

1 **Committee Print**
2 **Committee on Labor and Workforce Development**
3 **B23-309**
4 **DATE**

8 A BILL

10 B23-309
11 _____
12

13 To amend the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to
14 clarify the Mayor’s rulemaking authority with respect to titles XX-B, XX-C, XX-D, and
15 new title XX-E, to require District agencies to notify employees when their positions are
16 designated as safety-sensitive, to permit a District employee to request a written
17 explanation of the duties and conditions under which such duties are performed that make
18 the position safety-sensitive, to permit employees to appeal the designation of the
19 employee’s position as safety-sensitive to their personnel authority and then to the Office
20 of Employee Appeals, to authorize the Office of Employee Appeals to issue final
21 decisions, not subject to judicial review, as to whether an employee’s position is safety-
22 sensitive, to prohibit the District government from taking an adverse employment action
23 against an individual for participating in the District’s or another state’s medical
24 marijuana program, to prohibit a District agency from using the results of an agency-
25 administered drug test as the basis for employment related decisions unless reasonable
26 suspicion exists that the medical marijuana program participant used or was impaired by
27 marijuana at work or during work hours, to permit a District employee who is a
28 participant in a medical marijuana program to request and receive a reasonable
29 accommodation for the employee’s use of medical marijuana, and to require that existing
30 District employee drug testing programs comply with the new protections afforded to
31 medical marijuana program participants; and to make conforming amendments to the
32 Department of Corrections Employee Mandatory Drug and Alcohol Testing Act of 1996.
33

34 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
35 act may be cited as the “Medical Marijuana Program Patient Employment Protection
36 Amendment Act of 2020”.

37 Sec. 2. The District of Columbia Government Comprehensive Merit Personnel Act of
38 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*), is
39 amended as follows:

40 (a) The table of contents is amended as follows:

41 (1) Before the phrase “Sec. 604.” add a new phrase to read as follows:

42 “SEC. 603a. APPEALS OF SAFETY-SENSITIVE DESIGNATIONS”.

43 (2) Before the phrase “Sec. 1504.” add a new phrase to read as follows:

44 “SEC. 1503a. RIGHT TO NOTICE AND APPEAL OF SAFETY-
45 SENSITIVE DESIGNATION”.

46 Before the phrase “XXI. HEALTH BENEFITS”, add a new phrase to read as follows:

47 “XX-E. MEDICAL MARIJUANA PROGRAM PATIENT EMPLOYMENT
48 PROTECTIONS

49 “SEC. 2061. DEFINITIONS

50 “SEC. 2062. PROTECTIONS FOR QUALIFYING PATIENTS”.

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

52 (1) A new paragraph (14B) is added to read as follows:

53 “(14B) The term “qualifying patient” means an individual who is actively
54 registered in the District’s medical marijuana program established pursuant to section 6 of the
55 Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010
56 (D.C. Law 18-210; D.C. Official Code § 7-1671.05), or in the medical marijuana program of the
57 employee’s jurisdiction of residence.”.

58 (2) Paragraph (15B) is redesignated as paragraph (15C).

59 (3) A new paragraph (15B) is added to read as follows:

60 “(15B) The term “safety-sensitive” means a position in which it is reasonably
61 foreseeable that, if the employee performs the position’s routine duties while under the influence
62 of drugs or alcohol, the employee could suffer a lapse of attention or other temporary deficit that
63 would likely cause actual, immediate, and serious bodily injury or loss of life to self or others.”.

64 (c) Section 404(a) (D.C. Official Code § 1-604.04(a)) is amended by striking the phrase
65 “XX-A, XXI” and inserting the phrase “XX-A, XX-B, XX-C, XX-D, XX-E, XXI” in its place.

66 (d) A new section 1503a is added to read as follows:

67 “Sec. 1503a. Right to notice and appeal of safety-sensitive designation.

68 “(a) If a position is designated as safety-sensitive, the agency shall:

69 “(1) Include such designation in any position description for the position,
70 including a job description utilized for hiring or recruitment;

71 “(2) Provide written notice of an employee’s rights under this section, including
72 the right to appeal the safety-sensitive designation, and of an employee’s right to request a
73 reasonable accommodation, consistent with the terms of section 2062, to:

74 “(A) An employee hired into a position designated as safety-sensitive after
75 the effective date of the Medical Marijuana Program Patient Employment Protection
76 Amendment Act of 2020, as approved by the Committee on Labor and Workforce Development
77 on October 27, 2020 (Committee Print of Bill 23-309), on or before the employee’s date of hire;
78 and

79 “(B) Each incumbent employee in a position designated as safety-sensitive
80 as of the effective date of the Medical Marijuana Program Patient Employment Protection
81 Amendment Act of 2020, approved by the Committee on Labor and Workforce Development on
82 October 27, 2020 (Committee Print of Bill 23-309), within 30 calendar days after the effective

