

SUPPLEMENTAL MEMO TO RESOLUTION 2023-09 REGARDING PROPOSED AMENDMENTS TO SAID RESOLUTION.

Background:

On February 13, 2022, Resolution 2023-09 was considered by the City Council. During Council's discussion on this item, Council moved to postpone the consideration of this item to the February 27, 2023, meeting. The reasoning for such postponement was to provide staff time to present more information to the Council and to draft potential amendments to Resolution 2023-09.

City staff have brought forward two proposed amendments for Council's consideration.

Analysis:

This supplemental memorandum is offered to provide a summary of the scope of the two draft amendments.

Amendment 1

Amendment 1 adds language to Resolution 2023-09 which adds a definition for "safety-sensitive positions." Safety-sensitive positions will be defined as employment with the City which involves the performance of duties which have a direct and immediate impact on the safety of the employee, the public, or other City employees. This definition is based on a similar definition from Section 105.1116 RSMo. This is a section of State law which relates to the drug free workplace policy for State employees.

If approved Amendment 1 would still authorize off-duty consumption of marijuana for those City employees who are not designated as being in a safety-sensitive positions, are in a position in which the use of marijuana products would affect in any manner a person's ability to perform job-related employment responsibilities, could jeopardize the City's ability to secure grant funding from the federal government, could jeopardize certain licensing related benefits to the City under federal law, or conflicts with a bona fide occupational qualification that is reasonably related to the employee's employment.

Amendment 2

Amendment 2, if approved, would prohibit off duty consumption of marijuana by all City employees, unless such off-duty consumption is for medicinal purposes.

This Amendment also adds the safety-sensitive language added by Amendment 1.

The major distinction between the two amendments is Amendment 1 would still allow for off-duty consumption by certain employees. Amendment 2 would prohibit off-duty consumption by all employees, except for those with medical authorization.

Recommendation:

Both Amendments add language to the proposed policy which would clarify what a safety-sensitive position is. Staff is in support of these additions.

The ability to restrict off-duty conduct of employees under the provisions of Missouri Constitutional Amendment 3 is a question of debate. It is the Law Department's view that the City likely retains the ability to take adverse employment action if an employee tests positive for marijuana, however there is ambiguous language in Amendment 3 on this point.

MEMO SUBMITTED BY:

Nick Woodman | City Attorney

AMENDMENT NO. 1 TO RESOLUTION NO. 2023-09

A MOTION:

To amend Section 2 of said Resolution by adding the following language to line 112 after the phrase “above-mentioned categories.”:

“Safety-sensitive position shall mean employment with the City which involves the performance of duties which have a direct and immediate impact on the safety of the employee, the public, or other City employees.”

So that, the language of Section 2 of the Resolution shall thereafter read as follows:

SECTION 2: The City’s Personnel Code is hereby amended by adding thereto a new Policy referenced within the Personnel Code as “6.5.1 Marijuana Use Policy” which shall read as follows:

(Note: Language to be added is indicated by being underlined. Language to be removed is indicated by being ~~stricken~~.)

6.5.1 Marijuana Use Policy

Article XIV of the Missouri Constitution has authorized the consumption of marijuana in Missouri. Marijuana is still illegal under federal law. The consumption of marijuana or marijuana infused products by employees could jeopardize the City’s ability to secure grant funding from the federal government, could jeopardize certain licensing related benefits to the City under federal law, could interfere with an employee’s ability to perform job related responsibilities, could negatively impact the safety of others, or conflict with a bona fide occupational qualification of the employee.

Therefore, to comply with the requirements of Article XIV of the Missouri Constitution, the City adopts the following employment policies related to marijuana use:

- (1) The City will not discriminate against a person in hiring, termination or otherwise penalize a person based upon:
 - a. The person’s status as a qualifying patient or primary caregiver when they have a valid identification card, which shall be provided to the Human Resources Department, including the person’s legal use of a lawful medical marijuana product off City premises and during non-working hours, unless the employee was under the influence of medical marijuana on City premises during their hours of employment; or

b. A positive drug test for marijuana components or metabolites of a person who has a valid qualifying patient identification card, unless the person used, possessed, or was under the influence of marijuana while on duty.

