

CA Employers May Not Discriminate for Off-The-Job Cannabis Use

New rules against urine and hair tests for marijuana start 1/1/2024



Starting on January 1, 2024, most Californians will be protected by a Cal NORML-sponsored bill which states that employers may not refuse to hire, fire, or penalize an employee based on the results of hair or urine tests for marijuana. Prospective employees are also protected against questions about their past marijuana use. Employees may not be impaired by cannabis on the job, and may be subject to an oral fluid, breath, or blood test. Federal employees and those in the building and construction trades are not protected.

A new law ([AB 2188](#) – [GC 12954](#)) will prohibit employers from discriminating against hiring, or terminating, a person who has tested positive for non-psychoactive cannabis metabolites in their urine, hair, or bodily fluids. It allows workers who have experienced discrimination to institute a civil action for damages and other relief against employers.

The law does not interfere with employers' right to maintain a drug-free workplace. Employees may not be impaired on the job under the law. It allows for:

- urine and hair tests that do not detect marijuana, only other drugs;
- other kinds of tests that can indicate actual impairment on the job, such as computer-based performance tests; or
- chemical tests for active THC (tetrahydrocannabinol, the main psychoactive ingredient in cannabis) in oral fluid, breath or blood.

Pre-employment and post-accident drug testing can still take place, provided the tests do not look for can-

nabis, or detect only active THC and not its inactive metabolites. Drug-testing providers are offering urine and hair tests that do not detect cannabis. Employers who chose to continue testing for cannabis use can switch to oral swab or breathalyzer tests, which are less invasive than urine or hair tests and are a better indicator of recent use, while still not measuring impairment.

EXEMPTIONS AND FEDERAL OBLIGATIONS

Not protected by the law are workers in the building and construction trades.

The law also does not apply to applicants or employees hired for positions that require a federal government background investigation or security clearance, and does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances, such as DOT rules for commercial truck drivers. The federal government [has approved oral swab testing](#) to replace urine testing for truck drivers and other federal workers, but has not yet approved any labs to process oral swab tests.

Also excluded from California's law are employees who are required to be tested as a condition of receiving federal funding or federal licensing-related benefits. Companies that accept more than \$100K in federal grants are required to follow the [Drug-Free Workplace Act](#), but contrary to popular belief, this does not require drug testing, only disallowing drug use on the job.

WHAT'S WRONG WITH METABOLITE TESTING

Metabolite tests don't detect actual impairment, but rather the presence of non-psychoactive cannabis residues that stay in the system days and weeks after use, long after effects have faded. Numerous studies have found that workers who test positive for metabolites have [no higher risk of workplace accidents](#).

[Studies have shown](#) that black people are over twice as likely as white people to be reprimanded or fired for failing drug tests. Hair tests in particular can be racially discriminatory, detecting drugs in the hair of black people more so than whites.

Depending on their sensitivity, oral fluid and blood tests detect the presence of THC for only a few hours, or possibly up to one day. While they still don't prove impairment, by detecting cannabis use within a more narrow window, they are a more reasonable and useful alternative to metabolite testing.

QUESTIONS ABOUT PAST MARIJUANA USE ALSO PROHIBITED

A 2023 bill, [SB 700 \(Bradford\)](#), amended [GC 12954](#) to also disallow employers from asking about past marijuana use. SB 700 will also take effect on January 1, 2024, along with AB 2188. The law states, "Except as specified in subdivision (c), it is unlawful for an employer to request information from an applicant for employment relating to the applicant's prior use of cannabis...unless the employer is permitted to consider

or inquire about that information under [Section 12952](#) [the [Fair Chance Act](#), restricting employers' to ask about an applicant's conviction history] or other state or federal law."

EMPLOYEES' RIGHT TO SUE

Workers who have been discriminated against due to off-the-job cannabis use, whether via pre-employment screening, or being disciplined or fired as an employee, can file a complaint with the CA Civil Rights Department, and may hire a private attorney to file a claim.

WHAT SHOULD EMPLOYERS DO?

Employers should review their policies, employee manuals, etc. to make sure they are in accord with the pending state law. The [California Chamber of Commerce's Midyear Employment Law Update](#) acknowledges the passage of AB 2188, saying, "Though not taking effect until January 1, 2024, employers should be aware of and prepare for some changes with respect to cannabis law and drug screening compliance. Employers will be prohibited from discriminating against an employee or job applicant based on the person's use of cannabis off the job and away from the workplace. Employers may still conduct preemployment drug testing, and an employer can still refuse to hire someone based on a positive test — but only if it's a valid preemployment drug screening that doesn't screen for non-psychoactive cannabis metabolites [e.g. urine and hair tests]."

Employers in California can check with their drug-testing providers regarding compliant testing methods, like urine or hair tests that do not detect cannabis, or oral swabs or breath tests that detect active THC. Moving towards [performance indicators](#) or [performance testing](#) ensures a safe and equitable workplace without discrimination. The surest way to avoid a discrimination lawsuit is not to test potential or current employees for cannabis at all.



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