

HOW CAN EMPLOYERS PREPARE FOR CALIFORNIA'S NEW CANNABIS LAWS? ANSWERS TO YOUR TOP 5 COMPLIANCE QUESTIONS

Insights
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Two new employment-related cannabis laws will soon take effect in California, which may prompt changes to your employee handbooks and workplace policies. One law adds new employee protections for off-the-job cannabis use, and the other makes it unlawful for an employer to request information about a job applicant's prior cannabis use. Both laws take effect on January 1, 2024, giving employers in the state only a few more months to prepare. How can you best navigate the hazy horizon and get ready to comply with California's new cannabis laws? Here are the answers to your top five questions. [[You can also learn more at our complimentary upcoming webinar on Tuesday, November 7.](#)]

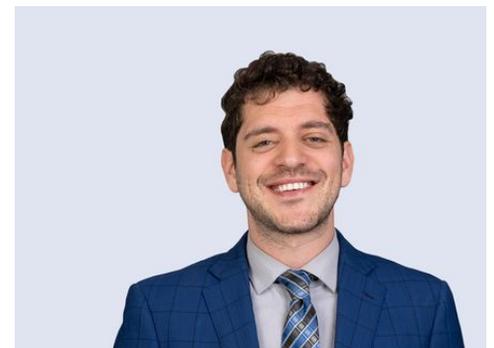
1. What Employee Protections Are Being Added?

Off-Duty Cannabis Use

California's Fair Employment and Housing Act (FEHA) makes it unlawful for an employer to discriminate against potential hires and existing employees based on a protected class. In other words, it is unlawful under FEHA for an employer to take an adverse employment action against an employee – such as demoting, refusing to hire, or terminating the employee – because of their race, religion, gender, or other protected characteristic.

[AB 2188](#) expands FEHA's anti-discrimination provisions to protect applicants and existing employees based on their use of cannabis outside of work. While employers can continue to enforce a drug-free workplace policy, most

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California employers will not be able to lawfully take any adverse employment action because an employee uses cannabis outside of work. In fact, under [SB 700](#), employers cannot even inquire or request information about an applicant's prior use of cannabis.

Limits on Drug Testing

A second component of AB 2188 relates to limits on drug testing. While the details get a little complicated, here are the basics:

- Tetrahydrocannabinol (THC) is the chemical compound in cannabis that can cause *psychoactive* effects and indicate impairment.
- After THC is metabolized, it is stored in the body as a *nonpsychoactive* cannabis metabolite.
- These metabolites *do not* indicate impairment, only that an individual has consumed cannabis in the past.
- Therefore, drug tests that look for cannabis metabolite do not correlate with impairment on the job.

Under the new requirements, employers need to adopt testing procedures that screen for active impairment/THC and discontinue testing for nonpsychoactive cannabis metabolites that do not indicate impairment.

2. Can Employers Still Prohibit Cannabis Use and Possession in the Workplace?

Yes. AB 2188 only prohibits discrimination based on cannabis use *outside* of the workplace. It does not affect the rights of employers to maintain a drug-free workplace. Employees or job applicants who are actively impaired or bring cannabis to work may still be denied employment opportunities, disciplined, or terminated on this basis.

3. Are There Any Exceptions to the New Requirements?

Yes, there are three. AB 2188 does not apply to employees in the building or construction trades. It also does not apply to employees who are hired for positions that require federal background investigations or security clearances — and it does not preempt state or federal laws that require applicants or employees to be tested for controlled substances.



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4. How Should Employers Prepare?

Employers should review their current policies on drug and alcohol use to ensure they comply with AB 2188. Employers should distinguish in their policies between cannabis use outside of work versus impairment at work and consider specifying in the policy what testing procedures will be utilized. Further, if any of the exceptions to AB 2188 apply to a particular group of employees within the company, you should address this as well.

Employers also need to make sure they are using compliant testing procedures and make changes if necessary to comply with this aspect of the law.

Lastly, employers should review their applications and new hire paperwork to make sure nothing in these materials request information about a job applicant's prior cannabis use.

5. How Can I Find Out More?

We encourage employers with questions on the new legislation to attend our **complimentary** upcoming webinar. [More information can be found on the event page here.](#)

We will continue to review 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](#).