

PERSONNEL SERVICES BULLETINS (PSBs)

100-15

Subject: Drug Screening of Applicants for and Appointees to Titles in the Classified Service of the City

Supersedes: Personnel Services Bulletin No. 100-15 issue February 28, 2022

Sources: Personnel Order 89-8
Omnibus Drug Testing Act of 1991
Pre-employment Screening Titles (DCAS, 9/19/2000)
Local Law 91 of 2019, New York City Administrative Code s. 8-107(31)(c)
New York Labor Law § 201-d

Date: July 25, 2022

I. Purpose

It is the policy of the City of New York to establish and maintain drug-free workplaces. Since the 1989 issuance of Mayor's Personnel Order (MPO) 89-8, the City has maintained comprehensive hiring, personnel, disciplinary, and employee assistance policies across agencies to curb the use of drugs before it interferes with job performance. The subsequent enactment of federal, state, and local laws has modified the City's practices to prevent the use of drugs in the workplace. The federal Omnibus Drug Testing Act of 1991 requires pre-employment, random and other drug screening of employees performing safety-sensitive duties in transportation-related occupations. In 2000, the Department of Citywide Administrative Services modified the list of titles subject to pre-employment and random drug screening pursuant to MPO 89-8. Local law 91 of 2019 amended the New York City Human Rights Law to prohibit pre-employment screening for marijuana for many occupations.¹

In 2021, the New York State Legislature enacted the Marijuana Regulation and Taxation Act (MRTA) to implement comprehensive reforms of the New York Penal Law, Public Health Law, Criminal Procedure Law, Taxation Law and numerous other provisions of state law to legalize adult-use of marijuana, create a regulatory scheme for the sale and distribution of marijuana, subject adult-use of marijuana to taxation, and enact measures to ensure that increased marijuana consumption does not impair public safety. Among the legislative changes included in the MRTA is the amendment of section 201-d of the Labor Law, which prohibits employers from taking adverse employment action against applicants and employees for recreational use of marijuana outside of the workplace, unless the employer's actions are required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate.

This Bulletin describes the City's policies on drug screening of City employees required by Personnel Order 89-8, as modified by federal, state, and local legislation, including the changes to pre-employment and random screening required by recent legislation permitting adult recreational use of marijuana.

¹ . Appendix I discusses the legal authority for the City's policies.

II. Applicability and Procedure

Certain City agencies have promulgated policies and guidelines for the drug screening applicants and employees in some titles. Agencies that have issued guidelines or policies for drug screening of employees in any title or applicants for any title shall ensure that the guidelines are consistent with the principles set forth in this Bulletin. Agencies that screen applicants or employees for unlawful use of controlled substances but have not written guidelines or policies shall promulgate such guidelines or policies consistent with the principles set forth in this Bulletin.

A. Screening

1. Pre-employment and Random Screening for Drugs other than Marijuana

Existing City agency policies and practices concerning screening for the presence of cocaine, amphetamines, opioids, barbiturates, phencyclidine (PCP), and other controlled substances other than marijuana remain unaffected by the MRTA and this PSB. Appendix II to this PSB lists the titles for which drug pre-employment and random screening is required by MPO 89-8 and federal regulations.

2. Pre-employment and Random Screening for Marijuana

Section 201-d of the Labor Law, as amended by the MRTA, prohibits a City agency from taking adverse employment actions against applicants for employment and incumbent employees for the recreational use of marijuana away from the agency's worksite and without use of its equipment, unless a state or federal statute, regulation, ordinance, or other state or federal governmental mandate requires the employer to take an adverse action.

Current technology for identifying the presence of marijuana in an applicant's or employee's system alone cannot establish the recency of use adequately to distinguish between recreational use and use close in time to or during an employee's presence in the workplace.² Consequently, except with respect to positions subject to United States Department of Transportation (USDOT) or United States Coast Guard regulations (USCG)³ that require testing for marijuana, agencies

² Urine and other tests for the presence of marijuana in a person's system are unable to specify the exact day or hour that marijuana was last used. Tetrahydrocannabinols (THC), the main psychoactive ingredient in Marijuana, can linger on average up to 10 days in the system of a casual user, up to 2 to 4 weeks in a frequent user, and as long as 90 days for a heavy user. Thus, THC can remain detectable long after usage has ceased. See Mayo Clinics Laboratories Test Catalog, <https://www.mayocliniclabs.com/test-info/drug-book/marijuana.html> (last accessed August 27, 2021); Marijuana Drug Test Detection Times at <https://www.canorml.org/employment/marijuana-drug-test-detection-times> (last accessed August 27, 2021). Consequently, the administration of a pre-employment, scheduled, or random screen for marijuana cannot distinguish between recent use that may affect or impair performance of a job and recreational use away from the employer's worksite and without the use of the employer's equipment that does not impair job performance.

³ Drug testing regulations of the Federal Motor Carrier Safety Administration (FMCSA) applicable to commercial driver's license holders are at 49 C.F.R. Part 382. Drug testing regulations of the Federal Transit Administration (FTA) applicable to employees working in the mass transit industry, including on commercial vessels, are at 49 C.F.R. Part 655. Additional regulations of the United States Coast Guard (USCG) applicable to employees operating commercial vessels are at 46 C.F.R. Parts 4 and 16.

must desist from pre-employment, and random screening of applicants and employees for marijuana.⁴

3. Reasonable Suspicion Screening

An agency may require an employee to submit to a screening for controlled substances, including marijuana, when it has a reasonable suspicion to believe that the employee is under the influence of a drug while at work. Section 201-d of the Labor Law does not prohibit requiring an employee to submit to a reasonable suspicion screening for marijuana or taking an adverse employment action if an employee appears impaired by the use of marijuana, manifested by specific articulable symptoms while working, that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or if such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law.

