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Maryland Joint Legislative Committee

The Voice of Merit Construction

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February 17, 2023

TO: ECONOMIC MATTERS COMMITTEE

FROM: ASSOCIATED BUILDERS AND CONTRACTORS

RE: H.B. 556 – CANNABIS REFORM

POSITION: INFORMATION

On behalf of the Associated Builders and Contractors of Maryland, we appreciate the opportunity to opine on H.B. 556, the Cannabis Reform bill.

While ABC is agnostic on the issue of legalizing cannabis for recreational use in the Maryland, we are adamant that companies in safety-sensitive industries, such as construction, be permitted to enforce zero-tolerance policies for drug and alcohol use, including for cannabis. ABC Maryland is a member of the Construction Coalition for a Drug and Alcohol-free Workplace, which includes a pledge to prevent substance abuse. Contractors that participate in this program though the STEP Safety Management System have an OSHA total recordable incident rate 84% lower than the national industry average. The ability of construction companies to maintain commonsense drug policies is a very serious matter for the protection of workers, businesses, and residents in the Maryland. Accordingly, we respectfully ask the General Assembly to take our concerns and recommendations seriously.

Worker Safety is more than OSHA compliance it's a Core Value

Worker safety permeates every aspect of the construction industry. It is not hyperbole to say that safety is Priority #1 for every ABC Maryland member. When our employees come to work each day, they deserve to know that the person working next to them is not under the influence of drugs or alcohol. Permitting construction employers to enforce a drug and alcohol-free jobsite is essential to protecting workers. At its very core, it's a pro-worker position.

With this in mind, we have reviewed H.B. 556 and respectfully recommend the following construction focused language:

36-101(O) (1) (pg 21 of bill, new language)

Understands the dose, potency, and effects of being under the influence of cannabis being consumed; and

36-101 (O)(2) (pg21 of bill, new language)

Consumes in a responsible manner so as not to be under the influence of cannabis while traveling to and reporting ready for work.

36-101(KK) (pg 25 of bill, new language)

"Safety Sensitive" means any position in the construction industry or with regular duties that in the reasonable judgement of the employer would pose a risk of injury to the employee, other employees, or the public if performed under the influence of cannabis.

36-1102(A) (pg 69 of bill, new language)

(6) Use cannabis in violation of a drug-free workplace or employment policy that:

(I) Requires pre-placement, fit for duty, post-accident, reasonable suspicion, and/or random drug testing of employees for cannabis or other drugs or drug testing of employees in safety sensitive positions;

(II) 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.

General language:

36–1301 (pg 72 of bill, additions in bold)

(E)(1) This section does not prevent a PRIVATE or government employer from disciplining an employee or a contractor for:

(I) Ingesting cannabis in the workplace;

(II) working while impaired by cannabis

In closing, I want to reiterate the seriousness with which construction companies take the issue of workplace safety, as well as underscore the potential ramifications of H.B. 556, as introduced, on the right of construction workers to work in a safe environment. On behalf of over 1500 ABC business members in Maryland, we remain available to the Committee as it works to finalize this legislation.

Marcus Jackson, Director
Government Affairs

Attachment (A)

ENGROSSED ORIGINAL

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, which may investigate bring a civil suit 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 rulemaking 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.

Attachment (B)

Legalization of Recreational Marijuana

Considerations for the Construction Industry

Introduction

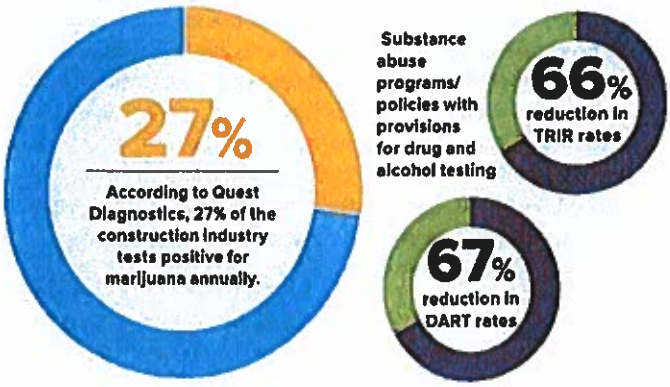
Beginning in 2012 with Washington and Colorado, the issue of the legalization of marijuana for recreational use has gained traction around the country. Multiple states each year see a bill introduced in their legislature or the issue placed on the ballot for a voter referendum, and the list of states with legal recreational use now stands at 12.

