



What Federal Contractors Need to Know About California Workers' New Cannabis Protections

Insights

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New legislation in California gives off-duty cannabis users the right to fight discrimination in the workplace and prohibits California employers from firing workers or refusing to hire applicants solely due to a positive cannabis test. You can read more about the new law in [our Insight here](#). However, federal contractors should note that the new legislation does not preempt state or federal laws requiring employees to be tested for controlled substances or directing employers to maintain a drug-free workplace, such as those required for receiving federal funds, licensing, or federal contracts. What do federal contractors need to know about California's new cannabis law?

Continuing Obligations under Drug Free Workplace Act

Federal contractors are required to comply with the federal Drug Free Workplace Act if they have a contract for more than \$100,000. This regulation mandates federal contractors to provide a drug-free workplace by doing the following:

1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance [which includes Tetrahydrocannabinols, except for tetrahydrocannabinols in hemp] is prohibited in workplace and specifying the actions that will be taken against employees for violations of the prohibition.
2. Establishing a drug-free awareness program to inform employees about:
 - the dangers of drug abuse in the workplace;
 - the employer's policy on maintaining a drug-free workplace;
 - available drug counseling, rehabilitation, and employee assistance programs; and
 - the penalties that may be imposed on employees for drug abuse violations.
3. Providing a copy of the drug-free workplace statement to each employee working on the contract.
4. Notifying the employee in the statement that as a condition of employment on the contract the employee will:
 - abide by the terms of the statement; and
 - notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after the conviction.

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5. Notifying the contracting agency within 10 days after receiving notice of a conviction.
6. Imposing a sanction on any employee who is convicted or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program.
7. Making a good faith effort to continue to maintain a drug-free workplace by implementing the steps listed above.

What's a Federal Contractor to Do?

As we know, federal law preempts state law, but where there are no conflicts, the state law will govern. For example, some federal laws require testing for cannabis use, including Department of Transportation (DOT) regulations for pilots, truck drivers, and other safety-sensitive transportation employees. To the extent the testing is required by the terms of a federal contract, the new California legislation would be in conflict, and those specific provisions of the state law would be unenforceable.

Note, however, that the federal Drug Free Workplace Act does not require drug testing. A federal contractor will not have a defense under that law if it fires a California employee for off-duty marijuana use.

At a minimum, federal contractors are required to adopt a drug-free workplace policy and establish a drug-free awareness program. Because cannabis is defined as a "controlled substance," the drug-free workplace policy will apply to cannabis use.

There are at least two options for federal contractors. First, you could adopt a policy that would conform to California's new law (AB 2188) as well as the federal Drug Free Workplace Act, by providing the same rights and protections for the use of all controlled substances. However, this is not advisable.

Alternatively, you could adopt a policy that specifies different consequences for violations, depending on whether the violation relates to cannabis use or some other controlled substance. This would allow you to fulfill your compliance with the Drug Free Workplace Act by addressing all of the controlled substances, including cannabis, in your policy.

While AB 2188 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. You can read more about the new law in [our Insight here](#).

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 author of this Insight, any member of

our Affirmative Action and Federal Contract Compliance Group, or any attorney in any of our California offices.

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