions requiring medical care or care of children, positions requiring a commercial driver's license or positions that significantly impact the health and safety of members of the public, as determined by the Director of the Department of Human Resources. To voice displeasure with that reality, Ms. Adesuyi argued that drug tests are ineffective indicators of marijuana impairment but are incredibly effective barriers to employment. She stated that the "failed marijuana laws have already disenfranchised and marginalized the most vulnerable citizens via countless collateral consequences: drug testing for marijuana is yet another additional barrier that locks people out of career paths."

Witness 5. Eric J. Jones, Associate Director of Government Affairs, Associated Builders and Contractors (ABC) of Metro Washington

Mr. Jones previously submitted testimony in regard to Bill 20-728, the Prohibition of Pre-Employment Marijuana Testing Act of 2014, and Mr. Jones extended the same arguments to B23-0266. There were three main concerns that Mr. Jones had with the legislation: general safety, OSHA requirements including the Drug Free Workplace Act, and increased insurance costs.

In terms of general safety, Mr. Jones argued that "it is the place of the employer to ensure the general safety of all of its projects," which included making sure that employees are not under the influence of any controlled substance during their tour of duty. In addition, he argued that companies would have to spend more money if an employer was only able to drug test an

individual after they have tendered a tentative job offer or after they have become an employee. Mr. Jones argued that companies would then have to complete the majority of the hiring process and then start over as they would simply terminate the employment of the individual after they have completed the drug test.

Mr. Jones went on to explain that companies are required to provide a safe workplace under the Occupational Safety Health Administration (or OSHA) Standards. In addition, contractors who do Federal work are required to maintain a drug-free workplace. He also mentioned that by being forced to eliminate programs, companies would face potential increases in liability and insurance cost as well as other potential setbacks. Further, these increased insurance costs would lessen the company's ability to secure funds and/or increase its financial situation, which would place an additional burden as it relates to companies obtaining bonds.

Witness 6. Deborah Harvey, Executive Director, The National Utility Contractors Association - District of Columbia Chapter

Ms. Harvey emphasized that her worker members perform skilled and often dangerous work. She noted that they must continuously be aware of their work environment, and alert for any potential safety hazard that would affect them, their team, or members of the public. Therefore, it is her belief that keeping work teams keenly focused on even the smallest details is critical to them performing good work, in a safe manner, allowing everyone to go home alive and whole at the end of the day. This focus also enables their work teams to help keep the general public safe by making sure that the work zone is secure.

With that context in mind, Ms. Harvey testified in support of the exceptions to the prohibition of preemployment marijuana testing. She said that "because of the serious potential for injury or loss of life in the type of work our members perform, NUCA of DC is 100 percent in support of the EXCEPTIONS to the prohibition preemployment marijuana testing." Finally, she maintained that by supporting an environment that promotes a drug-free workspace in commercial transportation and construction, the provision in this legislation benefits the city, the contractors and workers, as well as visitors and residents.

Witness 7. Fred Codding, Iron Workers Employers Association and Alliance For Construction (ACE)

Mr. Codding was in strong support of the exemptions in the legislation, and further emphasized the dangerous and hazardous nature of construction as an occupation. Additionally, he explained how workers depend on fellow workers for their safety and the safety of the general public. However, Mr. Codding wanted to make sure that apprenticeship programs were included in the broader construction exclusion, as they include occupational safety training as a key element. The current language was unclear in his opinion, and he sought a clarification specifically in section 2(b)(3).

Witness 10. Evette Banfield, Vice President for Economic Development Policy and Wealth Building Strategies, Coalition for Nonprofit Housing and Economic Development (CNHED)

CNHED "recognizes and supports the spirit of the bill." however they believe that the legislation could cause more harm than good. Ms. Banfield pointed out that while the District's marijuana policies continue to evolve, it is important not to forget that federal policy towards the

use of marijuana, under the Controlled Substance Act, remained unchanged, and that many workplaces and public housing still have "zero tolerance."

CNHED was concerned about the legislation's ability to protect residents during and/or after their probationary period if they are subject to random drug testing. Under the proposed bill, there was a concern that nothing will preclude an employer from terminating and/or denying benefits to an employee who tested for the presence of marijuana after their pre-employment period. Ms. Banfield argued that "in the District's pursuit to decriminalize and normalize the use and sale of marijuana it is de facto endorsing social policy that will potentially widen the economic divide that already exists in the District. Excluded are the majority of the in-demand sectors and occupations identified by the Workforce Investment Council (WIC) which pay a living wage, such as commercial driver's licenses, construction jobs and apprenticeships."

To conclude, Ms. Banfield presented a series of recommendations, including that a task force be established to examine and consider ways to advance a holistic and strategic approach for the District's recreational and medical marijuana policies, a call for the Council to consider strengthening this legislation to include safeguards for residents after the pre-employment process, and a request for the Department of Employment Services and the Office of Human Rights to disseminate information and educate employers and residents about the District's marijuana use and testing policies.

Witness 11. Darrell D. Gaston, Commissioner, Advisory Neighborhood Commission 8B

Mr. Gaston had a problem with the government "mandating how private sector employers should conduct their hiring requirements." He mentioned that marijuana causes a delayed reaction, and that the "limited" safety categories in the legislation do not include restaurants.

Mr. Gaston outlined a compromise where jobs that are funded through D.C. tax subsidies would not be required to submit to a drug test. He also indicated that he would allow for employers to have employees sign waivers that would not hold employees liable for Injury under the influence of marijuana.

While acknowledging that 66% of Mr. Gaston's constituents "think that it should be against the law to test for marijuana for employment except for safety positions," Mr. Gaston maintained that there is a lot of confusion with this bill and has questions regarding its enforcement.

Witness 12. Christopher Hawthorne, ANC Commissioner, Advisory Neighborhood Commission 8E05

Mr. Hawthorne had submitted a written testimony regarding both the Prohibition of Marijuana Testing Act of 2019 and the Medical Marijuana Program Patient Employment Amendment Act of 2019. Mr. Hawthorne supported the bill, but he asked that "more teeth [be added] to the regulations because the bill is vague and doesn't resolve many other challenges that may rise involving disciplinary proceedings pertaining to working conditions of an individual." He argued that the bill did not cover individuals who may have used, possessed, or were impaired by marijuana at the individual's place of employment or during employment hours, which is problematic in the eyes of Mr. Hawthorne. Furthermore, he pointed out that an employee may test

positive for the drug during their work hours, however; they may not be impaired to perform other duties at the workplace directly associated with their position descriptions.

Mr. Hawthorne informed the Council of allegations that District government workers have been let go from their employment due to positive tests despite them having medical cards issued by the doctor. He speculated that agencies secretly alter the job descriptions of workers to include them as drivers for marijuana testing purposes. In some instances, the worker does not drive as a condition of their employment, however; the agency terminated and/or suspended the person(s) from the employment citing the clause "other duties assigned" as a condition to now test them for marijuana.

Witness 14. Donald Bowlin, Environmental Services Worker, Medstar Georgetown Hospital

Mr. Bowlin supported the legislation with amendments. While he understood the need to exempt those healthcare workers that provide direct care treating patients, he argued that many healthcare workers, such as housekeepers, cooks, and environmental service workers do not provide direct care. Thus, Mr. Bowlin wanted to amend the bill to clarify that workers not providing "direct" care should not be exempted from the protections of this bill.

Witness 21. Elizabeth A. Davis, President, Washington Teachers Union

Ms. Davis acknowledged that African American communities in the District have been disproportionately hurt by marijuana criminalization. In addition, the possession of marijuana has been a pipeline to prison, especially for black men in the city. Ms. Davis testified that The War on Drugs has had a disproportional impact on D.C. youth, “sentencing many to years in prison and lifetimes of underemployment and poverty.” She argued that the research has made it clear that the criminalization of drugs has a severe negative impact on the lives of youth. Having an incarcerated parent worsens children's outcomes in school. As such, the WTU joined with others to support the decriminalization of marijuana in the District and across the nation.

With that in mind, Ms. Davis then brought her attention to children and marijuana. She stated that despite the benefits of decriminalization, there also needs to be an awareness of marijuana's impacts on youth. According to Ms. Davis, “marijuana use has been associated with a decline in IQ when regularly used among individuals under the age of 18. And, as we've seen decriminalization efforts succeed across the nation, we've also seen an increase in the number of young people who perceive little risk of regular marijuana use.” Ms. Davis believed this needed to be addressed in order to ensure that young people see the use of marijuana in the proper context and recognize the dangers associated with using the drug.

With regards to B23-0266, the WTU strongly believed that educators should not be in the presence of children while under the influence of drugs. As a union, they “fully support the intent of this legislation to subject educators to drug screenings as a condition of employment.” However, the union did not believe that the legislation should be limited to those classified as "teachers” and believes that further clarification is needed around language stating that those "in any position requiring the supervision or care of children" would be exempted from the provisions of this act.

The WTU believed that all employees in the education sector - DCPS, public charter as well as early education and adult education programs - should be subject to testing for marijuana

as a condition of employment, including those who work in an office setting or in support positions in our schools. Those individuals who work outside of schools make critical decisions for our students and should also be held to the same standard as classroom teachers. The WTU also wanted to be clear that anyone who has a valid medical prescription for medical marijuana should be exempted from testing provisions.

Witness 22. Abhi Dewan, President, GW Students for Sensible Drug Policy

This GW chapter of an international non-profit recognized the War On Drugs as a failure for our communities. Dewan testified that "The War on Drugs continues to cost Americans over $47 billion each year, and a large portion of which goes to incarcerating Americans.' Even though America contains only 5% of the world's population, we house over 25% of the world's prison population. Half of them are incarcerated for drug offenses, with people of color being disproportionately affected. In fact, more Americans are arrested for cannabis possession than for all violent crimes combined."