Each of these states has differing allowances for things like retail sale, personal growing of plants, possession amounts, etc. In addition, some of the states that most recently passed these policies are still at differing stages of the implementation process, as legislative action and regulatory rulemaking continues to be fleshed out around associated issues like taxation, retail structure and permitting. However, the common thread for the construction industry around every one of these new policies in any state is the preservation of jobsite safety. Under normal circumstances, construction is already a dangerous occupation with safety being a centerpiece of any contractor's responsibilities. With the emergence of these new policies, contractors must be able to continue doing their due diligence to protect their workers and projects.

While ABC does not engage in the debate around whether or not marijuana should be legalized as a general point of policy, it holds a very strict position that employer zero-tolerance policies for drug use and the preservation of drug- and alcohol-free jobsites must be allowed to continue.

What Is Our Message?

- Associated Builders and Contractors and our thousands of member contractors are champions of jobsite safety. The association is a member of the Construction Coalition for a Drug- and Alcohol-free Workplace, encourages contractors to implement a substance abuse policy and program in their companies, and administers a world-class safety program known as the STEP Safety Management System. Top-performing STEP contractors are more than 800% safer than the national industry average.
- According to Quest Diagnostics, 27% of the construction industry tests positive for marijuana annually. In states where marijuana is legalized, the test positivity rates are higher than the national average, with the exception of Alaska.
- Legalization increases public use, and being able to maintain a zero-tolerance/drug-free workplace is imperative to maintaining jobsite safety.
- According to ABC's Safety Performance Report, implementation of a substance abuse program is one of the foundations of world-class safety. Substance abuse programs/policies with provisions for drug and alcohol testing where permitted lead to a 66% reduction in TRIR and a 67% reduction in DART rates.



- According to ABC data, one-third of all incidents on construction jobsites are drug- or alcohol-related.
- Drug testing programs have been proven to serve as a preventative tool and deterrent to on-the-job drug use.
- There is an abundance of data around the construction industry's acute and unique experience with mental health and physical demands, and related substance use/abuse.
- In order for a contractor to maintain a world-class commitment to safety and protect its employees and the general public, it must be allowed to include drug testing provisions in any drug- or alcohol-related prevention policy, including pre-screening/pre-hire, random and for-cause assessments.
- Unfortunately, technology available to test for marijuana is not instant in the same way that alcohol inebriation testing is. However, as this is the only technology available, policy must reflect what is realistic, instead of removing the ability of an employer to test altogether.
- In addition to the safety of those working on the jobsite, pedestrian/public safety is of the utmost concern. Contractors must have the ability to preserve safety on the jobsite to ensure the surrounding public is kept safe, especially when heavy machinery is being used.
- There must be reasonable protections allowed for employers to protect themselves. If they cannot, it will drive up insurance costs even further, which will be passed along to taxpayers on public projects.

