What New Calif. Law Means For Employer Cannabis Tests

By **Tyler Bernstein and Susan Haines** (October 19, 2022)

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Following the passage of A.B. 2188, the California Fair Employment and Housing Act, or FEHA, will add employee protections against discrimination based on off-the-job cannabis use with a few, limited exceptions, beginning Jan. 1, 2024.

Gov. Gavin Newsom signed A.B. 2188 into law on Sept. 18.[1] A.B. 2188 focuses on employee impairment from cannabis use, which it correlates only to THC, the psychoactive component of cannabis, and places new requirements on employer-required drug screening tests.

The new law is significant because it is the first time that California's permissive cannabis-use laws have been incorporated into the employment realm.

California employers should consider reviewing their job application process and any preemployment drug screening protocols, as well as their policies and practices relating to drug screening in connection with hiring, discipline and termination to ensure they will comply with the new law.

To understand the transformative effect of A.B. 2188, a brief review of federal and current California state law with respect to cannabis is instructive.

Since 1971, cannabis has been classified as a Schedule 1 drug by the federal government under the Controlled Substances Act. Schedule 1 drugs, like cannabis, are described in the law as having "no currently accepted medical use," "a high potential for abuse," and "a lack of accepted safety for use ... under medical supervision."[2] Federal law remains unchanged, and cannabis is still classified as a Schedule 1 drug.

However, California law conflicts with federal law, as it became the first state to legalize medical marijuana through the Compassionate Use Act in 1996, which exempted patients and their primary caregivers from criminal prosecution for obtaining and using cannabis for medical purposes with a physician's recommendation.[3]

Although the Compassionate Use Act protected an individual from criminal prosecution, that protection did not extend to the workplace.

In Ross v. RagingWire Telecommunications Inc., a disability discrimination case based on the use of medical marijuana and brought under the FEHA, the California Supreme Court in 2008 upheld the employee's termination for cannabis use and found that "[n]othing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and duties of employers and employees."

The court held that "[u]nder California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions."[4]

Even when California legalized the recreational use of cannabis by enacting the Medicinal and Adult-Use Cannabis Regulation and Safety Act in 2016, the Ross decision remained

binding authority.[5]

A concurrently enacted provision in the California Health and Safety Code confirmed that public and private employers could "maintain a drug and alcohol free workplace," they were not required "to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace," and employers could have "policies prohibiting the use of cannabis by employees and prospective employees."[6]

A.B. 2188 adds Section 12954 to the Government Code and directly addresses the rights of employers and employees.

In the new law, the Legislature finds and declares that THC is stored in the body as a nonpsychoactive cannabis metabolite after it is metabolized. The law further states that these metabolites do not indicate impairment, but only that an individual has consumed cannabis in the last few weeks.

Presently, according to the Legislature, the intent of employment-related drug tests is to identify employees who may be impaired or under the influence of THC at a worksite. However, most cannabis drug tests tend to only show the presence of the nonpsychoactive cannabis metabolites that have no correlation to present impairment.

Further, the Legislature observed that because the science has improved, alternative drug tests that better correlate to impairment are more readily available and do not rely upon the presence of nonpsychoactive cannabis metabolites to identify the presence of recently consumed THC.

A.B. 2188 aims to address that perceived disconnect. In particular, the bill amends the FEHA to make it unlawful for an employer to discriminate against a person in hiring, termination or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon the person's "use of cannabis off the job and away from the workplace."

Specifically, the FEHA will now prohibit discrimination in hiring or any term of employment based upon an employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair or bodily fluids.

But the rule would not prohibit an employer from discriminating in hiring or any term of employment based on a "scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites."

In all events, Government Code Section 12954 does nothing to permit an employee to possess, be impaired by or use cannabis on the job, nor does it affect the rights or obligations of an employer to maintain a drug- and alcohol-free workplace. In other words, it does not invalidate or conflict with California Health and Safety Code Section 11362.45.