(2) Notwithstanding the provision in paragraph (1) above, the use of medical marijuana or non-medical marijuana products while an employee is on duty shall be subject to disciplinary action up to and including termination.

(3) The provisions in paragraph (1) shall not apply to employees designated as being in a safety-sensitive position, employees in a position in which the use of medical marijuana products affects in any manner a person's ability to perform job-related employment responsibilities, could jeopardize the City's ability to secure grant funding from the federal government, could jeopardize certain licensing related benefits to the City under federal law, impacts the safety of others, or conflicts with a bona fide occupational qualification that is reasonably related to the employee's employment. The City Administrator is authorized to designate certain positions as falling within the above-mentioned categories. Safety-sensitive position shall mean employment with the City which involves the performance of duties which have a direct and immediate impact on the safety of the employee, the public, or other City employees.

(4) The City shall not permit or accommodate the consumption or possession of any marijuana or marijuana products by any employee while on duty. Such actions may be subject to discipline up to and including termination.

The City shall not permit or accommodate employees to be under the influence of marijuana or any marijuana products while performing their job-related functions or otherwise on duty. Such actions may be subject to discipline up to and including termination.

Also, to amend Section 3 of said Resolution by adding the following language to line 187 after the phrase "up to and including termination.":

"The City Administrator is authorized to designate certain positions as falling within the above-mentioned categories. Safety-sensitive position shall mean employment with the City which involves the performance of duties which have a direct and immediate impact on the safety of the employee, the public, or other City employees."

And to amend Section 3 of said Resolution by adding the following language to line by adding to line 151 after the phrase "other than marijuana":

"for persons at least 21 years of age"

So that, the language of Section 3 of the Resolution shall thereafter read as follows:

SECTION 3: The City's Personnel Code is hereby amended by repealing the current Policy referenced within the Personnel Code as "6.5.1 Drug Testing" and adopting in lieu thereof a new policy which shall read as follows:

(Note: Language to be added is indicated by being underlined. Language to be removed is indicated by being ~~stricken~~.)

~~6.5.1~~ 6.5.2 Drug Testing

The City of Nixa reserves the right to request employees to submit to substance abuse tests, including but not limited to urine tests, blood tests, breath tests, or other examinations to determine the use of any illegal drugs, alcohol, marijuana, or the abuse or misuse of any legal drugs prohibited in this policy or to determine the employee's' fitness for duty. These tests may be utilized under the following circumstances:

- On-The-Job Accident: If an employee suffers an occupational on-the-job injury that requires a doctor's care or if a serious or potentially serious accident or incident occurs in which safety rules and procedures were violated, equipment or property damaged, unusually careless acts were performed, or where the cause was due to an employee or other person's failure to use prescribed personal protective equipment while working on the City's premises. The City requires the submission of a drug-test for an employee who incurs a work-related injury or illness, or "on-the-job accident" should there be a reasonable basis for such testing. Refer to the Workers' Compensation Policy and Procedures for further details.

- Pre-Employment: Job applicants will submit to a drug test after a conditional offer of employment; the conditional job offer will be withdrawn if the job applicant refuses to submit to a drug test or a positive confirmed drug test results, other than marijuana for persons at least 21 years of age.

- Reasonable Suspicion: the City has the right to ask the employee to submit to a reasonable-suspicion drug and/or alcohol testing, if there is enough evidence or reasonable suspicion that he/she is working under the influence. A written record shall be made of the observations leading to a controlled-substances reasonable suspicion test within twenty-four (24) hours of the observed behavior or before the results of the test are

is released, whichever is earlier. A copy of this documentation shall be given to the employee upon request, and the original documentation shall be kept confidential by the covered employer. This policy shall not be construed as to imply suspicion of the use of drugs or alcohol as reason to conduct testing, but as a standard procedure.

- Random Testing: the City of Nixa conducts quarterly random testing, for safety-sensitive ~~jobs~~ positions, through a 3rd party vendor. All ~~full-time~~ full-time employees, with safety-sensitive ~~jobs~~ positions, are subject to this random selection.

Employees must, as a condition of employment, abide by the terms of this policy and report to the City any charge under a criminal drug or alcohol violation occurring on or off City premises while conducting City business. A report of charge must be made to the Human Resources department within 5 days after the said charge. Failure to adhere to these policies may result in immediate termination.