Dewan also pointed out that "troves of evidence can be found that marijuana is equally as safe, if not safer than alcohol when used recreationally. Therefore, responsible adult consumers should not have to face marijuana testing as a condition of employment unless required by law, similarly to adult alcohol consumers."

Dewan encouraged the Council to move forward with Bill 23-0266 because the bill would prohibit tetrahydrocannabinol or marijuana testing as a precondition for employment. However, the bill excluded those in "in any position with the potential to significantly impact the health or safety of employees or members of the public." Given the current inability to accurately test the active vs inactive metabolite of THC, Dewan argued that the distinction cannot be conclusively made between someone under the influence of marijuana and a marijuana user who is not under the influence. This exclusion of safety sensitive positions strikes a balance between our current technological limits and public safety.

Witness 23. Nikolas R. Schiller, Co-Founder, D.C. Marijuana Justice

Mr. Schiller supported the removal of drug testing for all job applicants and employees. He believed that as long as an employee can do the work on the job, what they do off the job should have no bearing on their employment. The argument was made that "we do not test people for alcohol, prescription drugs, or for other substances unless there is important reason for such testing. Namely, declines in work performance or an on-the-job accident. Testing for cannabis prior to employment and during employment, should not be taking place any longer."

He contended that sections (b)(1) through (b)(5) should be removed entirely.

These sections unfairly demonize cannabis as an alternative to alcohol. If a police officer wants to relax at the end of a stressful day by smoking a joint, so be it. This off-hours conduct should not impede them from being able to apply for a different job within their department. Under this legislation, they are still being punished for conduct that has been legalized for the rest of the population. In regards to Section (c), I understand that no laws passed by the DC Council can impact federal law. Therefore, in Section (c)(3) the words "or local" should be struck. Furthermore, Section (c)(4) does not fit with the rest of this law

and should be removed entirely. Unless unions are going to also test for alcohol metabolites in prospective employees, then they shouldn't be testing for cannabis metabolites either. We should not be saying one form of off-hours relaxation is preferred over others.

Witness 24. Richard F. Kennedy*, *Former CIA Senior Economic Analyst, Member of Americans for Safe Access and Virginia NORML

Mr. Kennedy noted that it had been clear for a while that marijuana prohibition is a worse failure than alcohol prohibition. According to Mr. Kennedy, "there is an unbroken series of non-partisan studies going back to 1894, all concluding that marijuana is not a serious cause for concern." In addition, it was articulated that most of the fears about marijuana have been disproved—it is not a "gateway drug" and even heavy users do not get lung cancer or any other killer disease. With that being said, Mr. Kennedy recognized that marijuana is not harmless, and says that kids should not be using it, however there was an acknowledgement that prohibition is not working.

Witness 25. Linda Mercado Greene*, *Chair, DC Medical Cannabis Trade Association

Ms. Greene began the written testimony by expressing "unanimous" support for both bills. While there was an acknowledgment that exceptions should be made for "certain public positions such as, police officers and emergency personnel," it was DCMCTA's position that patients working in the District should not be discriminated against for exercising their right to improve their health by choosing to use cannabis. DCMCTA was also strongly opposed to patients being deprived of their mental well-being over the fears of losing their jobs.

Witness 26. Corey Barnette*, *Owner, District Growers

Mr. Barnette expressed support for both of the bills, believing that "these two pieces of legislations take bold steps towards removing employment barriers and to protecting patients' rights." District Growers testified that no employee of the District should be discriminated against when exercising their right to medical treatment and/or recreational use. He argued that doing so confronts patients with the difficult decision of choosing their well-being over their jobs - when they should be able to safely have both - and subjects employees to targeting and other means of labor discrimination.

While he understood the need for public safety and job safety, Mr. Barnette articulated that employers have methods already in place that supposedly promote safety and that identify issues of intoxication or impairment. Further, as these methods have proven sufficient for identifying all types of drug impairment, he argued that there is no need to single out cannabis. Singling out cannabis in this way "maintains a platform that is known to be abusive, discriminatory, misinformed, and contrary to the public good. Whenever arguments to maintain testing restrictions around cannabis are put forth, we need only ask: 'Why just cannabis?' to expose misaligned biases and untruths."

Witness 27. Rabbi Jeffrey Kahn*, *Owner, Takoma Wellness Center

Rabbi Kahn was in favor of both pieces of legislation. He argued that the District of Columbia is still dealing with the repercussions of the War on Drugs, and that the Council has too much experience and too much knowledge of marijuana to treat it as an illegal drug.

Rabbi Kahn outlined that society worries about marijuana because unlike alcohol, it is very difficult for employers to determine if a positive drug test for marijuana is the result of drug usage during work or on non-work hours. As a result, it had been logistically simpler to just have an outright ban. To address this dilemma, Rabbi Kahn recommended that the Council do something similar to what is done at his workplace. Takoma Wellness Center does not test for marijuana use – they would all fail - and those tests wouldn't tell anything about impairment on the job. They can't test for impairment, but they do look for it. He wrote:

> And as Supreme Court Justice Potter Stewart said about something else, "I know it when I see it" and so does everyone else. On the very rare occasion we suspect impairment, we have policies that deal with it effectively. And if Takoma Wellness Center can do it, so can the District of Columbia. I urge you to pass these two bills and treat the employees of the District with the respect and dignity they - and all of us – deserve.

Witness 28. Norbert Pickett, President, DC Holistic Wellness

Mr. Pickett emphasized that he is a patient and survivor, as well as the first black man to be awarded a DC medical cannabis dispensary license. He recounted a life-altering car accident that resulted in dozens of medical procedures including 5 major spinal surgeries. Mr. Pickett subsequently was prescribed 5 different opioids at once to deal with chronic pain and nerve damage that he'll have for the rest of his life. Additionally, he's been diagnosed with depression and PTSD as a result of the accident. In order to avoid the 5 types of opioids prescribed, his doctor suggested cannabis. Mr. Pickett believed cannabis to be his most effective pain relief, which afforded him a better quality of life with very few side effects.

Mr. Pickett asserted his belief that all pre-employment cannabis testing should be eliminated, except for jobs that involve public safety like police, EMS, and fire. Other jobs that involve serious liability such as operating heavy equipment should continue to be the subject of pre-employment and perhaps random testing. Further, he advocated for the usage of cannabis for medical reasons, be it regarding physical or mental health issues.

Witness 30. Maka Taylor*, *Founder, Global Gains Consulting Service

Ms. Taylor recounted a personal story. Ms. Taylor was excited about a job offer she received, but the offer was rescinded due to a failed marijuana test. This was puzzling to Ms. Taylor because the failed test would have no significance or influence on her job performance. In addition, Ms. Taylor says she is unable to recount how many opportunities she has missed out on due to marijuana testing.

Ms. Taylor wanted the Council to support "an effort to thwart any ill communicated statutes, regulations or scheduling in relation to cannabis." She also asked that the Council consider the emotional and socioeconomic "variants potentially related to cannabis use and functionality; when used in doses to manage anxiety, anxiousness, and other psychological injuries related to and resulting from ACE (Adverse Childhood Experiences) and life as an adult; adulting." Taylor asserted that trauma may be connected to individual cannabis use and that many self-medicate in opposition to pharmaceuticals and psychotropic drug prescriptions.

Witness 31. Charles Moreland*, *Graduate, UDC Law

Mr. Moreland testified in favor of B23-266, arguing that the bill "will once again make the District a pioneer in the cannabis movement" in addition to protecting job seekers. When discussing why this bill is necessary, Mr. Moreland outlined three main reasons: it helps job seekers secure employment, a ban on marijuana testing is in line with most residents' views about marijuana use, and it protects job seekers' privacy.

With regards to seeking a job, "this bill provides the estimated 160,000 marijuana consumers in the District peace of mind that their personal lives will not limit their employment opportunities." He argued that job seekers will no longer need to refrain from applying to a job out of fear of being tested for marijuana. Further, it may make the job hunt easier because an applicant no longer needs to take time out of his or her schedule to submit a marijuana test before being hired. Mr. Moreland testified that most importantly, this bill would eliminate an artificial barrier to employment. He argued that marijuana use is a personal choice that should not be considered by an employer. A job applicant's past marijuana use does not indicate how he or she will perform on the job. Urine tests, a standard toxicology test amongst employers, can detect prior use for up to two weeks in the casual user.

In regard to the popularity with District residents, they "overwhelmingly voted that people should not face criminal punishment for using or possessing moderate amounts of marijuana." District residents would not want marijuana users to be economically exiled by employers for using marijuana. He argued that this bill would help to remove the social stigma associated with marijuana use. Also, the public could rest assured that safety will not be compromised because several inherently risky jobs are exempt from the prohibition on marijuana testing. This bill struck a critical balance between physical safety and personal freedom to consume marijuana, according to Mr. Moreland.

When speaking about privacy, Mr. Moreland argued that a "right to privacy is more than a constitutional right; it is a human right." It was also articulated that the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and many other similar treaties recognize the human right to privacy. The assumption was that allowing employers to test job seekers for marijuana use gives employers information that job seekers may not want anyone to know. Marijuana testing may reveal an applicant's pregnancy status, health condition, or predisposition to genetic disorders. Mr. Moreland emphasized that employers have an unequal amount of power over applicants; an applicant must either relinquish his or her privacy or forgo a job opportunity.

Witness 34. Lisa Scott, Public Witness

Ms. Scott articulated that she suffered from acute arthritis due to her work using heavy machinery. Because of intense pain and difficulty sleeping, Ms. Scott needed to triple the dosage of over the counter, doctor-recommended pain relief. She went on to express excitement regarding the emergence of the Medical Marijuana Program, however she also stated that she didn't want to begin smoking and subsequently pointed out that dispensaries did not carry edibles. After crafting her own edibles with the help of local home growers, Ms. Scott noticed that the pain eased and she began to sleep better.