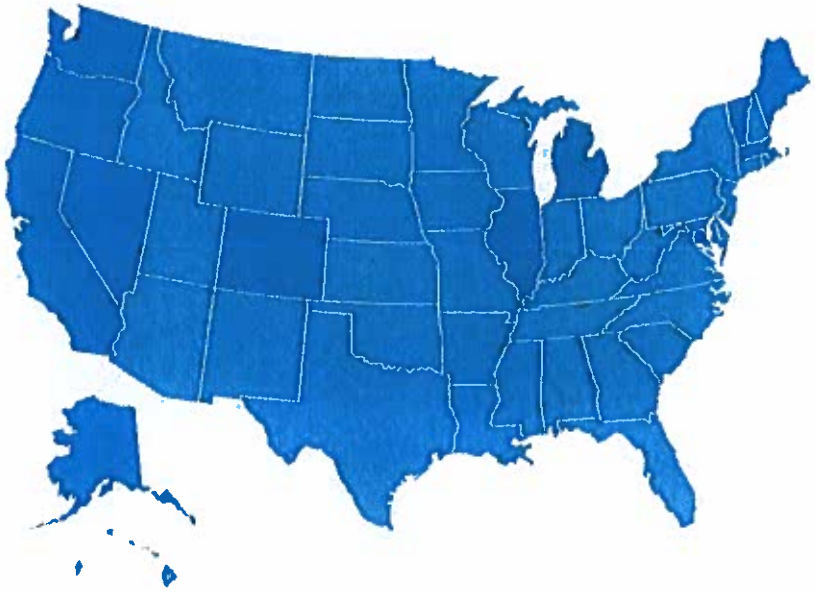
Legal and Policy Considerations

Legalization of recreational marijuana use creates unique hurdles for safety-sensitive industries like construction, but also presents issues for employers in all industries around personal privacy, employee rights and anti-discrimination policies. While a prospective or current employee can enjoy alcohol legally on their personal time with real-time inebriation testing available for employers and law enforcement, the same technology and thus maintenance of safe legal use testing and monitoring does not exist for marijuana. There is also a conflict between state legalization and continued illegality under federal law, and this is exhibited in some states' policies related to employee protections.

Because of this, during the crafting of legislation and the subsequent regulatory process, there will almost certainly be discussion around the conflict between legal and personal recreational choices and employer/workplace guidelines, many times directly addressed in policy language. This is especially an issue when pre-employment drug testing is in question, but will also affect an employer's ability to follow their standard procedures following a safety-related workplace incident in accordance with their zero-tolerance/drug-free workplace policies and liability protection processes. Due to the time that marijuana metabolites exist in urine, blood or hair, if an employee or prospective employee uses marijuana during their personal time in a state where it is legally protected, there is a risk that a subsequent pre-employment or incident-related drug test would yield a positive result and affect the employment process or implicate the employee as the cause for human or material harm and liability.

There have been legal cases that highlight the difficulties in this new environment, and the debate continues around employer obligations to workplace safety and employee privacy protections. Following any state ballot, legislative, and/or regulatory action, a contractor should consult with legal counsel to determine the best course of action per their state policies, as there is significant nuance in implementation. There is also a discussion to be had related to what is legally allowed or not expressly prohibited by state policy versus what may be the best realistic choices for a specific contractor based on any legal gray areas and the contractor and their employee's own unique situation.

Current State Policies



Alaska (2014) – Allows possession and cultivation for personal recreational use by individuals 21 years of age or older. Retail sales are allowed by state-licensed entities. Pre-employment drug testing and the testing of current employees is allowed, and employers may institute zero-tolerance policies restricting marijuana use by employees and drug-free workplace policies.

California (2016) – Allows possession and cultivation for personal recreational use by individuals 21 years of age or older. Retail sales are allowed by state-licensed entities. There is no comprehensive law regulating drug testing/ workplace policies, but subsequent state court decisions have determined that preemployment drug testing, drug testing of current employees for safety reasons, and random drug testing for employees in safety-sensitive positions is allowed. Employers can also institute zero-tolerance and drug-free workplace policies.

Colorado (2012) – Allows possession and cultivation for personal recreational use by individuals 21 years of age or older. Retail sales are allowed by state-licensed entities. There is no comprehensive law regulating drug testing/workplace policies, and court decisions have declared that employees are not protected by the state "lawful activities statute" due to marijuana remaining illegal under federal law. Therefore, employers are free to institute a testing program, zero-tolerance and drug-free workplace policies.

Illinois (2020) – Allows possession for personal recreational use by individuals 21 years of age or older. Unlicensed cultivation by recreational users is prohibited. Retail sales are allowed by state-licensed entities. Employers in safety-sensitive jobs are protected under the law and are also exempted from the state's Right to Privacy in the Workplace statute that protects an employee's lawful recreational activities outside of the workplace. Therefore, employers in construction are allowed to continue to enforce zero-tolerance policies and drug testing programs that are "reasonable" and "non-discriminatory."