83 date of the Medical Marijuana Program Patient Employment Protection Amendment Act of
84 2020, as approved by the Committee on Labor and Workforce Development on October 27, 2020
85 (Committee Print of Bill 23-309); and

86 “(3) If an agency designates an employee’s position as safety-sensitive after the
87 effective date of the Medical Marijuana Program Patient Employment Protection Amendment
88 Act of 2020, as approved by the Committee on Labor and Workforce Development on October
89 27, 2020 (Committee Print of Bill 23-309), provide the employee written notice of the change in
90 position designation, which shall include the notice described in paragraph (2) of this subsection,
91 at least 30 calendar days before the change in designation takes effect.

92 “(b)(1) An employee in a position designated as safety-sensitive has the right to request a
93 written explanation of the reasons and factors justifying the designation from the employee’s
94 agency.

95 “(2)(A) The agency shall provide the explanation to the employee within 10
96 business days after receiving a request pursuant to this subsection.

97 “(B) The explanation shall include a description of the specific routine job
98 duties and circumstances under which such duties are performed, for which it is reasonably
99 foreseeable that, if the employee performs such duties while under the influence of drugs or
100 alcohol, the employee could suffer a lapse of attention or other temporary deficit that would
101 likely cause actual, immediate, and serious bodily injury or loss of life to self or others.

102 “(C) The written explanation may be satisfied by providing the requesting
103 employee with a position description that contains the information required under subparagraph
104 (B) of this paragraph.

105 “(c) Notwithstanding any other provision of law or collective bargaining agreement, an
106 agency may update a position description to include the information required pursuant to
107 subsection (b)(2)(B) of this section without bargaining over the language; provided, that any
108 agreement with a labor representative, including a collective bargaining agreement, to bargain
109 over the position designation itself shall still apply.

110 “(d)(1) Except as provided in paragraphs (2) and (3) of this subsection, an employee has
111 the right to appeal the designation of the employee’s position as safety-sensitive under the
112 following circumstances:

113 “(A) For employees employed by the District in positions designated as
114 safety-sensitive as of the effective date of the Medical Marijuana Program Patient Employment
115 Protection Amendment Act, as approved by the Committee on Labor and Workforce
116 Development on October 27, 2020 (Committee Print of Bill 23-309), within 45 business days
117 after the employee receives the notification of rights provided pursuant to subparagraph (a)(2)(B)
118 of this section;

119 “(B) Within 45 business days after an employee becomes a qualifying
120 patient; or

121 “(C) Within 45 business days after the employee receives notice, pursuant
122 to subsection (a)(3) of this section, that the employee’s position will be newly designated as
123 safety-sensitive.

124 “(2) An employee may not appeal a safety-sensitive designation solely because:

125 “(A) The employee failed a job-related drug test; or

126 “(B) The employee is facing an adverse action related to the employee’s
127 failure to pass a job-related drug test.

128 “(3) An employee may not appeal a safety-sensitive designation when the position
129 is subject to random drug testing under federal law or as a condition of federal funding.

130 “(e)(1) An employee may appeal the designation of the employee’s position as safety-
131 sensitive by filing a petition with the employee’s personnel authority. The petition shall state the
132 reasons why the employee’s position does not meet the definition of the term “safety sensitive,”
133 as defined in section 301(15B).

134 “(2)(A) The personnel authority shall review the employee’s petition, and any
135 response from the agency, and issue a written determination granting or denying the employee’s
136 petition, within 30 calendar days after receiving the petition.

137 “(B) The determination shall state the reasons for the grant or denial of the
138 petition. If the personnel authority grants the petition, it shall redesignate the position in
139 consultation with the employing agency. If the personnel authority denies the petition, the
140 determination shall state the right of appeal, and, subject to the availability of funding, the
141 employee may appeal the denial to the Office of Employee Appeals, pursuant to section 603a:

142 “(i) Within 30 calendar days after the personnel authority issues
143 the determination; or

144 “(ii) If section 603a is not applicable when the personnel authority
145 issues the determination, within 30 calendar days after the applicability date of section 603a.

146 “(C) Upon receipt of an appeal of the personnel authority’s determination,
147 the Office of Employee Appeals shall finally determine, pursuant to section 603a, whether an
148 employee’s position is safety-sensitive.

149 “(g) Notwithstanding any other provision of this section, a negotiated appeal procedure
150 established within a collective bargaining agreement that permits an employee to challenge the

151 designation of a position as safety-sensitive shall supersede and replace the appeal procedures
152 established pursuant to this section and section 603a.