Ms. Scott maintained that years later, it is the cannabis that continues to help her perform well on her job using heavy machinery. In addition, she articulated that cannabis is not used with the intent of getting her high, rather she argued it aids with her comfort. She further urged the Council to speak to impacted members of the public before writing and passing any pieces of legislation.

Witness 35. Masipula Sithole Jr., Founder and Facilitator, Rhythm for Recovery

Mr. Sithole had concerns regarding bill 23-0266, especially Section 2(c). Mr. Sithole testified that instead of correcting some of the contradictions, the bill merely concedes and conceals some of the contradictions between the local and federal legislature. He argued that Section 2(e) "contradicts the spirit, striving and essence of the entire bill." Mr. Sithole felt like bill 23-0266 and bill 23-0309 "contradicts each other in situations in which patients of the medical marijuana program seek to work in exempted 'safety-sensitive sectors,' in local versus federal jurisdictions, and for public versus private employment settings." With that being said, Sithole believed that the biases in both bills, especially in regard to exemptions, will crowd-out labor participation in certain sectors and curtail labor mobility across certain sectors.

In order to strengthen the bill, Mr. Sithole suggested that the Council modify section 2(b), or add an entirely new clause, concerning echelons of exemption, that states "The provisions of this act shall exclude people working in the aforementioned positions and 'safety-sensitive sectors'." In addition, Mr. Sithole wanted to see section 2(c) modified or an entire new clause added concerning echelons of exemption, that states "The provisions of this act shall exclude people working in the forementioned positions, 'safety-sensitive sectors,' and federal jurisdictions." Finally, Mr. Sithole wanted to modify section 2(e) so that it is abundantly clear regarding what the bill expects of employers.

2. Written statements (did not provide live testimony)

Stephen Courtien, Executive Director, Baltimore-DC Building Trades

The Baltimore DC Building Trades suggested a change to the Bill "Prohibition of Marijuana Testing Act of 2019." They suggested changing section 2B.2 to clarify what construction is and to not have the use of occupational safety training as the determination of what construction is, as it is not a requirement for working in the construction industry. They also thanked the Council for excluding construction workers from this legislation because of the dangerous nature of the work.

Brittany Sakata, Associate General Counsel, American Staffing Association

Based on consultations with leading experts regarding other states' marijuana laws, Ms. Sakata's comments pertained to two issues—employers' ability to test for marijuana, at their discretion, with respect to safety-sensitive positions and their ability to take action when there is a reasonable suspicion of workplace impairment—for which we offer proposed amendments that should be included in any final legislation.

While the proposed legislation prohibits most employers from requiring a prospective employee to submit to pre-employment testing for THC or marijuana, Ms. Sakata argued that it contains several exceptions for certain positions, including "construction jobs that require

occupational safety training" and "any position with the potential to significantly impact the health and safety of employees or members of the public, as determined by the Director of the Department of
Human Resources." However, Sakata believed that this bill does not permit an employer to use its own independent judgment to identify positions as safety-sensitive and for which testing may be warranted.

Ms. Sakata pointed out that other states' drug testing laws have addressed this issue by allowing employers to exercise their discretion in determining when testing should be conducted due to safety concerns. For example, Arizona Revised Statute Title 23. Section 23-493 (Drug Testing of Employees) defines "safety-sensitive position" to mean "any job designated by an employer as a safety-sensitive position or any job that includes tasks or duties that the employer in good faith believes could affect the safety or health of the employee performing the task or others."

She also articulated that given the current state of drug testing technology, a positive marijuana test will not confirm whether an employee is currently impaired. Therefore, it is essential that employers be allowed to act when there is a reasonable suspicion of workplace impairment. While the proposed legislation states that "[n]othing in this act shall be construed to require an employer to permit or accommodate the use, consumption, possession. .in the workforce," it was argued that the legislation fails to address worker impairment. Ms. Sakata felt that employers have the obligation to ensure a safe work environment for all workers and should be protected for disciplining or discharging an employee if the employer possesses a good faith belief that the employee violated a workplace drug policy by being impaired on the worksite.

Doni Crawford, Policy Analyst, DC Fiscal Policy Institute

DCFPI supported the Prohibition of Marijuana Testing Act of 2019 because it would eliminate preemployment cannabis testing, "which not only conflicts with the spirit of Initiative 71, but also may be disproportionately harming groups of people already facing steep barriers to work." Crawford believed that both pieces of legislation are crucial to improving cannabis laws, boosting worker protections, and forging a more equitable future. However, Crawford said that "further improvements are needed in each bill to ensure that the District is positioned to meet these goals."

While the District had legalized the use and possession of small amounts of cannabis, most employers are still able to punish their employees for consuming cannabis, according to Crawford. In 2015, Initiative 71 legalized the possession of minimal amounts of cannabis in the District for adults aged 21 and older. The initiative made it legal for adults to possess, grow and transfer small amounts of cannabis and consume it on private property — but it didn't include a provision to prohibit cannabis testing as a condition of employment. As such, Crawford believed that existing law conflicts with this new right to consume cannabis on private property and on personal time by allowing employers to test for cannabis as a condition of employment. Pre-employment cannabis testing typically uses urinalysis, which measures usage or presence of cannabis within a certain timeframe rather than impairment.

Crawford recommended that the final bill language require DCHR to analyze whether entry-level positions are overrepresented as safety-sensitive throughout local government. If so, Crawford believed this could have a disproportionate impact on individuals enrolled in workforce training programs and returning citizens, who are often people already facing steep barriers to work and people of color. Additionally, it was urged that the final bill language should include employee protections for random on-the-job cannabis testing given the issues with urinalysis not measuring impairment.

Justin J. Palmer, VP, Public Policy & External Affairs, DC Hospital Association

Mr. Palmer acknowledged that the District's hospitals are in compliance with the "Prohibition of Pre-Employment Marijuana Testing Act of 2014." Mr. Palmer articulated that he believed the existing law meets the needs of health care providers. While he understood the intent of B23-0266, he had significant concerns about its application to health facilities and providers.

Mr. Palmer testified that the bill, as written, could complicate the delivery of care for patients. Most of the staff members come in contact with patients each and every day. Whether at reception or at the bedside, each employee is part of the care team. Mr. Palmer explains that a hospital is a "complex ecosystem that requires all staff members to be functioning at the top of their ability. Whether it is the bedside nurse, the dietician, or the environmental services associate, our employees work with advanced equipment and fragile patients and it is essential that they are not compromised." As an example, Mr. Palmer discussed how environmental services associates utilize chemicals and operate machinery that require complete focus and a person under the influence of a substance can jeopardize their safety and that of a patient's. While the current proposal did not apply to a person "in any position requiring the supervision or care of children, medical patients, or vulnerable persons...," Mr. Palmer believed this language was too vague to meet the needs of running a health facility.

Potomac Electric Power Company

Pepco's crews and supporting contractors meet the criteria of at least one or more of the exempted categories of employment, and as such, would be properly exempted from the requirements of this bills. Safety is the "number one priority" at Pepco, and they were pleased that this bill achieves its worthwhile goals without compromising the safety of Pepco's crews and the public at-large.

Commissioner Salim Adofo, Advisory Neighborhood Commission 8C, Single Member District 8C07

Commissioner Adofo pointed out that Initiative 71 did not change existing law on marijuana possession for anyone under 21 years of age: It is still illegal. A person under 21 with more than two ounces of marijuana can be arrested. If a Metropolitan Police Department officer sees a person under 21 with up to two ounces of marijuana, it will be seized. However, the person will not be arrested or issued a ticket. In addition, although the District of Columbia has decriminalized possession of up to two ounces of marijuana for persons over the age of 21, federal law continues to prohibit the possession or use of any amount of marijuana. As a result, federal law enforcement officers may arrest anyone in the District of Columbia for possession or use of any amount of marijuana as a violation of federal law.

With that being said, Commissioner Adofo articulated that with the local legislation decriminalizing marijuana, it would be unfair to test as a condition of employment for a perfectly legal activity locally. However, the District of Columbia is a hybrid of federal and municipal agencies that are responsible for employing thousands of people regularly. Many of the agencies have similar or identical names. It was argued that many people, especially our youth, did not know the difference between applying for employment at the federal level or municipal level. It's often simply viewed as a "government job." It is therefore reasonable to believe that one could think that she or he is applying at one level and not the other. Commissioner Adofo argued that without proper education, we could be setting up our residents for failure by having them think it's acceptable to consume marijuana, because it will not impact her or his employment.

Additionally, he stated that "there are no provisions in this bill for the amount of marijuana one can consume, without being considered under the influence. As it stands now, an employee can come to work under the influence and there would be no repercussions. This is a potential safety violation for the business owner, the employee and the customer."

On behalf of the residents of District 8C07, Commissioner Adofo did not approve of this bill as written. In his opinion, the bill should be revised to include education requirements for high school students, as it pertains to marijuana consumption. The revised bill should also include safety limits for consumption of marijuana.

Solomon Keene, President & CEO, Hotel Association of Washington, D.C.,

Mr. Keene testified against B23-266. He argued was made that pre-employment testing helps to reduce employee turnover and increases customer satisfaction. Customer satisfaction equates to more travelers to our city, which turns into more dollars into the District's coffers. He also stated that pre-employment testing protects customers and limits the number of potential negligent hiring claims an employer may have. In Mr. Keene's opinion, restricting employers' abilities to drug test any further than what the law already prohibits, threatens the safety of hotel workers and the guests they serve. Therefore, HAWDC did not support this bill and urged the Council not to pass this legislation. Mr. Keene urged the Council to allow their members to continue to have the tools that will assist their employees in providing positive customer service experiences for guests that will leave them wanting to return to our wonderful city many times over.