The reasonable suspicion must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. The observations may include indications of the chronic and withdrawal effects of controlled substances. Agencies should establish protocols for documenting the observations in writing that give rise to the reasonable suspicion that an employee is under the influence of drugs while at work.

4. Return to Duty and Follow-up Screening

In some circumstances, an agency may allow an employee who has tested positive for the unlawful use of a controlled substance, including marijuana, to undergo counseling and therapy with the objective of permitting the employee to return to duty. In such cases, scheduled or random testing may be used to ascertain whether the employee is compliant with applicable drug-free requirements and able to return to duty and remains compliant after returning to work. For more information regarding return to duty and follow-up screening, see paragraph B(2)(c)(ii) below.

B. Consequences of Use of Controlled Substances

1. Applicants for Employment

An agency must disqualify any candidate who fails or refuses to submit to authorized pre-employment drug screening or who fails an authorized drug screening, including screening for marijuana that is required by regulations promulgated by United States Department of Transportation (USDOT) agencies and the United States Coast Guard (USCG). The ground for the disqualification under Section 50(4) of the New York Civil Service Law is that the candidate lacks the required character for the title. Before disqualifying an applicant with a positive laboratory report, an agency may offer the applicant the opportunity to request the testing laboratory to retest a split specimen from the original specimen collected for the pre-employment testing. If the second laboratory report does not confirm the positive result of the first report, the applicant may be allowed to submit a new specimen for testing.

⁴ Appendix II lists the titles for which pre-employment screening is required, the titles which are subject to USDOT and USCG drug-screening regulations, the titles for which it is permissible to conduct pre-employment, random and scheduled screening for marijuana, and the titles for which random screening of employees for drugs other than marijuana should be performed.

2. Incumbent Employees

a. Refusal to Submit to a Drug Screening

An agency shall terminate a probationary employee who refuses to submit to an authorized drug screening. Except when there are mitigating circumstances, an agency shall seek termination of a permanent employee who refuses to submit to an authorized drug screening in accordance with statutory and contractual rights of the employee.

b. Employees Covered by USDOT or USCG Regulations

- i. Agencies with employees covered by the drug testing regulations promulgated by USDOT agencies or the USCG must perform all testing of covered employees in accordance with the procedures set forth at 49 C.F.R., Part 40.
- ii. An agency shall immediately remove from performing safety-sensitive functions any employee who tests positive for unlawful use of a controlled substance under applicable USDOT regulations.
- iii. An agency shall seek to impose appropriate discipline up to and including termination upon an employee who tests positive for unlawful use of a controlled substance in accordance with the employee's statutory and contractual rights.
- iv. An agency in its discretion may offer an employee who tests positive for unlawful use of a controlled substance the opportunity to return to duty performing safety-sensitive functions pursuant to the evaluation, referral, and treatment processes required by subpart O of 49 C.F.R., Part 40.

c. Employees Not Covered by USDOT or USCG Regulations

- i. An agency must immediately suspend a law enforcement officer, including Police Officers, Firefighters, Correction and Probation Officers, Fire Marshals, Special Officers, and all other employees in positions that are authorized to carry firearms, who test positive on a random screen for the unlawful use of controlled substances other than marijuana and must terminate or seek to terminate such employee in accordance with any applicable contractual or statutory disciplinary rights.
- ii. An agency must seek to discipline and impose an appropriate penalty, including termination, consistent with contractual or statutory disciplinary rights, upon any other employee who tests positive on a random screen for the unlawful use of controlled substances other than marijuana. The agency may agree to settle the disciplinary proceedings in an appropriate case provided that the employee (a) agrees to submit to a course of evaluation, treatment and counseling by an Employee Assistance Program (EAP) or other appropriate provider, (b) waives any right of confidentiality with respect to treatment and counseling and authorizes the EAP or other provider to report periodically to the agency on the employee's progress, (c) consents to be on probation during the course of treatment and counseling and for at least six

months thereafter, and (d) agrees to submit to scheduled drug testing during the probationary period and be subject to immediate termination upon the report of a positive test.

III. DCAS Role

DCAS has continuing responsibility for determining whether a title should be added to or deleted from the list of titles that are subject to screening for unlawful use of controlled substances. DCAS may audit agency practices for compliance with this Bulletin. Agencies that perform drug screening must submit to DCAS their written guidelines or policies within thirty days of issuance of this Bulletin and submit any modifications to the guidelines or policies within thirty days of their issuance.

IV. Disclaimer

This PSB shall not be construed to create any substantive rights.

Dawn M. Pinnock
Commissioner

Attachments:

[Appendix I: Legal Authority for the City's Drug Screening Policy](#)

[Appendix II: List of Titles that Require Drug Screening](#)

[Personnel Order 89-8](#)

[Pre-employment Screening Titles](#)

[Pre-Employment Testing for Tetrahydrocannabinols or Marijuana – NYC DCAS](#)

Inquiries: Contact Citywide Personnel Policy at cpp@dcas.nyc.gov