Maine (2016) – Allows possession and cultivation for personal recreational use by individuals 21 years of age or older. Retail sales by state-licensed entities have been approved by the legislature as of May 2018, with sales expected to begin in the spring of 2020. Employers may institute a drug testing policy, but the policy must be approved by the state Department of Labor, and for employers of 20 full-time employees, they must have a functioning employee assistance program that has been certified by the state's Office of Substance Abuse. Employers must offer employees who test positive up to 6 months in a treatment program before taking adverse employment action. Pre-employment drug testing is allowed only following a conditional offer of employment. Employers may institute drug-free workplace policies that address specifically use/intoxication within the bounds of the workplace, but cannot restrict recreational use on personal time outside of work.

Massachusetts (2016) – Allows possession and cultivation for personal recreational use by individuals 21 years of age or older. Retail sales are allowed by state-licensed entities. Provisions in the Regulation and Taxation of Marijuana Act protect an employer's ability to institute zero-tolerance policies and drug-testing programs for recreational use.

Michigan (2018) – Allows possession and cultivation for personal recreational use by individuals 21 years of age or older. Retail sales are allowed by state-licensed entities. There is no comprehensive law regulating drug testing/workplace policies, and marijuana remains illegal under federal law. Therefore, employers are free to institute a testing program and enforce zero-tolerance and drug-free workplace policies.

Nevada (2017) – Allows possession and cultivation for personal recreational use by individuals 21 years of age or older. Retail sales are allowed by state-licensed entities. There is no comprehensive law regulating drug testing/workplace policies, but the under the initiative to Regulate and Tax Marijuana and the subsequent legislation, the Regulation and Taxation of Marijuana Act, an employer is not prohibited from "maintaining, enacting and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under the initiative."

Oregon (2014) – Allows possession and cultivation for personal recreational use by individuals 21 years of age or older. Retail sales are allowed by state-licensed entities. Employers may test for marijuana, whether for pre-employment or for cause for current employees, though a positive test result must be confirmed by a third-party before an employer may take adverse employment action against an applicant or employee. In addition, the "Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act" that approved the recreational use of marijuana in the state expressly does not amend or affect any state or federal laws pertaining to employment, and does not prohibit enforcement of federal law related to marijuana. Thus, an employer is permitted to continue enforcement of any workplace marijuana policies, including zero-tolerance or drug-free workplace policies.

