

CALIFORNIA WORKERS GAIN NEW CANNABIS PROTECTIONS: WHAT EMPLOYERS NEED TO KNOW

Insights
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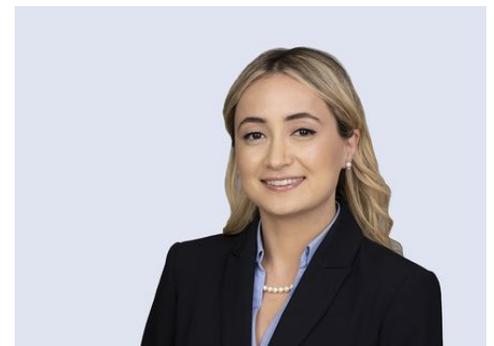
A new protection is on the way for employees in California who use cannabis before or after completing their workday. Governor Gavin Newsom signed a bill yesterday expanding employment discrimination protections under state law to also cover an employee's off-the-job cannabis use. AB 2188 greatly expands cannabis users' rights to fight discrimination in the workplace and prevents employers from firing workers or not hiring applicants just because of a positive cannabis test. While the new law does not go into effect until January 1, 2024, California employers will want to use the next 15 months to make sure you are in compliance. What do you need to know about this significant new development?

Cannabis Use Soon Protected Under Worker Rights' Law

The California Fair Employment and Housing Act (FEHA) – which is California's predominant civil rights law – currently protects employee rights "without discrimination, abridgment, or harassment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status." However, recreational cannabis use outside of the workplace is not currently protected under FEHA or elsewhere.

AB 2188 bridges this gap by making it unlawful for an employer to discriminate against an individual while hiring, firing, setting a condition of employment, or penalizing

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employees at work due to the individual's use of cannabis off the job, or when an employer-required drug test finds non-psychoactive cannabis in the individual's system. Specifically, AB 2188 prohibits the use of drug tests that rely on finding non-psychoactive cannabis, as the California Legislature found that these tests do not reflect the individual's impairment, but rather an individual's cannabis usage. This means that employers will be prohibited from firing employees or denying applicants job positions if drug test results merely detect cannabis metabolites in hair, blood, urine, or other bodily fluids.

What Does AB 2188 Not Change?

Importantly, AB 2188 will not take away an employer's right to maintain a drug-free workplace. You can continue to issue disciplinary actions against employees who possess or use cannabis on the clock.

Additionally, AB 2188 does not allow for a free-for-all in all trades and industries. In fact, the bill specifies that the cannabis use protections do not apply to employees in building or construction trades, or for individuals applying to positions that require federal background investigations and clearance.

The law also does not preempt state or federal laws requiring employees to be tested for controlled substances, such as those required for receiving federal funds, licensing, or federal contracts.

How Should Employers Prepare For AB 2188?

To prepare for AB 2188, you should review your current processes for drug testing to determine if they are compliant under the proposed legislation. If current testing methods rely on the finding of non-psychoactive cannabis metabolites, then you should research and consider alternative testing methods.

Additionally, we encourage you to review your current policies on drug and alcohol use to ensure that they comply with AB 2188. While AB 2188 does not allow employees to be "impaired" while at work, it does complicate the ability of employers to determine if an employee is impaired while working.

Specifically, the availability of tests that measure THC levels (as opposed to mere metabolite presence) may be limited and such tests may be expensive. This issue is what compelled the legislature to include a one-year delay in the effective date of the law. However, it remains to be seen whether such tests will be readily available and affordable by 2024. As such, you will have to implement policies and practices that comply with AB 2188 while also ensuring the health and safety of other employees in the workplace.

Conclusion

We will continue to develop developments related to this legislation and provide updates as warranted, so make sure you subscribe to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in any of [our California offices](#).