

MIAMI BEACH

COMMITTEE MEMORANDUM

TO: Finance and Economic Resiliency Committee Members

FROM: Interim City Manager Rickelle Williams

DATE: June 28, 2024

TITLE: A REFERRAL TO DISCUSS A PROPOSED RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, ESTABLISHING AS THE POLICY OF THE CITY OF MIAMI BEACH THAT MEDICAL MARIJUANA IS MEDICINE AND NOT AN ILLICIT RECREATIONAL DRUG; THAT EMPLOYEES OF THE CITY WHO ARE PRESCRIBED MEDICAL MARIJUANA BY A PROPERLY LICENSED MEDICAL PROFESSIONAL IN COMPLIANCE WITH ALL REQUIREMENTS SET FORTH IN FLORIDA LAW SHALL BE PERMITTED TO USE THIS PROPERLY PRESCRIBED MEDICATION DURING NONWORKING HOURS AND SUFFICIENTLY IN ADVANCE OF ANY SCHEDULED WORK SHIFT IN ORDER TO ENSURE THAT THE EMPLOYEE IS NOT IMPAIRED BY THE USE OF THE MEDICAL MARIJUANA WHILE ON THE JOB; AND DIRECTING THE CITY ADMINISTRATION TO DRAFT AND PROMULGATE WRITTEN DIRECTIVES EFFECTUATING THIS CITY POLICY

BACKGROUND/HISTORY

At the February 21, 2024 City Commission meeting, the Mayor and City Commission approved a referral (Item C7 O) to the Finance and Economic Resiliency Committee (FERC or Committee) to discuss a proposed resolution to establish a policy for the City that would allow employees of the City who are prescribed medical marijuana by a properly licensed medical professional to be permitted to use properly prescribed medication during nonworking hours and sufficiently in advance of any scheduled work shift. A proposed resolution sponsored by Commissioner Rosen Gonzalez was presented at the meeting but was not adopted and was instead referred to FERC for further discussion.

This item was included on the May 24, 2024 FERC agenda but was not reached.

ANALYSIS

After the constitutional amendment to legalize medical marijuana passed in Florida in November 2016, the legislature enacted Section 381.986, Florida Statutes, which provides for medical marijuana to treat certain medical conditions.

The legislature provided for important employment-related matters to be directly addressed by this state law:

- This law provides that employers may “establish, continue, or enforce a drug-free workplace program or policy.”
- This law does not require an employer to accommodate the medical use of marijuana in any workplace or to accommodate an employee working while under the influence of marijuana.
- Importantly, the statute explicitly states that the legalization of medical marijuana in Florida

“does not create a cause of action against an employer for wrongful discharge or discrimination” based on an employee’s marijuana use.

While considering the framework of the State’s medical marijuana statute, please also note important issues regarding the illegality of marijuana under Federal law and the impact of Drug-Free Workplace policies.

- Under Federal law marijuana or most cannabis is still a Schedule 1 substance under the Controlled Substances Act (CSA) (see Drug Scheduling (dea.gov)) and therefore it is not legal. Per the Congressional Research Service in The Federal Status of Marijuana and the Expanding Policy Gap with States (congress.gov), “Due to its status as a Schedule I controlled substance, the CSA prohibits the manufacture, distribution, dispensation, and possession of marijuana except in federal government-approved research studies.”

- Per the Drug Enforcement Administration (DEA), marijuana is considered to have a high potential for dependency and no recognized medical use under Federal law. The DEA lists these below exceptions to derived cannabis drugs as quoted in the Drug Fact Sheet: Marijuana/Cannabis (dea.gov):

- o Marinol, a Schedule III drug, is a synthetic version of THC in a capsule (also referred to as dronabinol, the generic or International Nonproprietary Name given to THC), prescribed for the control of nausea and vomiting caused by chemotherapeutic agents used in the treatment of cancer and to stimulate appetite in acquired immune deficiency syndrome (AIDS) patients.

- o Syndros, a Schedule II drug, is an oral dronabinol (THC) solution that is used for the treatment of anorexia associated with weight loss in patients who have failed to respond adequately to conventional antiemetic treatments.

- o Epidoloex, a Schedule V drug, is an oral solution of cannabidiol (CBD) that has no more than 0.1% THC, used to treat two epilepsy conditions, Dravet syndrome and Lennox-Gestaut syndrome.

