

PHILADELPHIA COMMISSION ON HUMAN RELATIONS

REGULATION NO. 10

PROHIBITION ON PRE-EMPLOYMENT MARIJUANA TESTING

10.0 SCOPE. This regulation, promulgated by the Commission pursuant to its authority under Sections 4-700 and 4-701 of the Home Rule Charter and Section 9-5503 of The Philadelphia Code, sets forth additional definitions and provisions pertaining to the prohibition on pre-employment marijuana testing set forth at Chapter 9-5500 of The Philadelphia Code.

10.1 DEFINITIONS.

- a. **Employer.** Shall have the meaning given in § 9-1102(1)(h).
- b. **Prospective Employee.** An individual who is seeking a position with a new Employer and whom the Employer is considering hiring for a position located within the City.
- c. **Regular Work.** Work activities that would be considered customary, typical, consistent or routine for an individual in the prospective employee's position.
- d. **Vulnerable Person.** A person who is either a minor or someone unable to care for themselves or their finances due to a physical or mental impairment.

10.2 POSITIONS THAT COULD SIGNIFICANTLY IMPACT THE HEALTH AND SAFETY OF OTHER EMPLOYEES OR MEMBERS OF THE PUBLIC. Section 9-5502(2)(d) authorizes the Commission, as the Enforcement Agency for Chapter 9-5500 of the Code, to establish by regulation an exception to the general prohibition on pre-employment marijuana testing for "any position in which the employee could significantly impact the health or safety of other employees or members of the public." As set forth in these regulations, an employer may require a prospective employee to undergo testing for the presence of marijuana as a condition of employment if the position requires the prospective employee to perform one or more of the following functions:

- a. Regular operation of heavy machinery;
- b. Regular work on or near power or gas utility lines;
- c. Regular operation of a motor vehicle;
- d. Work relating to fueling an aircraft, providing information regarding aircraft weight and balance, or maintaining or operating aircraft support equipment;
- e. Work covered by the Philadelphia Building Construction and Occupancy Code; or

f. Work for which impairment would interfere with the employee's ability to take adequate care in the carrying out of their job duties, which interference would pose a significant risk of physical harm to the employee or to other people.

10.3 PROCEDURE.

a. Complaint.

- i. Any Prospective Employee claiming to be aggrieved by Section 9-5502(1) may make, sign and file with the Commission a verified complaint in writing. The complaint shall set forth the business, employment agency or labor organization believed to have violated the prohibition on pre-employment marijuana testing, the circumstances of pre-employment testing, and such other information as may be required by the Commission.
- ii. No complaint shall be considered unless it is filed with the Commission within thirty (30) days after the occurrence of the alleged unlawful practice.
- iii. Upon the filing of a complaint, the Commission shall serve notice upon the Prospective Employee acknowledging the filing. The Commission shall also promptly serve notice of such complaint on the Employer charged with the unlawful employment practice, together with a copy of the complaint.

b. Answer.

- i. The Employer shall provide written response to the complaint, which sets forth the factual basis/bases for its requirement that the Prospective Employee undergo testing for the presence of marijuana as a condition of employment.
- ii. Employer may also provide any supporting documentation that substantiates its position.

c. Investigation.

- i. After the filing of any complaint, the Commission shall conduct a prompt investigation. The Commission may issue subpoenas requiring the Employer to furnish information, records or other documents.
- ii. In determining whether an Employer violated Section 9-5502(1), the Commission shall consider relevant evidence, including but not limited to:
 - Any laws governing the Prospective Employee's position and the applicability of the Prohibition on Pre-employment Marijuana Testing;
 - The enumerated exceptions set forth at Section 9-5502(2);
 - The nature of the Prospective Employee's position;
 - The job functions set forth at Section 10.2 of these Regulations;

- Facts regarding the interaction(s) between the Employer and Prospective Employee;
- The overall context of the interaction(s) between the Employer and the Prospective Employee; and
- Such other evidence relating to the Employer’s compliance with the Prohibition on Pre-employment Marijuana Testing as the Commission deems appropriate.

iii. If the Commission, after investigation, determines that the Employer violated Section 9-5502(1), the Commission may order appropriate remedies.

d. Staff Recommendations for Case Closing. At the conclusion of the investigation, Commission Staff may recommend one of the following to the Commissioners as the basis of a case determination:

- i. **Pre-employment Marijuana Testing Not Permissible.** The Commission Staff may recommend a finding of Pre-employment Marijuana Testing Not Permissible where the Employer failed to provide sufficient evidence to show that the position at issue in the complaint qualifies for an exception to the law.
- ii. **Pre-employment Marijuana Testing Permissible.** The Commission Staff may recommend a finding of Pre-employment Marijuana Screening Permissible where the preponderance of the evidence suggests that the Employer provided sufficient evidence to show that the position at issue in the complaint qualifies for an exception to the law.

e. Letter of Determination. Upon completion of the investigation, the Commission shall issue a letter of determination to all parties with its finding of Pre-Employment Marijuana Testing Permissible or Pre-Employment Marijuana Testing Not Permissible. The letter will also notify the parties of the Commission’s reconsideration procedure, consistent with PCHR Regulation 2.14.

f. Notice of Compliance to Employers. Where the Commission completes the investigation and finds that the Employer may not conduct pre-employment marijuana testing for the position in the complaint, the Commission shall issue a Notice of Compliance to the Employer directing that it may not conduct pre-employment testing for the position at issue in the complaint.

10.3 POST-INVESTIGATION PROCEDURES.

a. Final Order Issued Post-Reconsideration. If a party is granted reconsideration consistent with Regulation 2.14 and the decision of the investigation is either upheld or reversed, a final order shall be issued by the Commissioners.

b. Appeal. The Parties have a right to appeal and seek judicial review of any final order of the Commission in accordance with Section 9-1119 of the Fair Practices Ordinance.

10.4 PENALTIES.

a. As authorized by Section 9-105 (relating to penalties), an Employer who has violated the provisions of Chapter 9-5500 and these Regulations shall be subject to a fine of not more than three hundred dollars (\$300).

b. Any Employer receiving an initial Notice of Compliance who subsequently violates, on more than one occasion, the Notice of Compliance for any order of the Commission or any provision of this Chapter, or who, on more than one occasion, willfully resists, prevents, impedes or interferes with the Commission, its members, agents or agencies in the performance of duties pursuant to this Chapter, shall be guilty of a separate offense of repeat violation, and for each such repeat violation shall be subject to a fine of not more than three hundred (\$300) dollars.