Appendix I -- This appendix sets forth the legal authority for the City's drug screening policy.

A. Personnel Order 89-8

In 1989, a Citywide Drug Task Force established by the Mayor issued a report and recommendations concerning the City's employment policies and practices in the areas of drug testing, disciplinary action for unauthorized drug use, and the availability of employee assistance programs for drug-related problems. The report recommended a "two-pronged approach" to curbing drug abuse in the workplace:

> With the exception of law enforcement officers, it is important that employees be encouraged to voluntarily seek assistance from city employee assistance programs with regard to drug-related problems before they interfere with job performance. It is equally important that the City adopt and enforce consistent testing and disciplinary guidelines applicable to all employees.

The report recommended that pre-employment drug screening be required of all applicants for public health and safety positions, jobs that require a driver's license, physically demanding jobs, and inspectorial titles, and random screening of incumbents of a subset of those positions. It recommended that scheduled screening be implemented only with the prior approval of the First Deputy Mayor. And it recommended the continued use of immediate screening of any employee about whom the employing agency had a reasonable suspicion of drug use.

In accordance with the recommendation, the Mayor issued Personnel Order 89-8, which required pre-employment drug screening for approximately 250 competitive class titles – a list subject to later amendment as deemed appropriate by the Director of Personnel (now the Commissioner of Citywide Administrative Services). It authorized random screening for 53 titles of those titles. It required that scheduled screening be implemented only upon the approval of the First Deputy Mayor.

DCAS substantially reduced the number of titles requiring pre-employment drug screening in 1995 and 2000 primarily by deleting titles that require a driver license (not a CDL) but where driving is not a primary or significant part of the tasks.

B. Omnibus Transportation Employee Testing Act of 1991

Congress enacted the Omnibus Transportation Employee Testing Act of 1991 to require transportation industry employers throughout the United States to test employees who perform safety-sensitive functions for drug and alcohol use. Pursuant to implementing regulations promulgated by the United States Department of Transportation (DOT) agencies and the United States Coast Guard (USCG), drug testing is required for drivers of commercial motor vehicles and employees who perform safety-sensitive positions functions in the mass transit, commercial vessel, aviation, railroad, pipeline, and hazardous materials industries.

The definitions of safety-sensitive functions in the covered industries are set forth in regulations promulgated by the Coast Guard and the DOT agency that regulates the industry. City employees who are covered by these requirements are, in general, but not exclusively, those who are required to maintain a commercial driver license (CDL) to drive a commercial motor vehicle (CMV),[1] or who work in mass transit positions, including positions in the ferry service.

Safety-sensitive functions for CDL drivers include driving, remaining in readiness to operate, inspecting, servicing, conditioning, repairing, loading, unloading, supervising the loading or unloading of a CMV. Safety-sensitive functions for employees of mass transit include operating or dispatching a revenue service vehicle in or out of service; maintaining, repairing, overhauling and rebuilding revenue service vehicles or equipment; and carrying a firearm for security purposes. In addition, USCG regulations require testing of employees in the ferry service who perform duties and functions required by the vessel's certificate of inspection; function as patrolmen or watchmen; or are assigned the duties of warning, assembling, mustering, or controlling the movement of passengers during emergencies.

The regulations require pre-employment, post-accident, random, reasonable suspicion, return to duty, and follow-up testing, and, for some positions, scheduled or annual testing. Employers are required to test covered employees' urine for (a) Marijuana metabolites, (b) Cocaine metabolites, (c) amphetamines, (d) Opioids and (e) Phencyclidine (PCP).[2] Applicants for employment who test positive cannot be hired. Employees who test positive must immediately be removed from performing safety-sensitive functions. An employer may, but is not required to, offer an employee who tests positive the opportunity to return to duty. The requirements for return to duty of safety sensitive functions are strictly regulated by DOT rules at Subpart 0 of Part 40 of 49 C.F.R. An employee must complete a Substance Abuse Professional evaluation, referral, education, and treatment process and submit to testing after return to duty.

C. Local Law 91 of 2019: Prohibition of Marijuana Testing for Pre-employment Hiring Procedures

[1] Firefighters and emergency medical Service employees drive vehicles that meet the definition of commercial motor vehicles, but they are not required to obtain a commercial driver license and are exempt from FMCSA drug testing under regulations permitting states to exempt them. See 49 C.F.R. §§ 382.103, 383.3. New York State has exempted firefighters and emergency medical service drivers of commercial motor vehicles. See N.Y. Vehicle & Traffic Law § 501(2)(d).

[2] Procedures for the collection, laboratory testing, verification of test results by a qualified medical review officer, notification to employer and employee or results, reporting and confidentiality requirements, public interest exclusion from testing and other details of DOT drug testing procedures are subject to comprehensive regulations set forth at 49 C.F.R. Part 40.

In 2019, the City Council amended the New York City Human Rights Law to add a new subdivision 31 to section 8-107 of the Administrative Code of the City of New York. Subject to specified exceptions, subdivision 31 provides that "it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee's system as a condition of employment."

The exceptions to the prohibition include persons applying to be police officers or peace officers, certain construction workers, positions requiring a commercial driver's license, positions involving the supervision or care of children, patients or other vulnerable persons, and positions in the city's classified service with the potential to significantly impact the health or safety of employees or members of the public as determined, in relevant part, by DCAS. Also excepted is drug testing required by regulations of the federal Department of Transportation and other federal regulation concerning safety and security, or a federal contract or grant condition, or pursuant to a collective bargaining agreement that specifically addresses the pre-employment drug testing of applicants. DCAS promulgated a list of excepted titles in 2020.

D. The Marijuana Regulation and Taxation Act of 2021

The MRTA amended section 201-d of the New York Labor Law to prohibit adverse employment actions based upon adult recreational use of marijuana. As amended, section 201-d provides, in relevant part, that:

> 2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:
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> b. an individual's legal use of consumable products, including cannabis in accordance with state law, prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property;
>
> c. an individual's legal recreational activities, including cannabis in accordance with state law, outside work hours, off of the employer's premises and without use of the employer's equipment or other property[.]

Section 201-d(4-a) provides exceptions to the prohibition. It states:

> 4-a. Notwithstanding the provisions of subdivision three or four of this section, an employer shall not be in violation of this section where the employer takes action related to the use of cannabis based on the following:

(i) the employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate;

(ii) the employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law; or

(iii) the employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding.