

AB 2188: Provisions Against Discrimination Due to Cannabis Use

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Statement of Purpose: In 2016, California voters approved the legalization of the use, sale, and cultivation of recreational cannabis. In a rapidly evolving legal landscape, less than a decade later, the California Legislature enacted protections against discrimination in employment due to cannabis use while off duty and away from the workplace. This training gives California Employers an overview of the provisions of Government Code section 12954, an overview of general public agency considerations for compliance, and a synopsis of special public safety considerations.

I. Introduction

A. Overview

1. A.B 2188 went into effect January 1, 2024 and amends the Fair Employment and Housing Act (“FEHA”) to add new protections for employees’ use of cannabis when off the clock.

2. California Legislature found that tests results which show the presence of non-psychoactive cannabis metabolites have no correlation to impairment on the job.

3. As of January 1, 2024, an employer may not discriminate against a person for use of cannabis off the job and away from the workplace or for any employer-related drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

4. History of cannabis legalization in California

B. Employees Not Covered by AB 2188

1. Employees in the building and construction trades.

2. Applicants or employees hired for positions that require a federal government background investigation or security clearance in accordance with Department of Defense regulations, or equivalent regulations applicable to other agencies.

3. Note: Most, if not all, employees of a local fire and police department are covered by FEHA’s cannabis provisions.

II. Summary of New Legal Protections

A. Applicants

1. Under AB 2188, it is unlawful for an employer to request information from an applicant relating to prior use of cannabis.

i. There are exceptions if the employer learns about prior cannabis use from a person's criminal history.

2. POST has removed inquiries about candidates, prior cannabis use on the POST Personal History Statements.

Hypothetical:

- Applicant for an officer position had previously been turned down for a job, before AB 2188, because he/she had admitted to cannabis use. What should the department do with this information?

B. Current Employees

1. AB 2188 does not:

i. Permit an employee to possess, be impaired by, or use cannabis on the job.

ii. Affect the rights or obligations of an employer to maintain a drug- and alcohol-free workplace.

iii. Preempt state or federal laws requiring applicants or employees to be tested for controlled substances as a condition of employment, receiving federal funding or entering into a federal contract.

III. General Considerations for Fire and Police Department Compliance

A. Determine if any categories of employees are exempt from AB 2188

B. Review employment applications/interview forms and remove any inquiries about cannabis use.

C. Review and update department policies to ensure compliance.

D. Ensure continued compliance with Department of Transportation ("DOT") regulations.

IV. Drug Testing Policies and Procedures

A. AB 2188 does not prohibit discrimination "based on scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites."

B. Testing must screen only for psychoactive components, not non-psychoactive cannabis metabolites.

C. If working with a third-party lab service to conduct testing, confirm that the test used is AB 2188 compliant.

D. Testing is a mandatory subject of bargaining.

Question: How do AB 2188 and the Federal Gun Control Act of 1968 (“GCA”) interact?

- GCA (with certain exceptions) does not apply to firearms issued by and for the use of public entities.
- Cannabis users may possess department-issued firearms for official uses as directed/authorized by the agency.
- Employees may *either* use cannabis or possess non-agency owned firearms, but may now lawfully do both

Hypotheticals:

- Officer admits at beginning of morning shift to having used cannabis off-duty the night before. Can he/she be tested?
- Officer’s department receives federal block grants – can he/she be tested?

V. Subsequent Legislative Update

A. SB 1264 (will not become law)

1. Would have excluded sworn law enforcement officers and non-sworn employees with functions related to:

- i. Apprehension, incarceration, or correction of criminal offenders.
- ii. Civil enforcement matters.
- iii. Evidence gathering and processing.
- iv. Law enforcement records.
- v. Coroner.

VI. Conclusion

A. Instructor will ask the audience for questions and encourage discussion.