- The U.S. Department of Transportation (DOT) prohibits the use of Schedule 1 drugs by any CDL driver (see DOT "Medical Marijuana" Notice | US Department of Transportation). A CDL driver will be medically disqualified if he or she uses any type of Schedule I controlled substance, including marijuana. Many City employees utilize a CDL as a requirement of their job.

- Per the U.S. Department of Labor (DOL), as described at Preventing Substance Use in the Workforce | U.S. Department of Labor (dol.gov): “Under the Drug-Free Workplace Act of 1988, federal workplaces and non-federal workplaces with a federal contract of \$100,000 or more or a federal grant in any amount must implement a Drug-Free Workplace Program, which includes drug testing requirements.”

- The Human Resources (HR) Director certifies that the City of Miami Beach is a Drug-Free Workplace on all required Federal grant forms.

There are also important impacts of Drug-Free Workplace policies under Florida law:

- As stated in [drug-free-workplace-guide.pdf](http://myfloridacfo.com) (myfloridacfo.com), provided by the State of Florida Division of Workers’ Compensation, “In 1990, legislation was enacted that created the Florida Drug-Free Workplace Program. The intent was to ‘promote drug-free workplaces in Florida, in order that employers (would) be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees.’” (See Sections 440.101 and 102, Florida Statutes)

- The City's Human Resources (HR) Director or Risk Manager also certifies annually that the City of Miami Beach is a Drug-Free Workplace to the State of Florida Division of Workers’

Compensation.

- o This certification provides the City of Miami Beach an annual five percent (5%) credit (a discount valued at almost \$30k annually) to our workers' compensation insurance premiums as the City is self-insured.
- o The City also purchases excess worker's compensation (WC) insurance. We anticipate that not maintaining a Drug-Free Workplace Program would impact the ability of the City to re-insure.
- o Under State Law, the City is not required to provide an employee WC benefits if drugs are found in the employee's system at or above threshold levels.
- o The City could be exposed to comparative or contributory negligence if we were to allow an accommodation for the use of a Schedule 1 drug and impairment was a contributory factor in a workplace accident.

There are important impacts of Drug-Free Workplace policies under the City's adopted Personnel Rules and bargaining agreements:

- The City's Personnel Rules describe the City's Drug-Free Workplace Program. The City's recruitment website includes language that the City is a Drug-Free Workplace. New job candidates for safety sensitive jobs are provided Drug-Free Workplace notices before pre-employment drug testing.
- For many years, there have been established and agreed-upon random (and reasonable suspicion) drug and alcohol testing programs under each of the City's labor agreements which comport with Federal and State of Florida Drug-free Workplace requirements.
 - o Each labor agreement defines the testing thresholds under which an employee may be terminated for violating the City's Drug-Free Workplace policy.
 - o Marijuana is unique in that widespread drug-testing practices may show a presence of THC (delta-9-tetrahydrocannabinol), believed to be the main ingredient that produces the psychoactive effect, in the body for up to 30 days. Therefore, many tests may show a "positive" result beyond a period of impairment after use.
 - o Many times, if the employee is otherwise in good standing, and if the employee, the union, and management agrees, an employee who tests positive during a drug or alcohol test may be offered a "Last Chance Agreement" during a defined rehabilitation period rather than be terminated for a substance abuse issue. Most employees who are offered this opportunity complete this probationary period successfully.
 - o Any proposed change of policy or procedure to the drug and alcohol procedure must be bargained with each union.
- The City of Miami Beach's current employee drug testing practices and procedures are designed with the goals of engaging and assisting employees with a substance use disorder as well as to maintain a safe workplace. The City provides a confidential and free Employee Assistance Program to assist any employee who may have an issue.

Human Resources thoughtfully engages with employees, Departments, and the City Attorney's Office to provide reasonable accommodations to any employee impacted in the workplace by a disability or medical condition.

- If a job candidate or an employee requests a "reasonable accommodation" for a disability, including a medical condition which may be disabling to their ability to perform their job, the City already has an obligation under the Federal Americans with Disabilities Act (ADA) to engage with the employee in an "interactive process" to determine what, if any, reasonable accommodations may be agreed upon for the job candidate or employee to perform the "essential functions of the job."
 - o An agreed-upon reasonable accommodation is unique to the person and their specific medical circumstances and abilities.
 - o What may be reasonable for one employee may not be reasonable for another employee, based on the nature of the job, or any other factor which may impact the City's ability to agree to an accommodation as reasonable at that time.

