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California To Protect Employee Off-Duty Cannabis Use Effective 2024

California Governor Gavin Newsom signed [Assembly Bill 2188](#) (AB 2188) into law on September 18, 2022. AB 2188 will amend the state's employment anti-discrimination law, the Fair Employment and Housing Act (FEHA), and make it an unlawful practice for an employer to discriminate against an adult applicant or employee based upon the "person's use of cannabis off the job and away from the workplace." The new law will take effect on January 1, 2024.

California joins several other states, including [New York](#) and [New Jersey](#), that have adopted protections for applicants' and/or employees' off-duty cannabis use.

Key Features of AB 2188

AB 2188 notes that tetrahydrocannabinol (THC), the chemical compound most commonly associated with cannabis' psychoactive effects, remains stored in the body as a nonpsychoactive cannabis metabolite well after a period of impairment. These metabolites do not indicate impairment, only that an individual has consumed cannabis somewhat recently, generally over the previous few weeks. Notably, AB 2188 uses the term "THC" and does not distinguish between variations of THC. The use of this term indicates that the law could apply to variations of THC in addition to the well-known Delta-9 THC. The use of [Delta-8 THC](#), for example, may also result in positive THC drug tests and could also be protected under the statute.

Employee Protections

AB 2188 acknowledges that most tests for cannabis use "only show the presence of the nonpsychoactive cannabis metabolite and have no correlation to impairment on the job" and that "employers now have access to multiple types of tests that do not rely on the presence of nonpsychoactive cannabis metabolites." The law prohibits employers from discriminating "against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based" upon either of the following:

- The person's use of cannabis off the job and away from the workplace.
- An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

Although AB 2188 prohibits employment decisions based upon the presence of nonpsychoactive cannabis metabolites in a drug screening, it does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalizing a person based on *scientifically valid* preemployment drug screening conducted through methods that *do not screen for nonpsychoactive cannabis metabolites*.

Exceptions and Exclusions

AB 2188 does not permit an employee to possess or use cannabis in the workplace; it makes clear that nothing in the law permits an employee "to possess, to be impaired by, or to use, cannabis on the job" or affects "the rights or obligations of an employer to maintain a drug- and alcohol-free workplace."

Additionally, AB 2188 explicitly excludes from its protections employees "in the building and construction trades" and "applicants or employees hired for positions that require a federal government background investigation or security clearance" in accordance with federal regulations. Also, the law does not preempt state

or federal laws that require employees to be tested for controlled substances as a condition of employment, to receive federal funding, or to enter into a federal contract.

Employers Should Prepare To Comply With New Restrictions

California employers should review their job application process and employment drug screening protocols to ensure compliance with AB 2188.

Specifically, employers should ensure that commencing January 1, 2024, they do not make any adverse employment decisions based upon an applicant's or employee's off-duty cannabis use or the presence of nonpsychoactive cannabis metabolites in drug screening results outside of the narrow exceptions identified above.

Employers intending to continue testing for impairment caused by cannabis should consider alternative tests, including impairment tests, which measure an individual employee's performance against their own baseline performance, and other tests that identify the presence of THC in an individual's bodily fluids.

Companies and organizations should work with experienced legal counsel to determine the best approach to ensure compliance with this and other recent developments identified in Perkins Coie's "[2022 California Labor, Employment, and Independent Contractor Legislative Update](#)."

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