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NEW YEAR, NEW EMPLOYMENT PROTECTIONS FOR CANNABIS CONSUMPTION IN CALIFORNIA: A 3-STEP GUIDE FOR EMPLOYERS

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California employers should take steps now to ensure their policies and practices align with new employment protections for cannabis consumption. Specifically, employers in the state are now barred from discriminating against workers who test positive for cannabis in certain types of drug screens and asking job applicants or current employees about their off-duty cannabis use. What do you need to know to comply with the new rules? Here's a breakdown of the requirements and a three-step compliance guide.

What Is the Law on Discrimination in California?

Under California's Fair Employment and Housing Act (FEHA), it is unlawful for an employer to discriminate against job applicants and employees based on a protected class. In other words, employers are prohibited from taking an adverse employment action – such as refusing to hire, demoting, or terminating the employee – based on a protected characteristic, such as gender, race, religion, medical condition, or disability.

Until 2022, FEHA did not provide protections for cannabis users – but that changed when AB 2188 and SB 700 took effect on January 1, 2024.

What's Changed?

The California Legislature recently [enacted two new laws that amend FEHA](#) and protect cannabis users from

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employment discrimination in some circumstances. Key provisions include the following:

- **Protections for Off-Duty Use:** AB 2188 prohibits discrimination based on cannabis use outside of the workplace. More specifically, the bill created a new protected class under FEHA for individuals who engage in off-site, off-duty medical marijuana use.
- **Limits on Drug Testing:** AB 2188 further prohibits employers from using the results of hair or urine tests for marijuana — which can detect traces of cannabis for days or weeks — in decisions to hire, fire, or penalize workers. 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. AB 2188 does not prevent employers from using other tests to detect impairment, such as saliva or blood tests.
- **Drug-Free Workplaces Allowed:** Importantly, AB 2188 **does not affect** the rights of employers to maintain a drug-free workplace. Employees or job applicants who are under the influence, actively impaired, or bring cannabis to work may still be denied employment opportunities, disciplined, or terminated on this basis.
- **Exceptions May Apply:** There are exceptions from AB 2188's employment protections for workers in the building and construction industry and for job applicants and employees in positions that require a federal background investigation or security clearance.
- **Limits on Background Screening:** SB 700 clarifies AB 2188 by amending FEHA to bar employers from asking job applicants about their past use of cannabis. Further, employers may not discriminate against an applicant when they find information about past cannabis usage related to an applicant's criminal history unless otherwise permitted by law.

What Should You Do? A 3-Step Guide for Employers

- **Update Policies:** Review your current policies on drug and alcohol use to ensure compliance with AB 2188. Antidiscrimination policies and drug use policies should comport with the new protections concerning prior cannabis use. Policies should distinguish between



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cannabis use outside of work versus impairment at work, and you should consider specifying what testing procedures will be utilized.

- **Revise Testing Procedures:** Make any necessary changes to ensure testing procedures are compliant. If you rely on drug screens to identify cannabis use, you should reevaluate how you conduct screenings and use tests that differentiate between an employee who is currently under the influence of cannabis versus one who previously used cannabis.
- **Review New Hire Paperwork:** Review your applications and new hire paperwork to ensure nothing in these materials requests impermissible information about a job applicant's prior cannabis use.

Conclusion

If your company has policies that govern your employees' use of cannabis, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in any of [our California offices](#) for additional information.

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