

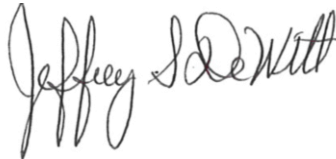
Government of the District of Columbia  
Office of the Chief Financial Officer



Jeffrey S. DeWitt  
Chief Financial Officer

**MEMORANDUM**

**TO:** The Honorable Phil Mendelson  
Chairman, Council of the District of Columbia

**FROM:** Jeffrey S. DeWitt  
Chief Financial Officer 

**DATE:** October 26, 2020

**SUBJECT:** Fiscal Impact Statement – Medical Marijuana Program Patient  
Employment Protection Amendment Act of 2020

**REFERENCE:** Bill 23-309, Draft Committee Print as provided to the Office of Revenue  
Analysis on October 22, 2020

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**Conclusion**

Funds are not sufficient in the fiscal year 2021 through fiscal year 2024 budget and financial plan to implement the bill. The bill costs \$103,000 in fiscal year 2021 and \$274,000 over the financial plan.

**Background**

The bill provides protections for qualifying District government agency employees<sup>1</sup> that are enrolled in a medical marijuana program and establishes an appeal process for safety-sensitive designated positions.<sup>2</sup> Both of these provisions are detailed below.

**Medical Marijuana Program Patient Employment Protections**

The bill prohibits<sup>3</sup> agencies from taking adverse employment actions against applicants and employees who are qualifying medical marijuana patients (qualified patients), provided that

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<sup>1</sup> Qualifying employees are those that do not work in a safety sensitive positions or in positions dependent on federal funding.

<sup>2</sup> Safety sensitive positions are those where employees under the influence of drugs or alcohol 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

<sup>3</sup> By amending 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.).

employees do not use or possess their prescriptions while at work nor are impaired at work. Agencies are prohibited from making employment-related decisions on qualified patients based on failed screenings for marijuana unless there is a reasonable suspicion that the employee is impaired while at work.

Agencies must provide a reasonable accommodation for a qualifying patient's use of medical marijuana. 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, working environment, or agency operating procedures to enable the employee to successfully perform the essential functions of the job. An accommodation is not reasonable if it would place the employee in a position that is safety sensitive; impose an undue hardship on the employing agency; or cause the agency to commit a violation of a federal law, regulation, contract, or funding agreement.

#### Appeal of Safety-Sensitive Designation

The bill also establishes<sup>4</sup> a two-tiered appeal process for employees whose positions are classified as safety-sensitive positions. Employees in safety-sensitive positions cannot participate in a medical marijuana program. Agencies are required specify in position descriptions if a position is safety sensitive and must notify employees of their right to appeal a safety-sensitive position designation. There are approximately 12,200 safety sensitive jobs in the District government.

Employees can appeal<sup>5</sup> a safety-sensitive designation within 45 business days of the bill becoming effective, 45 business days after an employee becomes a qualifying patient, or within 45 business days after the employee receives notice that the employee's position will be newly designated as safety-sensitive. An employee can file a first level appeal with their agency's personnel authority who may grant or deny an employee's petition. If a petition is denied, an employee can file a second level appeal by petitioning the Office of Employee Appeals (OEA) for a final determination within 30 calendar days. The Personnel, Labor and Employment Division of the Office of the Attorney General (OAG) litigates administrative and personnel matters before OEA on behalf of District agencies. If an appeals process is specified as part of a Collective Bargaining Agreement, that process supersedes this bill's appeals process.

OEA, after receiving a safety-sensitive appeal from an employee, can uphold, reverse, or modify the determination of the personnel authority within 60 business days. If an OEA Hearing Examiner determines that an evidentiary hearing is warranted, a determination may be issued within 90 days of an appeal filing. Decisions must include findings of fact and a reason for the basis of the decision. OEA must transmit copies of any decision on safety-sensitive designation to all parties to the appeal, including named parties and intervenors.

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<sup>4</sup> By amending D.C. Official Code § 1-604.04(a).

<sup>5</sup> An employee may not appeal a position designation because they fail a job-related drug test, face an adverse action related to the employee's failure to pass a job-related drug test, or appeal a safety-sensitive designation when the position is subject to random drug testing under federal law.

The Honorable Phil Mendelson

FIS: Bill 23-309, "Medical Marijuana Program Patient Employment Protection Amendment Act of 2020," Draft Committee Print as shared with the Office of Revenue Analysis on October 22, 2020

All agency personnel authorities must file an answer to an appeal within 15 business days after an employee files an appeal. The answer must include a complete record of proceedings before the personnel authority including evidence considered rendering a determination. OEA hearing examiners have the option to extend deadlines if necessary. Final OEA decisions on safety-sensitive designation are not subject to judicial review.

### **Financial Plan Impact**

Funds are not sufficient in the fiscal year 2021 through fiscal year 2024 budget and financial plan to implement the bill. The bill costs \$103,000 in fiscal year 2021 and \$274,000 over the financial plan.

No additional resources are required to implement the protections offered to qualified District government employees that are enrolled in a medical marijuana program. District agencies already follow reasonable accommodation requirements as required under the Americans with Disabilities Act and District of Columbia Human Rights Act.

The Department of Human Resources can absorb the additional workload of processing first level safety-sensitive designation appeals without additional resources.

The OAG's Personnel, Labor and Employment Division will need to hire one full time attorney for a term of two years to litigate second level safety-sensitive position designation appeals on behalf of District agencies in front of OEA. OAG estimates that approximately 90 appeals will be filed over the course of a two-year period after the bill's implementation. After this initial spike, the number of appeals is projected to be less than five per year. The total salary and fringe cost for this attorney is \$103,000 in fiscal year 2021 and \$274,000 over the financial plan.

OEA can process second level safety-sensitive position appeals with current Administrative Law Judges and staff. OEA does not require additional resources to implement the bill.

<b>Bill 23-309 - Medical Marijuana Program Patient Employment Protection Amendment Act of 2020 - Total Costs</b>					
	FY 2021	FY 2022	FY 2023	FY 2024	Total
Salary	\$85,000	\$113,000	\$28,000	\$0	\$226,000
Fringe	\$18,000	\$24,000	\$6,000	\$0	\$48,000
<b>Total</b>	<b>\$103,000</b>	<b>\$137,000</b>	<b>\$34,000</b>	<b>\$0</b>	<b>\$274,000</b>

Table Notes:

- (a) Assumes one Grade-13, Step-4 attorney with a term of 24 months.
- (b) Assumes a start date of January 2, 2021.
- (c) Assumes fringe rate of 21 percent and 1.5 percent fringe cost growth.