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## Discrimination Prohibited for Cannabis Use While Away from Employment

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Governor Newsom recently signed into law Assembly Bill (AB) 2188, which prohibits employers from discriminating against job applicants and current employees for cannabis use off the job and away from the workplace beginning January 1, 2024.

Under existing law, the California Fair Employment and Housing Act provides all persons the right and opportunity to seek, obtain, and hold employment without discrimination on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. AB 2188 adds section 12954 to the Government Code, making it unlawful for an employer to discriminate against a person based on the person's use of cannabis when off the job or away from the workplace.

While the California Legislature recognizes an employer's right and obligation to maintain a sober and safe work environment, AB 2188 differentiates between employment discrimination based on testing positive for tetrahydrocannabinol (THC), a chemical compound in cannabis that causes psychoactive effects, versus testing positive for non-psychoactive cannabis metabolite. When THC metabolizes, a non-psychoactive cannabis metabolite is formed, and it remains in a person's body long after a person last consumed cannabis. The presence of this metabolite does not indicate impairment, nor does it have correlation to impairment while on the job. AB 2188 seeks to prevent employers from discriminating against applicants and employees based on a positive test result for non-psychoactive cannabis metabolite.

AB 2188 does not apply to employees in building and construction trades, or to applicants and employees for federal jobs that require background investigation or clearance. Additionally, AB 2188 does not preempt any existing state or federal laws requiring applicants or employees to be tested for controlled substances as a condition of employment, nor does it affect any laws that condition the receipt of federal funding, licensing-related benefits, or entering into a federal contract, on controlled substances testing. Furthermore, AB 2188 does not prohibit an employer from discriminating while hiring, or conditioning employment or otherwise penalizing a person, based on scientifically valid preemployment drug screenings that do not rely on non-psychoactive cannabis metabolites results.

Traditional drug screenings generally detect the presence of non-psychoactive cannabis metabolites. As science continues to improve, alternative drug tests that do not rely on the presence of non-psychoactive cannabis metabolites, such as impairment tests, have become available, though challenges exist. The passage of AB 2188 is likely to motivate an evolution of alternative drug testing methods.

## Takeaways

Beginning January 1, 2024, an employer may not use a person's off-duty or away from work cannabis use as a factor in the hiring, disciplining, or terminating of employment on the basis of drug screenings that only detect non-psychoactive cannabis metabolites, except as follows:

- Employees of building and construction trades;
- Job applicants and employees for federal jobs requiring background investigations and security clearance; and
- Subject to existing state and federal laws and regulations requiring controlled substance testing as a condition to receive federal funding and licensing-related benefits or as condition to enter a federal contract.

Because the new law does not take effect until 2024, employers have ample time to update their workplace policies and protocols concerning drug use and screening, and to monitor technological developments and availability of alternative tests, as they prepare to comply with AB 2188.

If you have any questions about AB 2188, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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