A.B. 2188 also contains some wholesale exceptions for certain industries. For example, it does not apply to employees in the building and construction trades.

A.B. 2188 also recognizes that it conflicts with current federal law and, accordingly, has carveouts for "applicants or employees hired for positions that require a federal government background investigation or security clearance," and it does not preempt

> federal laws requiring applicants or employees to be tested for controlled substances ... as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

A.B. 2188's changes to the FEHA are effective on Jan. 1, 2024. Once in effect, they will substantially alter how and when employers can drug test employees for cannabis, and what they can do with those results.

With all new laws, there are numerous new challenges and open questions employers will be left facing. For one, employers will need to determine what valid tests they can use to detect active THC impairment or identify the presence of active cannabis metabolites in an individual.

The Legislature has suggested two potentially viable methods: (1) impairment tests, which measure an individual employee against their own baseline performance; and (2) tests that identify the presence of THC in an individual's bodily fluids.

The new law does not describe what an impairment test might look like or how it may be administered, but it may have its analog in the sobriety field test utilized in cases of potential drunk driving.

However, the data that presumably is necessary to reliably administer this type of test is hard to come by, particularly in the employment context, and would vary from industry to industry and job to job, depending on the duties in question.

In all events, employers would need to establish the validity and reliability of the impairment tests in question and ensure that the testing does not itself create or lead to some disparate impact on particular groups of workers.

Further, employers should emphasize and bolster the trainings provided to managers and supervisors in an effort to help them detect and identify signs of impairment.

As a result, employers that intend to continue with cannabis screenings will likely rely more heavily on "scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites."

While straightforward in theory, it remains unclear what the precise tests are that can detect the presence of active THC, how feasible it is to administer those tests in order to detect active THC in real-time, and the costs of supplying and administering these tests.

Whether the net benefit of administering these tests outweighs the attendant costs remains to be seen, and will likely depend on the type of worker and business in question.

California's forthcoming changes to the law are not a complete outlier. In fact, last year, New York legalized recreational cannabis use and revised Section 201-d of the New York Labor Law to make it unlawful for an employer to refuse to hire, discharge, or otherwise discriminate against persons who legally use cannabis before or after working hours, off the employer's premises, and without the use of the employer's property.[7]

The New York law makes clear that an employer is not violating the Labor Law when the employer's actions are required by state or federal law, the employee is impaired by the use of cannabis at work or while performing his job duties, or the employer's actions would result in violating federal law or losing a federal contract or funding.

Apart from these coastal states, cities are also beginning to expand protections for employees engaging in recreational, off-duty cannabis use. In June, the Council of the District of Columbia passed B24-0109, which prevents employers from firing, failing to hire or taking adverse actions against an individual for the use of cannabis or for failing to pass an employer-required or requested cannabis drug test, subject to certain limited exceptions.

The D.C. mayor signed the bill in July and transmitted it to Congress for approval.

And, with President Joe Biden's recent pardoning of all Americans who have been convicted at the federal level of possessing small amounts of cannabis, it appears that even the federal government is beginning to reexamine its strict policies related to cannabis, which remains a Schedule I controlled substance under federal law.

Given all of these recent developments and forthcoming changes, employers may want to consider reviewing existing employment hiring, discipline and termination policies and practices now to ensure they are in compliance upon the California law taking effect.

And, employers that utilize preemployment drug screening will need to identify and source compliant testing methods in order to continue preemployment screenings consistent with the new requirements.

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[1] Assembly Bill 2188.

[2] 21 U.S.C. §812(b)(1).

[3] Compassionate Use Act of 1996.

[4] Ross v. Ragingwire Telecommunications, Inc., 42 Cal.4th 920, 923-24 (2008).

[5] Medicinal and Adult-Use Cannabis Regulation and Safety Act.

[6] Cal. Health & Safety Code § 11362.45(f).

[7] Marihuana Regulation and Taxation Act.