District of Columbia Chamber of Commerce

The D.C. Chamber of Commerce testified that they were in support of previous legislation, The Prohibition of Pre-Employment Marijuana Testing Act of 2015, mainly because it was "viewed as a reasonable workplace policy for District employers." With that being said, the Chamber articulated their support for "the existing law as-is and does not recommend that the Committee or Council of the District of Columbia amend or change the law as it would impact employer hiring policies and disrupt the network of employment protections that come into place during the hiring process." After reviewing B23-266, the Chamber maintained that the new bill is evidently redundant to the existing law passed two Council Periods ago with the same goals. As such, they felt like it was unnecessary for the Committee to consider the measure any further. They also mentioned that the business community supports the existing employment standards because the underlying law does not remove an employer's right to prohibit the use of drugs at work or at

any time during employment. Nor does the existing law interfere with federal employment contracts. The Chamber argued that B23-266 would incorporate the DC Department of Human Resources into the employment policymaking practice on behalf of DC businesses, thus removing the flexibility for employers to develop their own drug testing policy that the 2015 law established. The Chamber also feared that Bill 23-266 proposed to mandate a policy shift that could micromanage operations of the private sector employer and decisions that occur between the employer and employee, therefore they could not support the new bill.

Commissioner Chuck Elkins, Advisory Neighborhood Commission 3D

Commissioner Elkins urged the Council to hold a separate hearing on the problem of second-hand marijuana smoke. Elkins articulated that he had heard complaints from residents of high rises and, in some cases, residents of single family homes, that the increase in marijuana smoking for recreational purposes is exposing non-smoking citizens of this city to second-hand marijuana smoke. Just as with second-hand cigarette smoke, Commissioner Elkins was concerned about the health effects of breathing second-hand marijuana smoke. He argued that the District should "not repeat our mistakes with cigarette smoke where we let years and years of exposure to the smoke occur before we looked at the health evidence regarding secondhand exposure and took action to protect people's health." Commissioner Elkins maintained that the Council should deal with this health and serious nuisance issue here at the beginning of recreational smoking and not wait until it is out of control.

He explained that ANC3D had initiated a research relationship with the School of Public Affairs at American University by which some of their graduate students explore issues of concern to our ANC. The students initiated an investigation of this problem of second-hand marijuana smoke and would be looking to see what other cities across the country may have done to deal with this issue. Commissioner Elkins hoped that these students would develop some creative ideas for how the DC City Council might take action in this area. A hearing by this Council later this year or early next year could serve as a means to explore the extent of this problem across the city and how the Council might deal effectively with it. He urged the Council to schedule such a hearing at a later time and bring in experts in this area to advise the Council.

Nathan Harrington, DC Marijuana Justice (DCMJ)

Mr. Harrington urged the Council to pass B23-0266 "Prohibition of Marijuana Testing Act of 2019." He argued that cannabis testing serves as a form of discrimination against many workers, and called the practice "wasteful, unjust, and counterproductive." Furthermore, Mr. Harrington claimed that there is no reliable evidence to support the notion that cannabis can reduce an individual's occupational competence. He articulated his belief in there being a double standard when testing for THC, considering that THC remains in the body anywhere from a few days to more than a month, and a host of other mind-altering substances either being untested or undetectable.

Mr. Harrington recounted his use of cannabis while teaching in the Prince George's County School System, mentioning that he was never drug tested. In order to get a position close to home in Ward 8, he had to go without cannabis for two weeks before the test which heighted his depression and back pain. Additionally, Mr. Harrington noted an example of a teacher who had a job offer revoked by DCPS due to testing positive for marijuana, which forced the teacher to take

their talents to Prince George's County where drug testing is non-existent. He also mentioned that some of the most dedicated workers he has encountered are regular consumers of cannabis.

3. Government Witness

Ventris Gibson, Director of the DC Department of Human Resources.

Please see Section IV of this report, Position of the Executive.

VI. IMPACT ON EXISTING LAW

The Committee print of B24-109 largely establishes new, standalone law. It also amends the District of Columbia Human Rights Act and makes conforming amendments to several laws governing DC government personnel.

Title I is standalone law, establishing new employment protections.

Title II amends Section 211 of the Human Rights Act of 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11) by adding a new subsection (b-1) to require that employers, employment agencies, or labor organization treat a medical marijuana program patient's use of medical marijuana to treat a disability in the same manner as it would treat the legal use of a controlled substance prescribed by or taken under the supervision of a licensed health care professional, with certain exceptions.

Title III makes conforming amendments

Amendments to the CMPA:

Amends Section 301, definitions:

Amends (14B) to state that the definition of "qualifying patient" shall have the same meaning as in the new proposed section 211(b-1) of the Human Rights Act.

Amends (15B) to state that the definition of "safety-sensitive" shall have the same meaning as section 101(8) of the Cannabis Employment Protections Amendment Act of 2022

Amends Section 2051(b) (as added by D.C. Law 12-124, the Omnibus Personnel Reform Amendment Act of 1998) to require compliance with the requirements of the protections provided by Section 102 of B24-109 and new section 211(b-1) of the DC HRA [Title II of this print].

Amends Section 2025(d) (as added by D.C. Law 12-227, the Department of Human Services and Commission on Mental Health Services Mandatory Employee Drug and Alcohol Testing and Department of Corrections Conforming Amendment Act of 1998) to require compliance with the requirements of the protections provided by Section 102 of B24-109 and new section 211(b-1) of the DC HRA [Title II of this print].

Amends section 2032(g) (as added by D.C. Law 15-353, Child and Youth, Safety and Health Omnibus Amendment Act of 2004) to require compliance with the requirements of the protections provided by Section 102 of B24-109 and new section 211(b-1) of the DC HRA [Title II of this print].

Amends Section 2061 (Code § 1-620.61), which codified L23-276, by adding a new paragraph (2A) to define "medical marijuana."

Amends Section 2062 (Code § 1-620.62), which codified L23-276, by repealing subsections (a), (b), and (c)(3), as they are now included in Title I of B24-109, and by revising subsection (d), concerning rules of construction for reasonable accommodations of medical cannabis patients, to confirm to the rule of construction in Title I of B24-109.

Also amends Section 2062 by adding a new subsection (d-1) to clarify that nothing shall abridge the rights under the new DC HRA Section 211 (b-1) [Title II of this print] and other provisions to harmonize the CMPA with the HRA reasonable accommodation process.

Conforming amendments to other laws:

Amends Section 3(d) of the Department of Corrections Employee Mandatory Drug and Alcohol Testing Act of 1996, effective September 20, 1996 (D.C. Law 11-158, D.C. Official Code § 24-211.22) to require compliance with the requirements protections provided by section 102 of B24-109 and Section 211(b-1) of the DC HRA [Title II of this print] for employees of the Department of Corrections.

VII. FISCAL IMPACT STATEMENT

The print does not require a fiscal impact statement because it will be marked up by a subsequent committee (the Committee of the Whole); the FIS will be prepared for the final mark-up.

VIII. SECTION BY SECTION ANALYSIS

Provides for the long and short titles of the legislation.

Title I. Employment protections

Section 101 establishes definitions

Section 102

Subsection (a) prohibits employers from refusing to hire, firing, suspending, failing to promote, demoting, or penalizing employees because they: 1) Use cannabis legally; 2) Don't use cannabis; 3) Are registered in the District's or their state's medical cannabis program; 4) Fail to pass a cannabis drug test.

Subsection (b) provides exceptions from such protections for 1) employees in safety-sensitive positions; 2) If, by complying with (a), employers would violate federal law, regulations, contracts, or funding agreements; 3) If employees use, consume, possess, or take other actions related to cannabis at the workplace or during work hours; 4) If the employee manifests articulable signs of cannabis use or impairment at work such that their performance is or is likely to be negatively affected or in a way that interferes with the employer's duty under health and safety laws

Section 103 establishes rules of construction for the prohibitions and exceptions in Section 102, including that employers are not prohibited from having a reasonable drug-free workplace policy or from prohibiting impairment at work.

Section 104 requires employers to provide employees notice of rights under the law and for OHR to develop a template notice.

Section 105 authorizes the filing of a complaint with the Office of Human Rights and provides procedures for the resolution of such complaints.

Section 106 provides a private right of action.

Section 107 authorizes enforcement by the Attorney General.

Section 108 requires rulemaking by the Mayor and authorizes rulemaking by the Council.

Title II: Medical Cannabis and Disabilities

Section 201 amends the Human Rights Act by adding a new section 211(b-1) to require qualifying patients with disabilities be treated the same as employees with disabilities using prescription medicine, with exceptions for safety sensitive employees or if compliance would violate federal law, regulation, contract, or funding agreement. Specifies that employers do not need to accommodate smokable forms of cannabis and that for the protections to apply employees must have a recommendation for medical cannabis from an authorized provider.

Title III: Conforming Amendments
See Section VI of this report, Impact on Existing Law

Title IV: Standard Provisions

Section 401 establishes applicability and specifies that Sections 104(b) [OHR development of a notice of rights] and 108 [rulemaking] shall apply upon their inclusion in a budget and financial plan. The remainder of the bill will apply upon those provisions' inclusion in a budget and financial plan and at least one year after the Mayor approves the bill.

Section 402 contains the fiscal impact statement.

Section 403 contains the effective date.

IX. COMMITTEE ACTION

The Committee on Labor and Workforce Development convened on March 3, 2022, at 3:12p.m. to consider and vote on the committee print of B24-109. Chairperson Silverman recognized the presence of a quorum, consisting of herself and Councilmembers Trayon White (Ward 8), Janeese Lewis George (Ward 4), and Christina Henderson (At-Large).