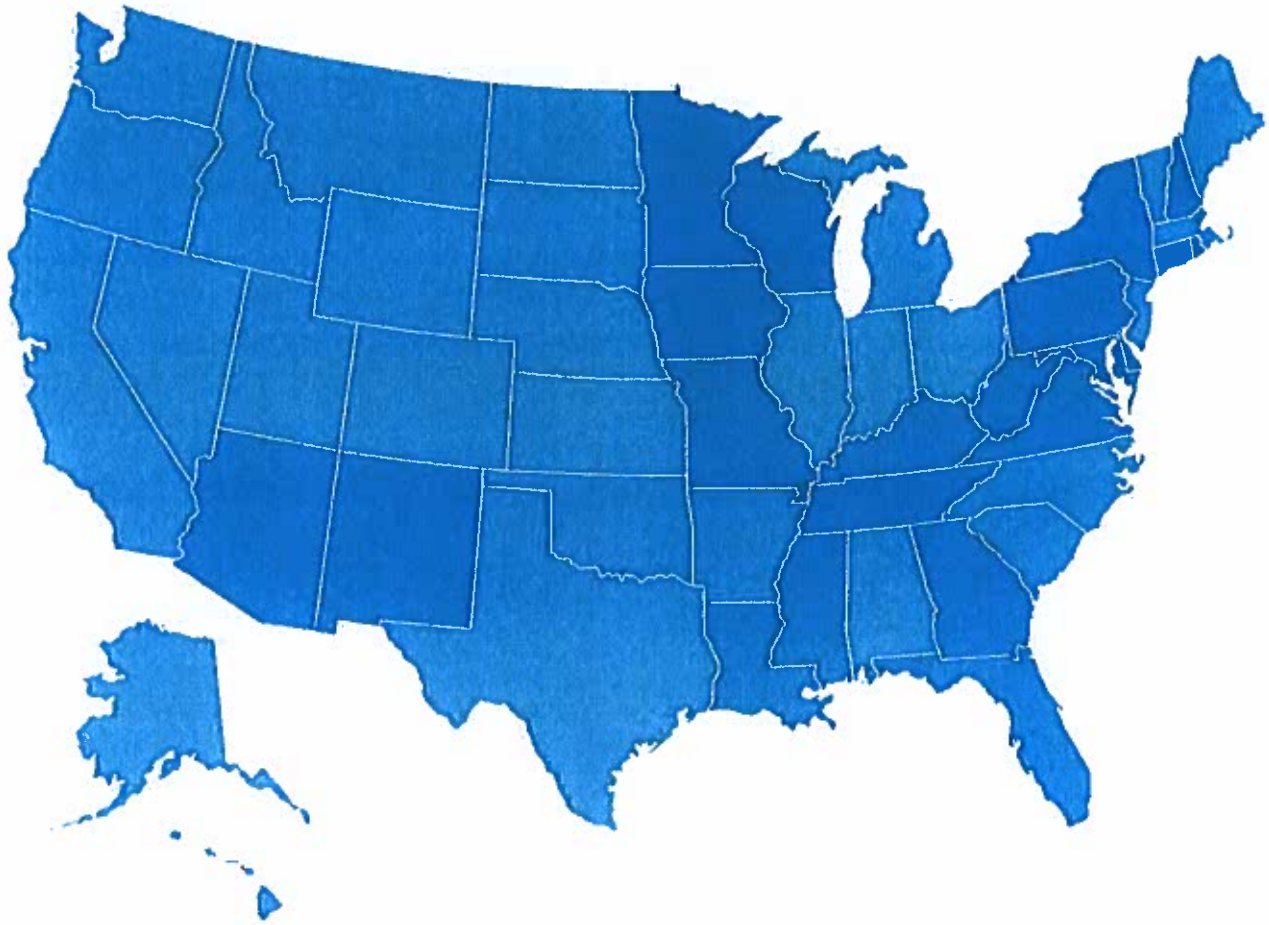
Vermont (2018) – Allows possession and cultivation for personal recreational use by individuals 21 years of age or older. Retail sales by state-licensed entities have been approved by the legislature as of February 2020, but a retail structure is not yet in place. An employer may utilize pre-employment drug testing if there is a conditional offer of employment. An employer may test a current employee if the employer has reasonable suspicion that the employee is under the influence on the job and the employer has made available a substance abuse-related rehabilitation program to employees either directly or through healthcare benefits. An employee that tests positive may not be terminated if they agree to participate in and successfully complete said program, though they may be suspended for the period of time necessary to complete the program, not to exceed three months. The state's recreational marijuana law also does not bar an employer from implementing drug-free workplace and zero-tolerance policies related to marijuana.

Washington (2012) – Allows possession for personal recreational use by individuals 21 years of age or older. Unlicensed cultivation is prohibited. Retail sales are allowed by state-licensed entities. There is no comprehensive law regulating drug testing/workplace policies, and marijuana remains illegal under federal law. Therefore, employers are free to institute a testing program and zero-tolerance and/or drug-free workplace policies.

Washington, DC (2015) – Allows possession and cultivation for personal recreational use by individuals 21 years of age or older. Retail sales are prohibited, but the transfer of regulated amounts to another individual without remuneration is allowed, which has created a loophole in the current law through "gifting" as an addition to purchased non-cannabis products. Preemployment drug testing is allowed only following a conditional offer of employment, but an employer is not prevented from denying employment based on a positive test for marijuana. Employers may also institute current employee drug testing programs and zero-tolerance policies.

States to Watch

Twenty-two states introduced legislation to legalize and regulate marijuana use in 2020. While legalization is unlikely in some of these states, there is substantive work around the issue in more states each year. The following states are considering legislation or saw action around the issue as of May 2020:



Arizona	Georgia	Louisiana	Missouri	Pennsylvania	West Virginia
Connecticut	Hawaii	Maryland	New Hampshire	Rhode Island	Wisconsin
Delaware	Iowa	Minnesota	New Mexico	Tennessee	
Florida	Kentucky	Mississippi	New York	Virginia	

Model Language

Legalization and associated policy can take a variety of forms and courses of action in the states. Some states have taken the path of a ballot question posed to voters, followed by legislative confirmation of the ballot question and passage of associated relevant legislative policy and subsequent regulatory rulemaking. Other states have pursued the issue through direct legislative action. In both instances, legislative policy is required to be written into state code, and state regulations must be created and/or amended per that legislative policy.

