

KD Alert: New York City Council Votes to Further Limit Pre-Hire Screening

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On April 9, 2019, the New York City Council passed a bill in a 41-4 vote that would amend the Fair Chance Act, (New York City Administrative Code §8-107(11-a)), to prohibit New York City employers from requiring job applicants to submit to drug testing for tetrahydrocannabinol, or THC, the active ingredient in marijuana, as a condition of employment. Currently, the Fair Chance Act has prohibited most employers in New York City from inquiring into a job applicant's criminal background prior to making a job offer. The bill, which further limits an employer's ability to conduct pre-hire screening, is currently awaiting Mayor Bill de Blasio's approval.

Importantly, the bill provides for numerous exceptions for safety sensitive jobs including: (1) police officers or peace officers; (2) construction jobs; (3) positions requiring commercial driver's licenses; (4) positions requiring the supervision or care of children, medical patients, or vulnerable persons; and (5) jobs with significant impact on health and safety of employees or the public. This bill also does not apply to jobs tied to a federal or state contract or drug testing required by collective bargaining agreements. Notably, if passed, the bill would not prohibit New York City employers from requiring existing employees to submit to drug tests for marijuana, nor would it prohibit employers from requiring post on-the-job accident drug testing.

Despite the exceptions to this regulation, there is concern that this will only create further confusion and uncertainty for New York City Employers. For example, what do jobs "with significant impact on health and safety" encompass? Could this apply to individuals serving food to the public? Could this apply to ride-sharing services? Indeed, the terms of the possible exemptions are ambiguous and will likely lead to disputes in the future.

It is worth noting that the Fair Chance Act was passed with the goal of ensuring that someone's past criminal activity would not immediately bar them from securing employment, thus giving the applicant a chance for employment and preventing possible recidivism. Advocates for the new bill, including the bill's sponsor, argue that this bill will provide "more access points for employment." However, others argue that this amendment asks employers to essentially ignore current drug use, not past drug use. This bill, if enacted, also raises questions regarding employer's future liability whose active-drug using employees may cause incidents that may have otherwise been avoidable had the employer known about the applicant's drug use before hire. Although the bill does not prohibit drug-testing existing employees or employees after an on-the-job incident, the new bill may open up employers to additional liability such as where an on-duty employee that had engaged in marijuana usage off-duty gets into a motor vehicle accident. It's unclear whether any consideration was given to this possible landmine by the City Council.

This bill comes alongside three other marijuana-related bills aimed at decriminalizing and lessening the penalties associated with marijuana use. Given the trend of moving towards marijuana legalization coupled with the support of Mayor de Blasio's administration, approval appears imminent. Assuming Mayor de Blasio approves the bill, it will take effect one year after enactment, during which time company policies will, once again, need to be revised.