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California Compliant: California Trailblazes with Two New Employment Laws Protecting Employees' Off-Work Use of Cannabis

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California often leads the way with respect to workers' rights. The Golden State also has been a pioneer in the national trend toward legalizing cannabis use (California was the first state to legalize medical marijuana, in 1996, and its voters legalized the recreational use of marijuana by those 21 and older in 2016). Beginning in 2024, most Californians will be protected from discrimination in employment based on their off-work use of cannabis; other cannabis-friendly states may follow suit.

California's legislature restricted discrimination based on individuals' non-workplace cannabis use in two steps. In 2022, Assembly Bill 2188 (AB 2188) added to the Government Code Section 12954 (effective as of January 1, 2024). This session, Senate Bill 700 (SB 700) amended and expanded Section 12954. California employers should be aware of Section 12954's limits on employers' drug screening protocols and their consideration of a person's cannabis use in making employment decisions.

Assembly Bill 2188 / Prohibition of Employment Discrimination Based on Off-Work Use

Until now, California employers have been permitted to reject applicants, or discipline employees, based on their use of marijuana – even if that occurred during non-work hours and away from the workplace. The state Supreme Court confirmed in 2008 that voters' efforts to legalize the use of marijuana (which remains a controlled substance under federal law) did not change employers' rights to take such use into account "in making employment decisions." (*Ross v. RagingWire Telecom., Inc.*, 42 Cal. 4th 920.)

That changed when Governor Newsom signed AB 2188 into law, in September 2022. The bill prohibits employers from discriminating "against a person in hiring, termination, or any term or condition of employment," or "otherwise penalizing" a worker, based on that individual's use of cannabis "off the job and away from the workplace." AB 2188 put the new law on pause for a year, however; the anti-discrimination provisions will become effective on January 1, 2024.

Permissible vs. Impermissible Testing for Cannabis Use

AB 2188 amends the Fair Employment and Housing Act ("FEHA") by prohibiting employers from (1) discriminating against an applicant or employee for the use of marijuana "off the job and away from the workplace" and (2) making employment decisions based on drug screening tests that detect the presence of nonpsychoactive cannabis metabolites[1] (in other words, tests that would reveal a person's ***prior*** use of cannabis). Essentially, AB 2188 protects an employee's use of cannabis when ***off the job and away from work***. The new law affirms, however, that applicants and employees can be disciplined or terminated based on test results that show (1) ***present*** impairment during work hours and/or (2) the presence of the psychoactive chemical compounds of marijuana. Section 12954 states: "Nothing in this section permits an employee to possess, to be impaired by, or to use, cannabis on the job." Consequently, employers may continue to make employment-related decisions based on tests that confirm an employee's impairment while on-duty (*e.g.*, by detecting the presence of ***active*** cannabis metabolites).

In passing AB 2188, the legislature declared that "employers now have access to multiple types of tests that do not rely on the presence of nonpsychoactive cannabis metabolites," for example, "impairment tests." According to the legislature, such testing identifies the presence of THC – "the chemical compound in cannabis that can indicate impairment and cause psychoactive effects." Employers therefore have the ability to make employment decisions based on "scientifically valid pre-employment drug screening conducted through methods ***that do not screen for nonpsychoactive cannabis***

metabolites" (some biological samples – such as breath, or oral fluid/saliva – have a shorter window of detection for THC than others, such as urine or hair).

Senate Bill 700 / Prohibition of Inquiries About Prior Cannabis Use

This year, the legislature expanded upon the protections provided in AB 2188 by passing SB 700. That bill amends Section 12954 to prohibit employers from ***requesting information*** from an applicant about ***prior use*** of cannabis. SB 700 also restricts employers' use of information about cannabis use obtained from a person's criminal history; employers can only consider or inquire about that information as permitted by the state's Fair Chance Act (the "Ban the Box" law, Government Code Section 12952), or other state or federal law. (Read more about the Fair Chance Act, here)

Exemptions for Certain Employees & Industries

Section 12954 is inapplicable to employees "in the building and construction trades," or to those "hired for positions that require a federal background investigation or security clearance." Likewise, the statute is inapplicable in cases where other laws require that employers receiving federal funding or benefits conduct specific testing of applicants or employees for controlled substances.

Employer Takeaways

AB 2188 and SB 700 both amended FEHA, which means that violating Section 12954 could expose employers to claims for damages and (for prevailing plaintiffs) attorneys' fees.

California employers should review their job postings, pre-hiring documents and processes, and disciplinary policies to ensure compliance with new Section 12954. To the extent that they rely upon drug screening tests in making employment decisions, they should confirm that the testing methods would reveal current "impairment" by, as opposed to prior use of, cannabis.

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1. Tetrahydrocannabinol ("THC"), a psychoactive cannabinoid, is the active chemical in cannabis that induces a high in the user. Non-psychoactive cannabis metabolites are the components that are stored in the body after the THC is metabolized and simply indicate that marijuana has been consumed sometime in the last few weeks. ↩

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