The following is an example of language that can be modified to best fit a state's needs, but it aims to accomplish the main policy achievements for ABC and the construction industry around zero-tolerance/drug- and alcohol-free workplace policies and protections to continuing to implement them for safety-sensitive jobs. This language could be inserted into the main vehicle crafting policy around legalization, or an alternative piece of legislation addressing workplace implications, etc. This will depend on the state and its unique process.

(a) Nothing in this Act shall prohibit an employer from adopting reasonable zero-tolerance or drug-free workplace policies, or employment policies concerning drug testing, smoking, consumption, storage, or use of cannabis in the workplace or while on call, provided that the policy is applied in a nondiscriminatory manner.

(b) Nothing in this Act shall require an employer to permit an employee to be under the influence of or use cannabis in the employer's workplace or while performing the employee's job duties or while on call.

(c) Nothing in this Act shall prohibit an employer in a safety-sensitive job category from implementing a pre-hire drug screening process, or refusing to hire a prospective employee due to a positive test result during a pre-hire drug screening process.

(d) Nothing in this Act shall limit or prevent an employer from disciplining an employee or terminating employment of an employee for violating an employer's employment policies or workplace drug policy.

(e) An employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others. If an employer elects to discipline an employee on the basis that the employee is under the influence of or impaired by cannabis, the employer must afford the employee a reasonable opportunity to contest the basis of the determination.

(f) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:

(1) actions, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing under the employer's workplace drug policy, including an employee's refusal to be tested or to cooperate in testing procedures or disciplining or terminating employment, based on the employer's good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies;

(2) actions, including discipline or termination of employment, based on the employer's good faith belief that an employee was impaired as a result of the use of cannabis, or under the influence of cannabis, while at the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's workplace drug policy; or

(3) injury, loss, or liability to a third party if the employer neither knew nor had reason to know that the employee was impaired.

(g) Nothing in this Act shall be construed to enhance or diminish protections afforded by any other law, including but not limited to (insert any applicable "compassionate use" or other personal privacy protection laws in place).

(h) Nothing in this Act shall be construed to interfere with any federal, state, or local restrictions on employment, including, but not limited to, United States Department of Transportation regulation 49 CFR 40.151(e), or impact an employer's ability to comply with federal or state law or cause it to lose a federal or state contract or funding.

(i) As used in this Section, "workplace" means the employer's premises, including any building, real property, and parking area under the control of the employer or area used by an employee while in performance of the employee's job duties, and vehicles, whether leased, rented, or owned. "Workplace" may be further defined by the employer's written employment policy, provided that the policy is consistent with this Section.

(j) For purposes of this Section, an employee is deemed "on call" when such employee is scheduled with at least 24 hours' notice by his or her employer to be on standby or otherwise responsible for performing tasks related to his or her employment either at the employer's premises or other previously designated location by his or her employer or supervisor to perform a work-related task.

(k) For purposes of this Section, "safety-sensitive" means any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task or others, including, but not limited to, any of the following:

(1) the handling, packaging, processing, storage, disposal, or transport of hazardous materials;

(2) the operation of a motor vehicle, other vehicle, equipment, machinery, or power tools;

(3) repairing, maintaining, or monitoring the performance or operation of any equipment, machinery, or manufacturing process, the malfunction or disruption of which could result in injury or property damage;

(4) performing firefighting duties;

(5) the operation, maintenance, or oversight of critical services and infrastructure, including, but not limited to, electric, gas, and water utilities; power generation; and distribution;

(6) the extraction, compression, processing, manufacturing, handling, packaging, storage, disposal, treatment, or transport of potentially volatile, flammable, combustible materials, elements, chemicals, or any other highly regulated component;

(7) dispensing pharmaceuticals;

(8) carrying a firearm; or

(9) direct patient care or direct child care;

In writing the official legislative language, legal counsel and/or government affairs staff and the bill drafting office in the legislature should be consulted.