Chairperson Silverman moved B24-109 and opened the floor for discussion. Her remarks as prepared follow:

> This bill was introduced on February 25, 2021, by Councilmember Trayon White and co-introduced by 5 additional councilmembers. The bill was a re-introduction of legislation from the prior Council period, B23-266, the "Prohibition of Marijuana Testing Act of 2019. The Committee had a hearing on the earlier version of this bill on September 25, 2019.
>
> The bill, as developed for the Committee print, would clarify District employment law related to cannabis use. There is a disconnect between the District's legalization of cannabis and its employment laws. Even though cannabis is legal, workers can be fired or disciplined for using it in their personal time and without any impact on their work. The print will provide rules of the road on the use of cannabis and its intersection with the workplace.
>
> The print prohibits employers from taking certain negative personnel actions (such as firing, refusing to hire, or suspending employees) because an employee legally used cannabis off the clock, refusal to use cannabis, or their status as a registered medical cannabis patient. The print also prohibits employers from taking negative personnel actions because an employee failed a cannabis drug test (without other reasons, such as performance). This is because such tests can't distinguish how recently someone used cannabis or whether it is causing cognitive or other impairment.
>
> The print incorporates important exceptions. The print does not extend employment protections to workers in safety-sensitive jobs, if such protections would cause an employer to violate federal law or a federal contract, or if an employee used or possessed cannabis at work. Also, importantly, employees cannot be impaired at work in a way that negatively affects their performance or causes an unsafe work environment. If they are, employers can take personnel action. The print also makes clear that employers can still have drug-free workplaces, may still prohibit impairment at work, and may still conduct drug testing (but the use of such tests' results is limited).
>
> Employees whose jobs are designated "safety-sensitive" required special consideration. The Committee must strike a balance between workers' individual rights and the safety and well-being of the workers and their coworkers, any persons they supervise, and the public at large. An important consideration is that there is currently no objective test to determine cannabis impairment. As a result, it is not possible currently to ensure the safety of safety-sensitive employees, or the safety of those they supervise and the public, if the

employees use cannabis. Therefore, the print does not extend the prohibition against adverse employment actions to employees in safety-sensitive jobs. This means safety sensitive employees can be prohibited from using cannabis and employers can take action against them if they fail a cannabis drug test.

Additionally, the print amends the DC Human Rights Act (HRA), which is our local version of the Americans with Disabilities Act. The print will clarify how our existing law, which provides employment protections to workers with disabilities, should be applied when a disabled worker uses medical cannabis. It would require employers to treat workers with disabilities the same whether they use medical cannabis or another prescription medication to treat the disability. This provision excludes workers in safety-sensitive roles, as well as circumstances when an employer must deny an accommodation request in order to comply with a federal law or contract.

I want to thank Councilmember Trayon White for his authorship of the introduced bill and his work with us in preparing the legislation. I also want to thank Councilmember Robert White for working with my office, as the bill will be implemented by an agency, the Office of Human Rights, that falls under the jurisdiction of the Committee of Government Operations, which he chairs.

I also want to thank the many stakeholders who worked with my office in development of this legislation, particularly the DC Chamber of Commerce; ACLU-DC; and the Executive--DCHR, OHR, and the Mayor's Office of Legal Counsel. I am pleased to note the support of ACLU-DC and the DC Chamber of Commerce of the Committee print.

At this time, I'd like to call for any of my colleagues to make a statement on B24-109 "Cannabis Employment Protections Amendment Act of 2022."

Councilmember White made a statement, as prepared:

Good afternoon, everyone, thank you all for making the time to be here today and thank you to Chairperson Silverman and the Committee staff for all your hard work on B24-109, the "Cannabis Employment Protections Amendment Act of 2022." I know it has required a monumental effort to coordinate with OHR, OAG, the business community, medical cannabis providers, and other stakeholders, and I really appreciate the work that has gone into it.

This bill is an important step towards eliminating the historic inequities of punishment for cannabis use, and ensuring that those who use cannabis, medically or recreationally, will not be penalized at work for use in their private time. I appreciate the thought and consideration put into the provisions regarding safety sensitive positions to ensure that those who care for others or operate dangerous machinery are able to safely carry out their jobs, and in turn, keep themselves and others safe. I will be paying close attention to any adjustments employers may make in safety-sensitive designations to see that these provisions are equitably enforced.

Thank you again, Chairperson Silverman, for holding today's hearing and I appreciate you all being here today and supporting this bill.

Councilmember Lewis George made a statement, as prepared:

Thank you Councilmember Silverman, and thank you to the staff of the Labor and Workforce Development Committee, for your thoughtful work on the "Cannabis Employment Protections Amendment Act of 2022." I know you have engaged in countless conversations with stakeholders in the employer community, medical cannabis providers, and worker rights and racial justice experts. And thank you as well Councilmember White for introducing this measure and pressing the city to move in this very right direction. It is great to see today's bill move the marble and to know that this bill for markup goes beyond its original scope to create an even more robust set of protections, and clear rules of the road for navigating legal cannabis usage and workplace safety.

I think we are striking a really sound balance with this bill though I do have some concerns or lingering questions regarding how we plan to treat safety-sensitive positions. I know our intention is to tailor exceptions in pragmatic and narrow ways but worry perhaps we are painting with too broad a brush.

Safety sensitive concerns ARE REAL! And yet... the reality is, a majority of workers who are likely to be in safety-sensitive sectors are also people of color and we know these are the same Black and brown workers who have faced decades of discrimination and incarceration precisely for cannabis usage. And so I worry how implicit bias may play out in practice with this law and I worry some of our residents who may want to take advantage of the benefits of medical cannabis will remain locked out of that opportunity.

I know this bill still has more steps to move through before full Council passage and I am hopeful the impending CORE analysis of this measure can help us with additional insights to ensure that we are legislating cannabis employment protections in ways that do as much as they can to advance racial equity. Thank you, Councilmember Silverman, and looking forward to today's vote.

Councilmember Henderson provided a statement, as prepared:

Thank you, Chairperson Silverman, for calling this meeting to markup the Cannabis Employment Protections Amendment Act of 2022. I'm proud to support this measure and am glad that we are closing a meaningful gap in employment protections, and one that has significant implications for equity in the District.

We all know about the history of cannabis in our Country. It's been called a gateway drug, use, possession, and distribution has been punished severely in our criminal justice system in ways inconsistent with the effects of the substance.

Thankfully, attitudes about cannabis have changed. The District has established a medical program and passed Initiative 71. We know cannabis use can yield helpful outcomes for people suffering from chronic illness or pain as an alternative to opioids.

Attitudes, misconceptions and incorrect beliefs about what cannabis is and what it does have contributed to racial disparities in arrests, convictions, imprisonment, and employment outcomes. We know better, and there are efforts underway in the District and in the United States to mitigate the disparities in convictions and imprisonment. I'm glad to be a part of the effort to address the impacts of cannabis use on employment outcomes in our city.

While the federal government continues to block our ability to legalize recreational use, we can at least ensure that people do not lose their jobs or face employment sanctions, with meaningful exceptions, for the things they do in their free time.

I'm glad to see the clear standards set in this legislation, especially for safety-sensitive positions. These workplaces can be dangerous by nature, and we should make sure that employers have the tools they need to keep their employees and any customers safe.

Thank you for moving this legislation to markup, Councilmember Silverman, and I look forward to voting yes on this committee print.

Discussion having ended, Chairperson Silverman then moved the proposed committee print and report for B24-109, with leave for the Committee staff to make technical and conforming amendments.

After opportunity for discussion, the members voted by voice vote. The committee print and accompanying report were passed, with the Members present voting unanimously.

The committee meeting adjourned at 3:27p.m.

X. ATTACHMENTS

1. B24-109 as introduced
2. Committee referral memo
3. Notice of Intent to Act, March 5, 2021
4. Public hearing notice for B23-266, Sept. 25, 2019
5. Public hearing agenda, witness list, and testimony for the September 25, 2019, hearing
6. Additional materials submitted to the Committee
7. Legal sufficiency determination
8. Comparative Print of B24-109
9. Committee Print of B24-109

COMMITTEE OF THE WHOLE
DRAFT COMPARATIVE PRINT
BILL 24-109

D.C. OFFICIAL CODE § 2-1402.11. PROHIBITIONS.

… (b) Subterfuge. — It shall further be an unlawful discriminatory practice to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, matriculation, genetic information, disability, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, or credit information of any individual.

(b-1)(1) Except as provided in paragraph (2) of this subsection, for the purposes of subsection (a) of this section, an employer, employment agency, or labor organization shall treat a qualifying patient's use of medical marijuana to treat a disability in the same manner as it would treat the legal use of a controlled substance prescribed by or taken under the supervision of a licensed health care professional.

(2) Paragraph (1) of this subsection shall not apply if it would require an employer, employment agency, or labor organization to:

(A) Commit a violation of a federal statute, regulation, contract, or funding agreement;

(B) Permit an employee to use medical marijuana while the employee is in or assigned to a safety sensitive position; or

(C) Permit the use of medical marijuana in a smokable form at a location the employer, employment agency, or labor organization owns, uses, or controls.

(2) For the purposes of this subsection the term:

(A) "Authorized practitioner" shall have the same meaning as provided in section 2(1E) of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.01(1E)).

(B) "Controlled substance" shall have the same meaning as provided in section 102(6) of the Controlled Substances Act, approved October 27, 1970 (84 Stat. 1242; 21 U.S.C. § 802(6)).

(C) "Medical marijuana" shall have the same meaning as provided in section 2(12) of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.01(12)).