Prescriptions are to be carried and used only by the individual for whom they are prescribed. Such drugs must be used only in the manner, combination, and quantity prescribed. In the event an employee is taking a prescribed medication that will impair the employee's ability to perform his or her duties safely, the employee is required to notify his or her supervisor immediately.

Employees who are in positions in which the consumption of marijuana or marijuana infused products by said employees could jeopardize the City's ability to secure grant funding from the federal government, could jeopardize certain licensing related benefits to the City under federal law, could interfere with an employee's ability to perform job related responsibilities, could negatively impact the safety of others, or conflict with a bona fide occupational qualification of the employee and who have a positive test result may be subject to discipline, up to and including termination. The City Administrator is authorized to designate certain positions as falling within the above-mentioned categories. Safety-sensitive position shall mean employment with the City which involves the performance of duties which have a direct and immediate impact on the safety of the employee, the public, or other City employees.

Said Amendment was adopted by the required majority of City Council on the 27th day of February 2023 and said Resolution was therefore amended and modified as set forth herein.

PRESIDING OFFICER

ATTEST:

CITY CLERK

AMENDMENT NO. 2 TO RESOLUTION NO. 2023-09

A MOTION:

To amend Section 2 of said Resolution by adding the following language after Paragraph (4), which said Paragraph (4) is located between lines 114 and 116:

“(5) Unless the exception provided in paragraph (1) applies, the use of marijuana by employees, whether on or off duty, is subject to discipline up to and including termination.”

Also, to amend Section 2 of said Resolution by adding the following language to line 112 after the phrase “above-mentioned categories.”:

“Safety-sensitive position shall mean employment with the City which involves the performance of duties which have a direct and immediate impact on the safety of the employee, the public, or other City employees.”

So that, the language of Section 2 of the Resolution shall thereafter read as follows:

SECTION 2: The City’s Personnel Code is hereby amended by adding thereto a new Policy referenced within the Personnel Code as “6.5.1 Marijuana Use Policy” which shall read as follows:

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6.5.1 Marijuana Use Policy

Article XIV of the Missouri Constitution has authorized the consumption of marijuana in Missouri. Marijuana is still illegal under federal law. The consumption of marijuana or marijuana infused products by employees could jeopardize the City’s ability to secure grant funding from the federal government, could jeopardize certain licensing related benefits to the City under federal law, could interfere with an employee’s ability to perform job related responsibilities, could negatively impact the safety of others, or conflict with a bona fide occupational qualification of the employee.

Therefore, to comply with the requirements of Article XIV of the Missouri Constitution, the City adopts the following employment policies related to marijuana use:

- (1) The City will not discriminate against a person in hiring, termination or otherwise penalize a person based upon:

- a. The person's status as a qualifying patient or primary caregiver when they have a valid identification card, which shall be provided to the Human Resources Department, including the person's legal use of a lawful medical marijuana product off City premises and during non-working hours, unless the employee was under the influence of medical marijuana on City premises during their hours of employment; or
 - b. A positive drug test for marijuana components or metabolites of a person who has a valid qualifying patient identification card, unless the person used, possessed, or was under the influence of marijuana while on duty.
- (2) Notwithstanding the provision in paragraph (1) above, the use of medical marijuana or non-medical marijuana products while an employee is on duty shall be subject to disciplinary action up to and including termination.
- (3) The provisions in paragraph (1) shall not apply to employees designated as being in a safety-sensitive position, employees in a position in which the use of medical marijuana products affects in any manner a person's ability to perform job-related employment responsibilities, could jeopardize the City's ability to secure grant funding from the federal government, could jeopardize certain licensing related benefits to the City under federal law, impacts the safety of others, or conflicts with a bona fide occupational qualification that is reasonably related to the employee's employment. The City Administrator is authorized to designate certain positions as falling within the above-mentioned categories. Safety-sensitive position shall mean employment with the City which involves the performance of duties which have a direct and immediate impact on the safety of the employee, the public, or other City employees.
- (4) The City shall not permit or accommodate the consumption or possession of any marijuana or marijuana products by any employee while on duty. Such actions may be subject to discipline up to and including termination.
- (5) Unless the exception provided in paragraph (1) applies, the use of marijuana by employees, whether on or off duty, is subject to discipline up to and including termination.