153 “(h) The designation of an employee’s position as safety-sensitive shall not be suspended,
154 tolled, or otherwise invalidated during the pendency of an appeal initiated pursuant to this
155 section.

156 “(i) Notwithstanding section 404(a), the Council may issue rules to implement the
157 provisions of this section.

158 “(j) For the purposes of this section, the term “agency” includes the Council.”.

159 (e) A new title XX-E is added to read as follows:

160 “Title XX-E. MEDICAL MARIJUANA PROGRAM PATIENT EMPLOYMENT
161 PROTECTIONS

162 “Sec. 2061. Definitions.

163 “For the purposes of this title, the term:

164 “(1) “Agency” includes the Council.

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

168 “(3) “Undue hardship” shall have the same meaning as provided in section
169 101(10) of the Americans with Disabilities Act of 1990, approved July 26, 1990 (104 Stat. 330;
170 42 U.S.C. § 12111(10)).

171 “Sec. 2062. Protections for qualifying patients.

172 “(a)(1) Notwithstanding any other provision of law and except as provided in subsection

173 (b) of this section, an agency may not refuse to hire, terminate from employment, penalize, fail to

174 promote, or otherwise take adverse employment action against an individual based upon the
175 individual's status as a qualifying patient unless the individual used, possessed, or was impaired
176 by marijuana at the individual's place of employment or during the individual's hours of
177 employment.

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

183 “(b) Subsection (a) of this section shall not apply:

184 “(1) To positions that are designated as safety-sensitive; or

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

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

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

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

197 “(B) Impose an undue hardship on the employing agency; or
198 “(C) Cause the agency to commit a violation of a federal law, regulation,
199 contract, or funding agreement.

200 “(3)(A) An employee’s election to pursue relief under this section shall not
201 prejudice the employee’s right to pursue relief under other District or federal law.

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

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

207 “(1) Use or administer marijuana at the employee’s place of employment or
208 during the employee’s hours of employment; or

209 “(2) Be impaired by marijuana at the employee’s place of employment or during
210 the employee’s hours of employment.

211 “(e) Notwithstanding section 404(a), the Council may issue rules to implement the
212 provisions of this section.”.

213 (f) A new section 603a is added to read as follows:

214 “Sec. 603a. Appeals of Safety-Sensitive Designations.

215 “(a) An employee may appeal the determination of a personnel authority denying the
216 employee’s petition appealing a safety-sensitive position designation (pursuant to section 1503a)
217 to the Office within 30 calendar days after the issuance of the personnel authority’s
218 determination or if this section is not applicable when the personnel authority issues the
219 determination, within 30 calendar days after the applicability date of this section.

220 “(b) In any appeal taken pursuant to this section, the Office shall review the
221 record and uphold, reverse, or modify the determination of the personnel authority.

222 “(c) All decisions of the Office on appeals of safety-sensitive designations
223 (“designation decisions”) shall include findings of fact and a written decision, as well as the
224 reasons or basis for the decision upon all material issues of fact and law presented on record, and
225 an order; provided, however, that the Office may affirm a determination of a personnel authority
226 or Hearing Examiner without findings of fact and a written decision. Final designation decisions
227 shall be published in accordance with the rules and regulations of the Office, and shall be
228 published on the Office’s website. Any designation decision shall include a statement of any
229 further process available to the parties including, as appropriate, a party’s right to file a petition
230 for review or a petition for enforcement. The Office shall transmit copies of any designation
231 decision to all parties to the appeal, including named parties and intervenors.

232 “(d)(1) In appeals brought pursuant to this section, a Hearing Examiner shall issue
233 an initial designation decision within 60 business days after the appeal is filed with the Office,
234 unless the Hearing Examiner determines that an evidentiary hearing is warranted, in which case
235 the Hearing Examiner shall issue an initial designation decision within 90 business days after the
236 appeal is filed. A Hearing Examiner may permit oral argument only when the Hearing Examiner
237 determines such argument is necessary to resolve matters of law and material fact.

238 “(2) A personnel authority shall file an answer to an appeal within 15 business
239 days after the employee files the appeal. The answer shall include the complete record of the
240 proceedings before the personnel authority, including any documentary evidence reviewed or
241 considered in rendering the determination. The employee may file a reply within 5 business days
242 after the personnel authority files its answer.

243 “(3) A Hearing Examiner may grant an extension of a deadline in paragraph (1) or
244 (2) of this subsection only where extraordinary circumstances prevent the meeting of the
245 deadline and the need for the extension outweighs any prejudice to a party. If a Hearing
246 Examiner determines that the dilatory actions of a party contributed to the need for an extension,
247 the Hearing Examiner may, in the Hearing Examiner’s discretion, draw inferences against the
248 offending party.