(D) "Qualifying patient" means an individual who:

(i) Is actively registered in the District's medical marijuana program established pursuant to section 6 of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.05), and has received a recommendation to use medical marijuana from an authorized practitioner in accordance with section 3 of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective February 25, 2010 (D.C. Law 13-315; D.C. Official Code § 7-1671.04); or

(ii) Is registered in the medical marijuana program or medical cannabis program of the employee's jurisdiction of residence.

(E) "Safety sensitive" shall have the same meaning as provided in section 101(8) of the Cannabis Employment Protections Amendment Act of 2022.

(c) Accommodation for religious observance. —

(1) It shall further be an unlawful discriminatory practice for an employer to refuse to make a reasonable accommodation for an employee's religious observance by permitting the employee to make up work time lost due to such observance, unless such an accommodation would cause the employer undue hardship. An accommodation would cause an employer undue hardship when it would cause the employer to incur more than de minimis costs….

* * *

D.C. OFFICIAL CODE § 1-603.01. DEFINITIONS.

(14B) The term "qualifying patient" shall have the same meaning as provided in section 211(b-1)(2)(D) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11).

(15B) The term "safety sensitive" shall have the same meaning as provided in section 101(8) of the Cannabis Employment Protections Amendment Act of 2022.

D.C. Official Code § 1-620.11. General.

(a) In compliance with federal regulations issued pursuant to 49 U.S.C. § 31306 , the Mayor and each personnel authority shall adopt and administer a program for conducting pre-employment, reasonable suspicion, random, post-accident, return-to-duty, and follow-up testing of employees who are employed as drivers of commercial motor vehicles, or who are candidates for such employment, for the use of alcohol and controlled substances.

(b) To the extent permitted by federal law and regulations, programs adopted pursuant to subsection (a) of this section **shall treat employees in compliance with requirements of Title XX-E, section 102 of the Cannabis Employment Protections Amendment Act of 2022, and**

section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1)) ~~**shall treat qualifying patients in compliance with subchapter XX-E of this chapter**~~.

* * *

D.C. OFFICIAL CODE § 1-620.25. PROCEDURE AND EMPLOYEE IMPACT.

(a) The drug and alcohol testing policy shall be issued in writing in advance of program implementation to inform employees and allow them the opportunity to seek treatment. An employee shall be allowed only one opportunity to seek treatment following his or her first positive test result. Thereafter, any confirmed positive drug test, or positive breathalyzer test, or a refusal to submit to a drug or breathalyzer test shall be grounds for termination of employment.

(b) The program shall cover all Department of Mental Health and Department of Human Services employees, including management, and shall be implemented as a single program of each Department.

(c) The results of any random test conducted pursuant to this subchapter may not be turned over to any law enforcement agency without the employee's written consent.

(d) Notwithstanding § 1-620.22(f) and the second and third sentences of subsection (a) of this section, this subchapter shall comply with the requirements of subchapter XX-E of this chapter **and the requirements of section 102 of the Cannabis Employment Protections Amendment Act of 2022, and section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1))** ~~**for employees who are qualifying patients**~~.

* * *

D.C. OFFICIAL CODE § 1-620.32. EMPLOYEE TESTING.

(g) ~~**Notwithstanding § 1-620.35(a), subchapter XX-C of Chapter 6 of Title 1 shall comply with the requirements of subchapter XX-E of Chapter 6 of Title 1 for employees who are qualifying patients.**~~ **Notwithstanding section 2035(a), District agencies shall comply with the requirements of Title XX-E, section 102 of the of the Cannabis Employment Protections Amendment Act of 2022, and section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1)).**

* * *

D. C. OFFICIAL CODE §1-620.61. DEFINITIONS.

For the purposes of this subchapter, the term:

(1) "Agency" includes the Council.

(2) "Marijuana" shall have the same meaning as provided in § 48-901.02(3)(A).

(2A) "Medical marijuana" shall have the same meaning as provided in section 2(12) of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.02(12)).

(3) "Undue hardship" shall have the same meaning as provided in section 101(10) of the Americans with Disabilities Act of 1990, approved July 26, 1990 (104 Stat. 330; 42 U.S.C. § 12111(10)).

* * *

D.C. OFFICIAL CODE § 1-620.62. PROTECTIONS FOR QUALIFYING PATIENTS.

(a) **[Repealed]** ~~**(1) Notwithstanding any other provision of law and except as provided in subsection (b) of this section, an agency may not refuse to hire, terminate from employment, penalize, fail to promote, or otherwise take adverse employment action against an individual based upon the individual's status as a qualifying patient unless the individual used, possessed, or was impaired by marijuana at the individual's place of employment or during the individual's hours of employment.**~~

~~**(2) A qualifying patient's failure to pass an agency-administered drug test for marijuana components or metabolites may not be used as a basis for employment-related decisions unless reasonable suspicion exists that the qualifying patient was impaired by or used marijuana at the qualifying patient's place of employment or during the qualifying patient's hours of employment.**~~

(b) **[Repealed]** ~~**Subsection (a) of this section shall not apply:**~~

~~**(1) To positions that are designated as safety-sensitive; or**~~

~~**(2) If compliance would cause the agency to commit a violation of a federal law, regulation, contract, or funding agreement.**~~

(c)(1) Upon the request of an employee who is a qualifying patient, an agency must provide a reasonable accommodation for the employee's use of medical marijuana, including by engaging in an interactive process to determine the appropriate reasonable accommodation.

(2) A reasonable accommodation may include reassigning or transferring an employee to an open position for which the employee is otherwise qualified, or modifying or adjusting the employee's job duties or working environment, or modifying or adjusting the agency's operating procedures to enable the employee to successfully perform the essential functions of the job. An accommodation is not reasonable if it would:

(A) Place the employee in a position that is designated as safety-sensitive;

(B) Impose an undue hardship on the employing agency; or

(C) Cause the agency to commit a violation of a federal law, regulation, contract, or funding agreement.

(3) **[Repealed]** ~~**(A) An employee's election to pursue relief under this section shall not prejudice the employee's right to pursue relief under other District or federal law.**~~

~~**(B) A reasonable accommodation or interactive process provided under this subsection may be combined with a reasonable accommodation or interactive process provided pursuant to other District or federal law.**~~

(d) Nothing in subsection (c) of this section may be interpreted as requiring an agency employer to permit an employee who is a qualifying patient to:

(1) **Use, consume, possess, store, deliver, transfer, display, transport, sell, purchase, or grow marijuana at the employee's place of employment, while performing work for the agency, or during the employee's hours of work; or** ~~**Use or administer marijuana at the employee's place of employment or during the employee's hours of employment; or**~~

(2) **Be impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working, or during the employee's hours of work, that substantially decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy workplace as required by District or federal occupational safety and health law.** ~~**Be impaired by marijuana at the employee's place of employment or during the employee's hours of employment.**~~

(e) Notwithstanding § 1-604.04(a), the Council may issue rules pertaining to Council employees to implement the provisions of this section.

(d-1)(1) Nothing in this section may be interpreted to derogate or abridge the rights afforded under section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1)), to a qualifying patient who uses medical marijuana to treat a disability.

(2) An employee's election to pursue relief available under this act for a violation of subsection (b) of this section shall not prejudice the employee's right to pursue relief in other venues for violations of other District or federal laws.

(3) A reasonable accommodation or interactive process provided under subsection (c) of this section may be combined with a reasonable accommodation or interactive process provided pursuant to other District or federal law.

* * *

D.C. OFFICIAL CODE § 24-211.22. EMPLOYEE TESTING.

(a) The following Department employees shall be tested for drug and alcohol use:

(1) Applicants;

(2) Those employees who have had a reasonable suspicion referral;

(3) Post-accident employees, as soon as reasonably possible after the accident; and

(4) HPR employees.

(b) Only HPR employees shall be subject to random testing.

(c) Employees shall be given at least a 30-day written notice from September 20, 1996, that the Department is implementing a drug and alcohol testing program and shall be given an opportunity to seek treatment. Following September 20, 1996, the Department shall procure a testing vendor and testing shall be implemented as described herein.

(d) **Notwithstanding any other provision of this act, the Department shall comply with the requirements of title XX-E of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective April 27, 2021 (D.C. Law 23-276; D.C. Official Code § 1-620.61 et seq.), section 102 of the Cannabis Employment Protections Amendment Act of 2022, and section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1)).** ~~**The Department shall comply with the requirements of subchapter XX-E of Chapter 6 of Title 1.**~~

DRAFT Committee Print
Committee of the Whole
April 19, 2022

A BILL

24-109

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To prohibit employers from firing, failing to hire, or taking other personnel actions against an individual for use of cannabis, participating in the District's or another state's medical cannabis program, or failure to pass an employer-required or requested cannabis drug test, unless the position is designated safety sensitive or for other enumerated reasons; to authorize enforcement of Title I by the Office of Human Rights, the Attorney General, and through a private right of action; to amend the District of Columbia Human Rights Act to clarify that employers must treat a medical cannabis program patient's use of medical cannabis to treat a disability in the same manner as it would treat the legal use of a controlled substance; to amend the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to make conforming amendments; to amend the Department of Corrections Employee Mandatory Drug and Alcohol Testing Act of 1996 to make conforming amendments; and to delay applicability of certain provisions until at least one year after the Mayor's approval.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Cannabis Employment Protections Amendment Act of 2022".

TITLE I. EMPLOYMENT PROTECTIONS FOR CANNABIS USE

Sec. 101. Definitions

(1) "Cannabis" means marijuana.

