

Takeaways From NYC Ban On Preemployment Marijuana Tests

By **Robert Nichols and Rebecca Baker** (May 10, 2019, 12:39 PM EDT)

While 33 states have legalized medical marijuana and another 10 have legalized recreational use, outright bans on employer testing for marijuana have not been a part of these state laws. The city of New York, however, has now taken such a step, barring certain testing.

Specifically, on May 10, 2019, a New York City enactment prohibiting most preemployment marijuana testing, previously passed in April by the City Council by a 40 to 4 margin, became law by virtue of Mayor Bill De Blasio's decision not to exercise his veto. Going forward, employers should reasonably expect that at least some states and municipalities will follow suit by banning preemployment marijuana testing and, perhaps, ultimately all marijuana testing in the workplace.



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New York City Testing Prohibition

The new law bars employers, labor unions and employment agencies from requiring any candidate for employment to submit to testing for the presence of marijuana itself or tetrahydrocannabinols, the intoxicating ingredient found in marijuana commonly known as THC.[1] Under the measure, this prohibition becomes effective one year after the effective date of the enactment — allowing employers time to revise their testing programs to comply.



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Importantly, this groundbreaking municipal law takes a key step further than the laws that previously have proliferated across the country creating certain protections for marijuana users with respect to employment. Specifically, while a variety of states, through statutory language or court decisions, have created employment protections for medical marijuana users, none have gone so far as to outright ban preemployment testing for marijuana.

There have been some jurisdictions, like the state of Oklahoma, that have prohibited employers from taking action against most employees based solely upon a positive test for marijuana without other evidence of actual on-duty use or impairment, but the New York City enactment entirely bars preemployment testing.[2] While the law notably does not prohibit marijuana testing of current employees, a reasonable assumption is that, going forward, there will be pressure on the New York City Council and other state and local legislative bodies around the country to consider banning testing for marijuana at any stage of the employment relationship.

Policy Basis for Law

A key rationale for prohibiting testing for marijuana, preemployment or otherwise, is that, unlike a breathalyzer test for alcohol, urinalysis or hair testing measuring a marijuana metabolite does not reflect current impairment, but rather detects use that may have occurred days or even weeks earlier. As a result, it may well be that an applicant ceased using marijuana weeks prior to applying for a job or an employee only has used marijuana away from work, for example in the evenings, and has not been impaired by the drug at work on any occasion while still producing a positive test for the THC metabolite. Proponents of marijuana testing bans point to the fact that off-duty marijuana users who do not report to work under the influence are akin to employees who consume alcohol off-duty, but do not report to work intoxicated, and, thus, should be treated the same way with respect to workplace drug policies.

A positive test for marijuana with no actual on-the-job impairment easily can be the case since the intoxicating effect of THC on an individual generally lasts no more than three hours. If, at some point, a test for marijuana, akin to the alcohol breathalyzer exam that gauges whether the individual is currently “under the influence” becomes available, opposition to all employer marijuana testing may well disappear. Unless and until that kind of measure of current impairment is developed, the policy argument that testing fundamentally is unjust because it may punish preemployment or off-duty use that causes no workplace impairment will persist.

Another public policy concern emphasized by advocates of the New York City law is the particularly harsh impact of drug testing on minority groups. For instance, in a tweet, the law’s lead sponsor, City Public Advocate Jumaane D. Williams explained “that the ‘ban on preemployment marijuana testing ... [will] help end a war on drugs which has become a war on workers, [especially] in black & brown communities.”[3]

Finally, the law’s supporters argued that testing exacerbates chronic unemployment for some Americans and one effect of the law should be the removal of unjustified barriers to employment. For instance, Williams has described employers’ reaction to marijuana use, including marijuana testing, as “[h]ysteria” that is “hurting people seeking employment and we need more job access points, not less.”[4]

Exceptions to the Testing Ban

Importantly, this new municipal ban on preemployment marijuana testing does have exceptions — primarily related to safety and mandated testing under other laws. For example, applicants for positions such as a police officer or other peace officer are exempted, as well as jobs requiring a commercial driver’s license or involving the supervision of children, medical patients or other vulnerable persons.

The law also recognizes that, of course, it does not interfere with required federal drug testing such as United States Department of Transportation mandated drug urinalysis for certain classes of transportation workers or testing required under a federal contract or under any federal law.

Notably, the New York City Council, which generally strongly supports organized labor, also included the exception allowing preemployment testing pursuant to a “valid collective bargaining agreement that specifically addresses the preemployment drug testing of ... applicants.”

While the legislation calls for the promulgation of rules by the city for implementation of this new

testing ban, the very straightforward prohibition included in the enactment leaves little need for interpretation except with respect to some of the exemptions such as the health care and child care position carveouts.

If supporters of this new law have their way, more liberalization of marijuana laws will follow. Williams already has called for more dramatic reforms related to marijuana, explaining, for example, on his website that “[w]e ... should rapidly move towards the full legalization of marijuana that has been massively successful in other states, expunge the State criminal records of past users, and create a pathway for all New Yorkers to benefit economically from this industry.”[5]

Next Steps for Employers

Given this first-of-its-kind ban on preemployment marijuana testing, employers should consider the following:

- Any employer, union or employment agency with operations anywhere in New York City must carefully consider how the new law will impact its testing policies and whether any of the exemptions may apply to some of their operations. Given the narrow scope of the exemptions, almost all New York City employers will have at least some positions for which the testing ban applies.
- Covered employers need to make sure that their job advertisements, employment applications, policies and procedures do not provide for across-the-board drug testing inconsistent with the new law.
- Even an employer that has no headquarters or sizable office in New York City must still be concerned with the ban if it hires, or may hire, one or more employees to work anywhere in the city’s five boroughs.
- Employers throughout the country should carefully follow developments in other states and municipalities, anticipating it is likely only a matter of time before other jurisdictions impose restrictions on marijuana testing.
- More broadly, given the wide variety of new statutes and case authority around the country creating employment protections for off-duty marijuana use, including in particular off-duty medical marijuana use, it may be prudent for employers to evaluate their entire approach to rules and testing for marijuana with respect to both candidates and current employees.
- Especially for employers with highly safety-sensitive operations, this continuing proliferation of laws protecting marijuana use in certain circumstances can be expected to complicate employer efforts to assure that no employee is impaired by marijuana when performing safety-sensitive functions in their workplaces.

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[1] <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3860393&GUID=7040463F-8170-471C-97EC-A61AE7B1AA2F&Options=ID%7cText%7c&Search=1445-A>

[2] <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=483204>

[3] <https://twitter.com/JumaaneWilliams/status/1115718276905078784>

[4] <https://twitter.com/jumaanewilliams/status/1115336725176438784>

[5] <https://jumaanewilliams.com/issues/legalizing-marijuana>