California Makes Marijuana Users a Protected Class

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California first legalized medical marijuana in 1996 and adult use or recreational marijuana in 2016. Since then, 39 states and the District of Columbia have legalized medical marijuana; 19 states have legalized adult marijuana use. Further, laws in Connecticut, Illinois, Montana, Nevada, New Jersey, New York and Rhode Island generally protect employees who use marijuana off-premises and off-duty. Until now, California law did not protect marijuana users from adverse employment action based on their marijuana use. That will change beginning January 1, 2024.

Recently signed California Assembly Bill 2188 makes it "unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment" based upon:

- The person's use of marijuana off the job and away from the workplace. However, an employer may take adverse action based on "scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites."
- An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

The law does not require that an employer permit an employee to possess, to be impaired by, or to use, marijuana on the job.

Additionally, there are three specific exceptions to these protections for marijuana users. The law will not apply to (1) employees in the building and construction trades; (2) applicants and employees are required to undergo a federal background investigation or security clearance; or (3) applicants and employees who must be drug tested as a condition of employment, receiving federal funding or licensing, or entering into a federal contract.

So, can California employers still drug test? Yes, but with important caveats. First, if an employer takes adverse action based on drug test results that show non-psychoactive cannabis metabolites, that will be

deemed discrimination. An applicant or employee is entitled to the full remedies of California's anti-discrimination law – compensatory and punitive damages, hiring/reinstatement/promotion, and attorney's fees. Second, current drug tests do not show whether an applicant or employee is currently impaired by marijuana. Instead, most standard drug tests merely detect the presence of non-psychoactive cannabis metabolites, which can linger in the body for weeks and which Assembly Bill 2188 makes off-limits for nearly all considerations. This highlights the importance of contemporaneous observations of impairment.

Employers should review their policies and procedures to ensure compliance with these new protections (including that off-duty marijuana use is now a protected classification). Employers also should train managers and supervisors on how to observe and detect potential impairment.

Contact your Vorys lawyer if you have questions about workplace drug testing.