(2) "District government" means the government of the District of Columbia, including:

(A) Any department, agency, or instrumentality of the government of the District;

(B) Any independent agency of the District established under Part F of Title IV of the District of Columbia Home Rule Act, approved December 24, 1973 (69 Stat. 699; D.C. Official Code § 1–204.91 *et seq*.);

(C) Any agency, board, or commission established by the Mayor or the Council and any other agency, public authority, or public benefit corporation which has the authority to receive monies directly or indirectly from the District (other than monies received from the sale of goods, the provision of services, or the loaning of funds to the District); and

(D) The Council.

(3) "Employee" means any individual employed by or seeking employment from an employer and shall include unpaid interns.

(4) "Employer" means any person who, for compensation, employs an individual, except for the employer's parent, spouse, or children engaged in work in and about the employer's household, and any person acting in the interest of such employer, directly or indirectly. The term shall include public employers, including the District government, but excluding the District of Columbia court system and the federal government.

(5) "Marijuana" shall have the same meaning as provided in section 102(3)(A) of the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981 (D.C. Law 4-29; D.C. Official Code § 48-901.02(3)(A)).

(6) "Medical cannabis program" means the District's medical marijuana program established pursuant to section 6 of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.05).

(7) “Medical cannabis program patient” means an individual who is actively registered in the District’s medical cannabis program or in the medical marijuana program or medical cannabis program of the employee’s jurisdiction of residence.

(8) “Safety sensitive” means an employment position, as designated by the employer, in which 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; and may include positions that require or involve:

(A) The provision of security services, such as police, special police, and security officers, or the custodianship, handling, or use of weapons, including firearms;

(B) Regular or frequent operation of a motor vehicle, heavy or dangerous equipment, or heavy or dangerous machinery;

(C) Regular or frequent work on an active construction site or occupational safety training;

(D) Regular or frequent work on or near power or gas utility lines;

(E) Regular or frequent handling of hazardous materials as defined in § 8-1402;

(D) The supervision of, or the provision of routine care for, an individual or individuals who are unable to care for themselves and who reside in an institutional or custodial environment; or

(E) The administration of medications, the performance or supervision of surgeries, or the provision of other medical treatment requiring professional credentials.

(9) "Use of cannabis" means an individual's legal consumption of marijuana under section 401(a) of the District of Columbia Uniform Controlled Substances Act of 1981 (D.C. Official Code § 48-904.01(a)), or the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.01 *et seq*).

Sec. 102. Employment protections.

(a) An employer may not refuse to hire, terminate from employment, suspend, fail to promote, demote, or penalize an individual based upon:

(1) The individual's use of cannabis;

(2) The individual's status as a medical cannabis program patient; or

(3) The presence of cannabinoid metabolites in an individual's bodily fluids in an employer-required or requested drug test without additional factors indicating impairment pursuant to subsection (b)(4) of this section.

(b) Notwithstanding subsection (a), an employer shall not be in violation of this section where the employer takes action related to the use of cannabis based on the following:

(1) The employee is in a position designated as safety sensitive;

(2) The employer's actions are required by federal statute, federal regulations, or a federal contract or funding agreement;

(3) 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, unless otherwise permitted pursuant to section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1)) ("section

211(b-1) of the HRA"), or section 2062 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective April 27, 2021 (D.C. Law 23-276; D.C. Official Code § 1-620.62); or

(4) Notwithstanding section 211(b-1) of the HRA or section 2062 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective April 27, 2021 (D.C. Law 23-276; D.C. Official Code § 1-620.62), the employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working, or during the employee's hours of work, that substantially decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy workplace as required by District or federal occupational safety and health law.

Sec. 103. Rules of Construction.

Nothing in this title shall be construed to:

(1) Require an employer to permit or accommodate the use, consumption, possession, storage, delivery, transfer, display, transportation, sale, purchase, or growing of cannabis at the employee's place of employment while performing work for the employer, or during the employee's hours of work unless otherwise required pursuant to section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1)) ("section 211(b-1) of the HRA"), or section 2062 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective April 27, 2021 (D.C. Law 23-276; D.C. Official Code § 1-620.62);

(2) Prohibit an employer from adopting a reasonable drug-free workplace or employment policy that:

(A) Requires post-accident or reasonable suspicion drug testing of employees for cannabis or other drugs or drug testing of employees in safety sensitive positions;

(B) Is necessary to comply with federal law, including the Drug-Free Workplace Act of 1988, or a federal contract or funding agreement, if applicable to the employer;

(C) Prohibits the use, consumption, possession, storage, delivery, transfer, display, transportation, sale, purchase, or growing of cannabis at the employee's place of employment, while performing work for the employer, or during the employee's hours of work, unless otherwise permitted pursuant to section 211(b-1) of the HRA or section 2062 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective April 27, 2021 (D.C. Law 23-276; D.C. Official Code § 1-620.62); or

(D) Prohibits employees from being impaired at the employee's place of employment, while performing work for the employer, or during the employee's hours of work, as described in section 102(b)(4); or

(3) Create or eliminate any common law or statutory cause of action for any person against an employer for injury, loss, or liability to a third party

(4) Eliminate any common law or statutory cause of action otherwise available under District law; or

(5) Create a safe harbor for an employer or to provide immunity for the employer from suit.

Sec. 104. Notice of rights under the law.

(a) Employers shall provide notice to employees of employees' rights under this Title, whether the employer has designated the employee's position as safety sensitive, and the protocols for any testing for alcohol or drugs that the employer performs:

(1) Within 60 days after the applicability date of this title and on an annual basis thereafter to all incumbent employees; and

(2) Upon hire of a new employee.

(b) Within 45 days after the applicability date of this section, the Office of Human Rights shall publish a template for the notice required pursuant to subsection (a) of this section.

Sec. 105. Filing a complaint with the Office of Human Rights.

(a) An employee claiming employer noncompliance with section 102 may file an administrative complaint with the Office of Human Rights ("OHR") within one year after the alleged act of noncompliance.

(b) The administrative complaint adjudication procedure shall include:

(1) Intake – Upon receipt of a complaint, OHR shall review the complaint for jurisdiction and whether it states a claim under section 102. If OHR determines that it has jurisdiction and the complaint states a claim, OHR shall docket the complaint for mediation.

(2) Mediation – All complaints over which OHR determines it has jurisdiction and that state a claim under section 102 shall be scheduled for mediation within 45 days after the docketing of the complaint. All parties shall participate in mediation in good faith.

(3) Request for Information – Once a case is docketed, OHR may request information from both parties, including a response to the complaint from the respondent and a rebuttal statement from the complainant.

(4)(A) Fact-Finding Hearing – If the complaint is not resolved through mediation or settlement conference, within 20 days after the most recent unsuccessful resolution attempt, OHR shall serve a notice on the parties scheduling a public fact-finding hearing before a hearing examiner.

(B) The factfinding hearing shall be conducted in accordance with procedures promulgated under Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*).

(C) Following the fact-finding hearing, the hearing examiner shall submit a proposed decision and order accompanied by findings of fact and conclusions of law to the Director.

(6) Final determination and order – The Director of OHR, or his or her designee, shall issue a final determination and order based on the recommendations or proposed decision or order of the hearing examiner, which shall advise the parties of their rights under paragraph (7) of this subsection. The Director's final determination and order may modify or reject the proposed decision of the hearing examiner or remand for more information.

(7) Appeals and judicial review – The non-prevailing party on a particular issue may:

(A) Within 15 days after issuance of the final determination and order, request that the Director of OHR reconsider or reopen the case; or

(B) Seek judicial review of the final determination and order by a court of competent jurisdiction pursuant to section 110 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1209; D.C. Official Code § 2-510).

(c) At any time before the final determination, the Director of OHR may hold a settlement conference to attempt to resolve the complaint, and the parties shall participate in good faith.

(d) If the Director of OHR finds that an employer violated section 102, the Director may order the employer to do any of the following:

(1) Pay civil penalties as follows, of which half shall be awarded to the complainant, and half shall be deposited into the General Fund of the District of Columbia:

(A) For employers that employ 1 to 30 employees, a fine of up to $1,000 per violation;

(B) For employers that employ 31 to 99 employees, a fine of up to $2,500 per violation;

(C) For employers that employ 100 or more employees, a fine of up to $5,000 per violation;

(2) Pay double the civil penalty described in paragraph (1) of this subsection if the Director finds that the employer violated section 102 more than once in the previous year.

(3) Pay the complainant lost wages;

(4) Undergo training and provide other equitable relief necessary to:

(A) Undo any adverse employment action taken against the complainant in violation of section 102; and

(B) Place the complainant in the posture or position the complainant would have enjoyed had the employer not violated section 102; or

(5) Pay reasonable attorney's fees.

(e) If the Director of OHR has not issued a final determination and order after 365 days after the employee filed a complaint with OHR, and the employee withdraws the complaint from OHR before the Director issues a final determination and order, the employee shall be deemed to have exhausted administrative remedies and may pursue a private cause of action consistent with section 106.

Sec. 106. Private cause of action.

(a) An employee claiming employer noncompliance with section 102 may bring a private cause of action in a court of competent jurisdiction against an employer within one year after the unlawful act; provided that:

(1) If the employee is not a medical cannabis program patient, the employee must first be deemed to have exhausted administrative remedies as provided in section 105(c); and

(2) If the employee is a medical cannabis program patient, the employee:

(A) Does not have an administrative complaint alleging the same unlawful acts pending before the Office of Human Rights; or

(B) Has not received a final determination from the Office of Human Rights on an administrative complaint alleging the same unlawful acts.

(b) The statute of limitations for an employee's private cause of action arising under section 102 shall toll during the time that an employee's complaint is pending before the Office of Human Rights.

(c) Upon a finding that an employer violated section 102, a court may order any relief it deems appropriate, including the following:

(1) Civil penalties in amounts not greater than the penalties provided under section 105(c)(1) and (2), of which half shall be awarded to the complainant, and half shall be deposited into the General Fund of the District of Columbia;

(2) Payment of lost wages;

(3) Payment of compensatory damages;

(4) Equitable relief as may be appropriate; and

(5) Payment of reasonable attorneys' fees and costs.

