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## **Protecting Cannabis Users - Don't let Outdated Drug Screening Policies be the Smoking Gun in a Discrimination Case Against Your Company**

California's Fair Employment and Housing Act prohibits employment discrimination based on certain protected classes and empowers the Civil Rights Department to investigate and prosecute complaints alleging unlawful practices. On September 18, 2022, Governor Gavin Newsom signed AB 2188, which, *upon its effective date of January 1, 2024*, essentially adds a new category of protected persons – cannabis users.

AB2188 will make it unlawful for employers to discriminate against persons in hiring, termination, or any term or condition of employment, or otherwise penalizing a person based on *the use of cannabis off the job and away from work*. The new law is premised on findings that: (a) THC, the chemical compound in cannabis that can indicate impairment and cause psychoactive effects, once metabolized, is stored in the body as *nonpsychoactive* cannabis metabolites, which do not indicate impairment but only recent consumption of cannabis; (b) drug tests are intended to identify employees who may be impaired, but most tests conducted for cannabis only reveal the presence of the nonpsychoactive cannabis metabolite and have no correlation to impairment; (c) employers now have access to tests that do not rely on the presence of nonpsychoactive cannabis metabolites, including impairment tests, which measure an individual employee against their own baseline performance, and tests that identify the presence of THC in a person's bodily fluids.

While AB2188 does not permit employees to possess, be impaired by or use cannabis on the job, the sum and substance of the law is to make unlawful an employer's discrimination against any job applicants and employees based on the use of cannabis off the job and away from the workplace, or if an employer-mandated drug test shows the person has nonpsychoactive cannabis metabolites in their hair, blood, urine or other bodily fluids. Exceptions include employees in the building and construction trades, applicants or employees hired for positions requiring a federal government background investigation or security clearance as regulated issued by the United States Department of Defense, or equivalent regulations applicable to other agencies, or those required by state or federal laws to be tested for controlled substances or those receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

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While employers should not find it difficult to add another class of applicants and employees to those classes protected from discrimination, they would be wise to start early in securing scientifically reliable drug tests that will show impairment (as opposed to nonpsychoactive cannabis metabolite), and to implement a testing process based on a reasonable suspicion of impairment.

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