**ENROLLED ORIGINAL**

AN ACT

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IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

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

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

Sec. 2. 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) The table of contents is amended as follows:

(1) A new section designation is added to read as follows:

"SEC. 603a. APPEALS OF SAFETY-SENSITIVE DESIGNATIONS".

(2) A new section designation is added to read as follows:

"SEC. 1503a. RIGHT TO NOTICE AND APPEAL OF SAFETY-SENSITIVE DESIGNATION".

(3) Before the title designation "XXI. HEALTH BENEFITS" a new title designation and section designations are added to read as follows:

"XX-E. MEDICAL MARIJUANA PROGRAM PATIENT EMPLOYMENT PROTECTIONS

"SEC. 2061. DEFINITIONS

"SEC. 2062. PROTECTIONS FOR QUALIFYING PATIENTS".

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

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

"(14B) The term "qualifying patient" means an individual who 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), or in the medical marijuana program of the employee's jurisdiction of residence.".

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

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

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

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

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

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

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

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

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

"(A) An employee hired into a position designated as safety-sensitive after the effective date of the Medical Marijuana Program Patient Employment Protection Amendment Act of 2020, passed on 2nd reading on December 1, 2020 (Enrolled version of Bill 23-309), on or before the employee's date of hire; and

"(B) Each incumbent employee in a position designated as safety-sensitive as of the effective date of the Medical Marijuana Program Patient Employment Protection Amendment Act of 2020, passed on 2nd reading on December 1, 2020 (Enrolled version of Bill 23-309), within 30 calendar days after the effective date of the Medical Marijuana Program Patient Employment Protection Amendment Act of 2020, passed on 2nd reading on December 1, 2020 (Enrolled version of Bill 23-309); and

"(3) If an agency designates an employee's position as safety-sensitive after the effective date of the Medical Marijuana Program Patient Employment Protection Amendment Act of 2020, passed on 2nd reading on December 1, 2020 (Enrolled version of Bill 23-309), provide the employee written notice of the change in position designation, which shall include the notice described in paragraph (2) of this subsection, at least 30 calendar days before the change in designation takes effect.

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

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

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

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

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

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

"(A) For employees employed by the District in positions designated as safety-sensitive as of the effective date of the Medical Marijuana Program Patient Employment Protection Amendment Act, passed on 2nd reading on December 1, 2020 (Enrolled version of Bill 23-309), within 45 business days after the employee receives the notification of rights provided pursuant to subparagraph (a)(2)(B) of this section;

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

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

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

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

"(B) The employee is facing an adverse action related to the employee's failure to pass a job-related drug test.

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

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

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

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

"(i) Within 30 calendar days after the personnel authority issues the determination; or

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

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

"(f) Notwithstanding any other provision of this section, a negotiated appeal procedure established within a collective bargaining agreement that permits an employee to challenge the designation of a position as safety-sensitive shall supersede and replace the appeal procedures established pursuant to this section and section 603a.

"(g) The designation of an employee's position as safety-sensitive shall not be suspended, tolled, or otherwise invalidated during the pendency of an appeal initiated pursuant to this section.

"(h) Notwithstanding section 404(a), the Council may issue rules to implement the provisions of this section.

"(i) For the purposes of this section, the term "agency" includes the Council.".

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

"Title XX-E. MEDICAL MARIJUANA PROGRAM PATIENT EMPLOYMENT PROTECTIONS

"Sec. 2061. Definitions.

"For the purposes of this title, the term:

"(1) "Agency" includes the Council.

"(2) "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)).

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

"Sec. 2062. Protections for qualifying patients.

"(a)(1) Notwithstanding any other provision of law and except as provided in subsection (b) of this section, an agency may not refuse to hire, terminate from employment, penalize, fail to promote, or otherwise take adverse employment action against an individual based upon the individual's status as a qualifying patient unless the individual used, possessed, or was impaired by marijuana at the individual's place of employment or during the individual's hours of employment.

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

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

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

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

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

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

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

"(B) Impose an undue hardship on the employing agency; or

"(C) Cause the agency to commit a violation of a federal law, regulation, contract, or funding agreement.

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

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

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

"(1) Use or administer marijuana at the employee's place of employment or during the employee's hours of employment; or

"(2) Be impaired by marijuana at the employee's place of employment or during the employee's hours of employment.

"(e) Notwithstanding section 404(a), the Council may issue rules to implement the provisions of this section.".

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

"Sec. 603a. Appeals of safety-sensitive designations.

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

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

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

"(d)(1) In appeals brought pursuant to this section, a Hearing Examiner shall issue an initial designation decision within 60 business days after the appeal is filed with the Office, unless the Hearing Examiner determines that an evidentiary hearing is warranted, in which case the Hearing Examiner shall issue an initial designation decision within 90 business days after the

appeal is filed. A Hearing Examiner may permit oral argument only when the Hearing Examiner determines such argument is necessary to resolve matters of law and material fact.

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

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

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

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

"(B) After issuing the initial designation decision, the Hearing Examiner shall retain jurisdiction over the case only to the extent necessary to correct the record, rule on a motion for attorney fees, or process any petition for enforcement filed under the authority of the Office.

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

"(f) The Office may issue such rules and regulations as it considers practicable or desirable to govern appeals under this section.".

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

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

(2) The newly designated subsection (a) is amended by striking the phrase "and issue rules".

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

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

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

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

(i) Section 2031(10) (D.C. Official Code § 1-620.31(1)) is repealed.

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

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

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

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

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

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

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

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

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

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

Sec. 3. Section 3 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), is amended by adding a new subsection (d) to read as follows:

"(d) The Department shall comply with the requirements of title XX-E of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, passed on 2nd reading on December 1, 2020 (Enrolled version of Bill 23-309).".

Sec. 4. Applicability.

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

(b) The Chief Financial Officer shall certify the date of the inclusion of its fiscal effect 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 the provisions identified in subsection (a) of this section.

Sec. 5. 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. 6. 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.

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Chairman
Council of the District of Columbia

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Mayor
District of Columbia