The City shall not permit or accommodate employees to be under the influence of marijuana or any marijuana products while performing their job-related functions or otherwise on duty. Such actions may be subject to discipline up to and including termination.

Also, to amend Section 3 of said Resolution by removing the following language from lines 150 and 151:

“, other than marijuana”

And adding the following language to line 187 after the phrase “up to and including termination.”:

“The City Administrator is authorized to designate certain positions as falling within the above-mentioned categories. Safety-sensitive position shall mean employment with the City which involves the performance of duties which have a direct and immediate impact on the safety of the employee, the public, or other City employees.”

So that, the language of Section 3 of the Resolution shall thereafter read as follows:

SECTION 3: The City’s Personnel Code is hereby amended by repealing the current Policy referenced within the Personnel Code as “6.5.1 Drug Testing” and adopting in lieu thereof a new policy which shall read as follows:

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~~6.5.1~~ 6.5.2 Drug Testing

The City of Nixa reserves the right to request employees to submit to substance abuse tests, including but not limited to urine tests, blood tests, breath tests, or other examinations to determine the use of any illegal drugs, alcohol, marijuana, or the abuse or misuse of any legal drugs prohibited in this policy or to determine the employee’s’ fitness for duty. These tests may be utilized under the following circumstances:

- On-The-Job Accident: If an employee suffers an occupational on-the-job injury that requires a doctor’s care or if a serious or potentially serious accident or incident occurs in which safety rules and procedures were violated, equipment or property damaged, unusually careless acts were performed, or where the cause was due to an employee or other person’s failure to use prescribed personal protective equipment while working on the City’s premises. The City requires the submission of a drug-test for an employee who incurs a work-related injury or illness, or “on-the-job accident” should there be a reasonable basis for such testing. Refer to the Workers’ Compensation Policy and Procedures for further details.
- Pre-Employment: Job applicants will submit to a drug test after a conditional offer of employment; the conditional job offer will be

withdrawn if the job applicant refuses to submit to a drug test or a positive confirmed drug test results.

- Reasonable Suspicion: the City has the right to ask the employee to submit to a reasonable-suspicion drug and/or alcohol testing, if there is enough evidence or reasonable suspicion that he/she is working under the influence. A written record shall be made of the observations leading to a controlled-substances reasonable suspicion test within twenty-four (24) hours of the observed behavior or before the results of the test ~~are~~ is released, whichever is earlier. A copy of this documentation shall be given to the employee upon request, and the original documentation shall be kept confidential by the covered employer. This policy shall not be construed as to imply suspicion of the use of drugs or alcohol as reason to conduct testing, but as a standard procedure.
- Random Testing: the City of Nixa conducts quarterly random testing, for safety-sensitive ~~jobs~~ positions, through a 3rd party vendor. All ~~full-time~~ full-time employees, with safety-sensitive ~~jobs~~ positions, are subject to this random selection.

Employees must, as a condition of employment, abide by the terms of this policy and report to the City any charge under a criminal drug or alcohol violation occurring on or off City premises while conducting City business. A report of charge must be made to the Human Resources department within 5 days after the said charge. Failure to adhere to these policies may result in immediate termination.

Prescriptions are to be carried and used only by the individual for whom they are prescribed. Such drugs must be used only in the manner, combination, and quantity prescribed. In the event an employee is taking a prescribed medication that will impair the employee's ability to perform his or her duties safely, the employee is required to notify his or her supervisor immediately.

Employees who are in positions in which the consumption of marijuana or marijuana infused products by said employees could jeopardize the City's ability to secure grant funding from the federal government, could jeopardize certain licensing related benefits to the City under federal law, could interfere with an employee's ability to perform job related responsibilities, could negatively impact the safety of others, or conflict with a bona fide occupational qualification of the employee and who have a positive test result may be subject to discipline, up to and including termination. The City Administrator is authorized to designate certain positions as falling within the above-mentioned categories. Safety-sensitive

position shall mean employment with the City which involves the performance of duties which have a direct and immediate impact on the safety of the employee, the public, or other City employees.

Said Amendment was adopted by the required majority of City Council on the 27th day of February 2023 and said Resolution was therefore amended and modified as set forth herein.

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CITY CLERK