- o Sometimes a Fitness for Duty Exam is warranted to determine the medical necessity of an accommodation(s).
- o If a job candidate or an employee produces a medical marijuana card, it is the current practice of HR to engage with the candidate or employee in an interactive process under the ADA to determine what reasonable accommodation, if any, may be made.

Conflicts between Federal and state laws are currently being challenged and cases are working their way through courts and appeals:

- The conflicts between state and Federal Law in and of themselves creates a series of challenges in employment practices and confusion with employees as to what is “allowed.” There are many things in flux, both at the state and federal level, which could result in new legal and administrative developments regarding marijuana. These will not necessarily result in clarity or less conflict between state and Federal law.

- o See *ORTIZ v. DEPARTMENT OF CORRECTIONS* (2023) | FindLaw for a recent case in Florida where the termination of a correctional officer who was a regular user of medicinal marijuana was sustained by both the state Public Employees Relation Commission and Florida’s First District Court of Appeal. “Because Mr. Velez Ortiz could not perform an important requirement of the job of corrections officer, training with and using firearms, without being in violation of federal law and causing other agency personnel to be in violation of federal law, his termination was lawful.” The State Supreme Court declined to hear the case.

- California just passed legislation, Assembly Bill No. 2188 which went into effect January 1, 2024, which makes it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon the person’s use of cannabis off the job and away from the workplace, except for preemployment drug screening, as specified, or upon an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

The bill would exempt certain applicants and employees from the bill’s provisions, including employees in the building and construction trades and applicants and employees in positions requiring a federal background investigation or clearance, as specified. The bill would specify that it does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

- As discussed in recent literature and as cited in this recent legislation “employers now have access to multiple types of tests that do not rely on the presence of non-psychoactive cannabis metabolites. These alternative tests include impairment tests, which measure an individual employee against their own baseline performance and tests that identify the presence of THC in an individual’s bodily fluids.”

The City Administration is exploring with its Medical Review Officer new, valid tests for cannabis which may be better at showing impairment. These have been recently approved for use by the DOL. As noted above, use of new types of tests, including impairment tests using saliva or other bodily fluids would need to be agreed to in collective bargaining. More valid measures of impairment would potentially reduce the potential of a “positive” test for cannabis when an employee is not impaired at work, but used marijuana in the recent past for medical purposes legally under Florida state law.

- The U.S. Justice Department recommended on Tuesday, April 30, 2024, to commence a rule-making process, expected to take many months, to ease federal restrictions on rules surrounding medical marijuana. This rule making process is not expected to end federal criminalization of the drug, but may include changing the schedule classification of cannabis.

- On May 1, 2024, a bill was introduced in the U.S. Senate legalize marijuana and removed it from Schedule 1 on the controlled substances list. As of now, no Republicans have signed on to sponsor the bill in the U.S. House of Representatives.
- In Florida, voters will decide on a referendum for a constitutional amendment on the November 5, 2024 ballot to legalize recreational marijuana in Florida for adults. Governor DeSantis and the Republican Party have come out in opposition to the referendum.

FISCAL IMPACT STATEMENT

NA

Does this Ordinance require a Business Impact Estimate?
(FOR ORDINANCES ONLY)

The Business Impact Estimate (BIE) was published on . See BIE at:
<https://www.miamibeachfl.gov/city-hall/city-clerk/meeting-notices/>

FINANCIAL INFORMATION

CONCLUSION

If recommended by the Committee, members of the City Commission will discuss whether to adopt this Resolution as policy and direct the Administration to propose new workplace guidelines that would better allow City employees to use legally prescribed medical marijuana during nonworking hours and sufficiently in advance of any scheduled work shift, and that procedures and practices would be developed and adopted to more broadly accommodate the use of medical marijuana by employees of the City of Miami Beach provided that an employee was not impaired at work. The Administration has provided information on employment practices and legal considerations to inform the Committee's debate and its consideration of the proposed Resolution to adopt this policy.

Applicable Area

Citywide

Is this a "Residents Right to Know" item, pursuant to City Code Section 2-17?

No

Is this item related to a G.O. Bond Project?

No

Was this Agenda Item initially requested by a lobbyist which, as defined in Code Sec. 2-481, includes a principal engaged in lobbying? No

If so, specify the name of lobbyist(s) and principal(s):

Department

Human Resources

Sponsor(s)

Commissioner Kristen Rosen Gonzalez

Co-sponsor(s)