249 “(4) A Hearing Examiner shall review the question of whether an employee’s
250 position is safety-sensitive without deference to the agency’s designation or the personnel
251 authority’s determination. The employee shall bear the burden of establishing jurisdictional facts
252 by a preponderance of the evidence. To prevail, the personnel authority must establish, by a
253 preponderance of the evidence, that the employee’s position meets the definition of safety-
254 sensitive in section 301(15B).

255 “(5)(A) The initial designation decision of a Hearing Examiner shall become final
256 15 business days after issuance, unless a party files a petition for review of the initial decision
257 with the Office within the 15 business-day period. The responding party may file an answer to
258 the petition for review within 15 business days after the petition for review is filed. The Office
259 shall issue a final designation decision on a petition for review within 60 business days after the
260 petition for review is filed. If the Office denies all petitions for review, the initial designation
261 decision shall become final upon the issuance of the last denial. If the Office grants a petition for
262 review, the subsequent designation decision of the Office shall be the final designation decision
263 of the Office unless the decision states otherwise.

264 “(B) After issuing the initial designation decision, the Hearing Examiner
265 shall retain jurisdiction over the case only to the extent necessary to correct the record, rule on a

266 motion for attorney fees, or process any petition for enforcement filed under the authority of the
267 Office.

268 “(e) A final designation decision of the Office issued pursuant to this section is not
269 subject to judicial review.

270 “(f) The Office may issue such rules and regulations as it deems practicable or desirable
271 to govern appeals under this section.”.

272 (g) Section 2051 (D.C. Official Code § 1-620.11) is amended as follows:

273 (1) Designate the existing text as subsection (a).

274 (2) The newly designated subsection (a) is amended by striking the phrase “and
275 issue rules”.

276 (3) Add a new subsection (b) to read as follows:

277 “(b) To the extent permitted by federal law and regulations, programs adopted pursuant to
278 subsection (a) of this section shall treat qualifying patients in compliance with title XX-E.”.

279 (h) Section 2025 (D.C. Official Code § 1-620.25) is amended by adding a new subsection
280 (d) to read as follows:

281 “(d) Notwithstanding section 2022(f) and the second and third sentences of subsection (a)
282 of this section, this title shall comply with the requirements of title XX-E for employees who are
283 qualifying patients.”.

284 (i) Section 2031 (D.C. Official Code § 1-620.31) is amended by repealing paragraph (10).

285 (j) Section 2032 (D.C. Official Code § 1-620.32) is amended as follows:

286 (1) Subsection (a)(1) is amended by striking the phrase “safety-sensitive
287 positions” and inserting the phrase “positions designated as safety-sensitive” in its place.

288 (2) Subsection (b) is amended by striking the phrase “safety-sensitive positions”
289 and inserting the phrase “positions designated as safety-sensitive” in its place.

290 (3) A new subsection (g) is added to read as follows:

291 “(g) Notwithstanding section 2035(a), this title shall comply with the requirements of title
292 XX-E for employees who are qualifying patients.”.

293 (k) Section 2035(d) (D.C. Official Code § 1-620.35(d)) is amended by striking the phrase
294 “a safety-sensitive position” and inserting the phrase “designated as safety-sensitive” in its place.

295 (l) Section 2036 (D.C. Official Code § 1-620.36) is amended as follows:

296 (1) Strike the phrase “safety-sensitive positions” both times it appears and insert
297 the phrase “positions that are designated as safety-sensitive” in its place.

298 (2) Strike the period and insert the phrase “; provided, that a private provider or
299 entity is not required to comply with title XX-E.” in its place.

300 (m) Section 2037 (D.C. Official Code § 1-620.37) is repealed.

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

304 “(d) The Department shall comply with the requirements of title XX-E of the District of
305 Columbia Government Comprehensive Merit Personnel Act of 1978, as approved by the
306 Committee on Labor and Workforce Development on October 27, 2020 (Committee Print of Bill
307 23-309).”.

308 Sec. 4. Applicability.

309 (a) Section 2(f) shall apply upon the date of inclusion of its fiscal effect in an approved
310 budget and financial plan.

311 (b) The Chief Financial Officer shall certify the date of the inclusion of its fiscal effect in
312 an approved budget and financial plan and provide notice to the Budget Director of the Council
313 of the certification.

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

316 (2) The date of publication of the notice of the certification shall not affect the
317 applicability of the provisions identified in subsection (a) of this section.

318 Sec. 5. Fiscal impact statement.

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

322 Sec. 6. Effective date.

323 This act shall take effect following approval by the Mayor (or in the event of veto by
324 Mayor, action by the Council to override veto), a 60-day period of congressional review as
325 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
326 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
327 Columbia Register.