Sec. 107. Enforcement by the Attorney General.

(a)(1) The Attorney General may receive complaints and conduct investigations for the purposes of enforcing this title; provided that any complaints and investigations shall be limited to non-governmental employers.

(2) In the course of conducting an investigation, the Attorney General shall have the power to administer oaths and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses, compel the production of papers, books, accounts, records, payrolls, documents, and testimony, and to take depositions and affidavits in any investigation or proceeding conducted to enforce this Title.

(2) The Attorney General's investigation pursuant to subsection (a)(1) shall not constitute the filing of a legal claim, nor toll the time for complainants to file a complaint with the Office of Human Rights or a private cause of action in a court of competent jurisdiction, as applicable.

(3) A person to whom a subpoena or notice of deposition has been issued pursuant to paragraph (1) of this subsection shall have the opportunity to move to quash or modify the subpoena or object to the notice of deposition in the Superior Court of the District of Columbia. In case of failure of a person to comply with any subpoena lawfully issued under this section, or on the refusal of a witness to testify to any matter regarding which he or she may be lawfully interrogated, it shall be the duty of the Superior Court of the District of Columbia, or any judge thereof, upon application by the Attorney General, to compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from the Court or a refusal to testify therein.

(b) The Attorney General, acting in the public interest, including the need to deter future violations, may enforce this title by commencing a civil action in the name of the District of Columbia in a court of competent jurisdiction on behalf of the District.

(c) Upon prevailing in an action initiated pursuant to this section, the Attorney General shall be entitled to any combination of the following:

(1) Civil penalties in amounts not greater than the penalties provided under section 105(c)(1) and (2), of which half shall be awarded to any aggrieved employee, and half shall be deposited into the General Fund of the District of Columbia;

(2) The payment of restitution for lost wages, for the benefit of aggrieved employees;

(3) Equitable relief as may be appropriate; and

(4) Reasonable attorneys' fees and costs, including fees and costs for any action brought by the Attorney General under subsection (a)(3) of this section;

(d)(1) OHR may refer matters to the Office of Attorney General for civil prosecution in pursuit of the public interest, and such referral shall not be construed to violate any confidentiality provisions of OHR's investigation.

(2) No later than 180 days after the effective date of the Cannabis Employment Protections Amendment Act of 2022, the Office of Human Rights and the Attorney General shall enter into, and may update as deemed necessary, a Memorandum of Agreement ("MOA") that addresses subjects such as referrals, information sharing, confidentiality, and other complaint-handling processes. No provision of this Title shall be construed to limit the information sharing between the Office of Human Rights and the Attorney General that the MOA may authorize, but such information sharing shall conform to any confidentiality requirements in other federal or District law.

Sec. 108. Rulemaking authority.

(a) The Mayor, pursuant to Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq*.), shall issue rules to implement this title. Rules issued by the Mayor shall not be applicable to the Council. The absence of such rules shall not delay the enforcement of this Title.

(b) Proposed rules promulgated pursuant to subsection (a) of this section shall be submitted to Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution within this 45-day period, the proposed rules shall be deemed to be approved.

TITLE II. MEDICAL CANNABIS AND DISABILITIES

Sec. 201. Section 211 of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11), is amended by adding a new subsection (b-1) to read as follows:

"(b-1)(1) Except as provided in paragraph (2) of this subsection, for the purposes of subsection (a) of this section, an employer, employment agency, or labor organization shall treat a qualifying patient's use of medical marijuana to treat a disability in the same manner as it would treat the legal use of a controlled substance prescribed by or taken under the supervision of a licensed health care professional.

"(2) Paragraph (1) of this subsection shall not apply if it would require an employer, employment agency, or labor organization to:

"(A) Commit a violation of a federal statute, regulation, contract, or funding agreement;

"(B) Permit an employee to use medical marijuana while the employee is in or assigned to a safety sensitive position; or

"(C) Permit the use of medical marijuana in a smokable form at a location the employer, employment agency, or labor organization owns, uses, or controls.

"(2) For the purposes of this subsection the term:

"(A) "Authorized practitioner" shall have the same meaning as provided in section 2(1E) of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.01(1E)).

"(B) "Controlled substance" shall have the same meaning as provided in section 102(6) of the Controlled Substances Act, approved October 27, 1970 (84 Stat. 1242; 21 U.S.C. § 802(6)).

"(C) "Medical marijuana" shall have the same meaning as provided in section 2(12) of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.01(12)).

"(D) "Qualifying patient" means an individual who:

"(i) Is actively registered in the District's medical marijuana program established pursuant to section 6 of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.05), and has received a recommendation to use medical marijuana from an authorized practitioner in accordance with section 3 of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective February 25, 2010 (D.C. Law 13-315; D.C. Official Code § 7-1671.04); or

"(ii) Is registered in the medical marijuana program or medical cannabis program of the employee's jurisdiction of residence and has received a recommendation to use medical marijuana from a licensed medical provider.

"(E) "Safety sensitive" shall have the same meaning as provided in section 101(8) of the Cannabis Employment Protections Amendment Act of 2022.

TITLE III. CONFORMING AMENDMENTS

Sec. 301. The District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*), is amended as follows:

(a) Section 301 (D.C. Official Code § 1-603.01) is amended as follows:

(1) Paragraph (14B) is amended to read as follows:

"(14B) The term "qualifying patient" shall have the same meaning as provided in section 211(b-1)(2)(D) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11).".

(2) Paragraph (15B) is amended to read as follows:

"(15B) The term "safety sensitive" shall have the same meaning as provided in section 101(8) of the Cannabis Employment Protections Amendment Act of 2022.".

(b) Section 2051(b) (D.C. Official Code § 1-620.11(b)) is amended by striking the phrase "shall treat qualifying patients in compliance with Title XX-E" and inserting the phrase "shall treat employees in compliance with the requirements of Title XX-E, section 102 of the Cannabis Employment Protections Amendment Act of 2022, and section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1))" in its place.

(c) Section 2025(d) (D.C. Official Code § 1-620.25(d)) is amended by striking the phrase "for employees who are qualifying patients" and inserting the phrase "and the requirements of

section 102 of the Cannabis Employment Protections Amendment Act of 2022, and section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1)).".

(d) Section 2032(g) (D.C. Official Code § 1-620.32(g)) is amended to read as follows:

"(g) Notwithstanding section 2035(a), District agencies shall comply with the requirements of Title XX-E, section 102 of the Cannabis Employment Protections Amendment Act of 2022, and section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1)).".

(e) Section 2061 (D. C. Official Code §1-620.61) is amended by adding a new paragraph (2A) to read as follows:

"(2A) "Medical marijuana" shall have the same meaning as provided in section 2(12) of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.02(12)).

(f) Section 2062 (D.C. Official Code § 1-620.62) is amended as follows:

(1) Subsection (a) is repealed.

(2) Subsection (b) is repealed.

(3) Subsection (c)(3) is repealed.

(4) Subsection (d) is amended as follows:

(A) Paragraph (1) is amended to read as follows:

"(1) Use, consume, possess, store, deliver, transfer, display, transport, sell, purchase, or grow marijuana at the employee's place of employment, while performing work for the agency, or during the employee's hours of work; or".

(B) Paragraph (2) is amended to read as follows:

"(2) Be impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working, or during the employee's hours of work, that substantially decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy workplace as required by District or federal occupational safety and health law.

(4) A new subsection (d-1) is added to read as follows:

"(d-1)(1) Nothing in this section may be interpreted to derogate or abridge the rights afforded under section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1)), to a qualifying patient who uses medical marijuana to treat a disability.

"(2) An employee's election to pursue relief available under this act for a violation of subsection (b) of this section shall not prejudice the employee's right to pursue relief in other venues for violations of other District or federal laws.

"(3) A reasonable accommodation or interactive process provided under subsection (c) of this section may be combined with a reasonable accommodation or interactive process provided pursuant to other District or federal law.".

Sec. 302. Section 3(d) of the Department of Corrections Employee Mandatory Drug and Alcohol Testing Act of 1996, effective September 20, 1996 (D.C. Law 11-158; D.C. Official Code § 24-211.22(d)), is amended to read as follows:

"(d) Notwithstanding any other provision of this act, the Department shall comply with the requirements of title XX-E of the District of Columbia Government Comprehensive Merit

Personnel Act of 1978, effective April 27, 2021 (D.C. Law 23-276; D.C. Official Code § 1-620.61 *et seq.*), section 102 of the Cannabis Employment Protections Amendment Act of 2022, and section 211(b-1) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.11(b-1)).".

TITLE IV. APPLICABILITY; FISCAL IMPACT STATEMENT; EFFECTIVE DATE

Sec. 401. Applicability.

(a)(1) Sections 104(b) and 108, shall apply upon inclusion of their fiscal effect in an approved budget and financial plan.

(2) Sections 102, 103, 104(a), 105, 106, 107, Title II, and Title III shall apply upon the date of inclusion of their fiscal effect in an approved budget and financial plan or 365 days after the Mayor approves this act, whichever is later.

(b) The Chief Financial Officer shall certify the date of the inclusion of the sections listed in subsection (a) of this section in an approved budget and financial plan, and provide notice to the Budget Director of the Council of the certification.

(c)(1) The Budget Director shall cause the notice of the certification to be published in the District of Columbia Register.

(2) The date of publication of the notice of the certification shall not affect the applicability of this act.

Sec. 402. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 403. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by Mayor, action by the Council to override veto), a 60-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1–206.02(c)(1)), and publication in the District of Columbia Register.