

## Blog Post

# California's New Drug Testing Rules Protect Employees' Off-Duty Cannabis Use

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With expanding legalization and commercialization—including several state initiatives in 2024 and perhaps even federal legislation—the chances are good that your California business has at least a few employees who consume recreational cannabis in their free time. A new California law, [Assembly Bill 2188](#), shields these employees from consequences at work for using cannabis away from work. Among other things, AB 2188 prohibits employers from taking adverse action against employees for off-the-job cannabis consumption and limits employers from testing for cannabis with methods which are unable to identify active chemical cannabis compounds. Here's what California employers can (and should) do about it.

## Recent Trends in Cannabis Use

Despite its current federal legal status as a prohibited Schedule I substance, cannabis use has increased substantially across the country as nearly half the states have legalized its recreational use. As of January 2024, recreational cannabis use is legal for individuals over age 21 in 24 states and the District of Columbia, and medicinal use is legal in 40 states. Recent polling shows 70% of Americans support legalization. Federal lawmakers have taken notice, with several Senators issuing a [letter](#) on April 8, 2024, seeking cosponsors for a comprehensive

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federal bill to decriminalize, regulate, and tax cannabis. Even more recently, on May 21, 2024, the U.S. Department of Justice (DOJ), published a notice of proposed rulemaking (NPRM) to reschedule marijuana to a Schedule III controlled substance, based upon an evaluation that the drug has a relatively lower level of abuse and moderate or low physical dependence and low likelihood of psychic dependence than Schedule I and II substances.

Proof of the growing prevalence of cannabis use throughout the country and in California is in the numbers:

### ***Nationwide Statistics:***

- 17% or 55 million Americans use cannabis.
- 54% of Americans live in states where recreational cannabis use is legal (under state law).
- 74% of Americans live in states where recreational or medicinal cannabis use is legal (again, under state law).
- The cannabis industry is expected to generate nearly \$40 billion in revenue in 2024.

### ***California Statistics:***

- 20% or 8 million Californians use cannabis.
- 99.5% of Californians live in a county with a cannabis dispensary.
- There are more cannabis dispensaries in Los Angeles County alone (1,481) than in any other state.

As the statistics above show, employers can expect a growing number of their employees to use cannabis at least once or twice a week, but only recently, have the implications of such growing use with respect to employers become clearer.

## **Cannabis & the Workplace**

Although California voters legalized recreational cannabis in 2016, the legislature generally allows California employers to maintain policies regarding drug free workplaces or otherwise keep cannabis out of the workplace. (See Health & Safety Code section 11362.45(f).) The increasing popularity of recreational cannabis use sparks understandable concerns about safety as well as work performance quality and competency. But California employers should be cautious when considering how to address these issues. Extreme measures, like zero tolerance policies and drug testing protocols, may run afoul of California law, which requires, for example, reasonable suspicion for drug testing and the interactive process to determine reasonable accommodations for medical conditions (even though California employers are not required to allow on-duty medicinal marijuana use as an accommodation).

## New California Law Protects Employees' Off-Duty Use of Cannabis

While California employers can prohibit cannabis use in the workplace, enforcing such policies has posed additional challenges. Cannabis contains non-psychoactive metabolites that remain in the body for weeks after the effects have worn off. This means that standard drug testing methods cannot reliably determine whether an individual is under the influence at the time of testing or has simply consumed cannabis in prior days or weeks.

AB 2188, which took effect January 1, 2024, now imposes new requirements to ensure that California employers do not make adverse employment decisions based on an employee's off-duty use of cannabis. In passing the law, the California legislature emphasized the importance of testing for active cannabis compounds to determine impairment, as opposed to inactive ones which do not indicate impairment and remain in the body for several weeks after cannabis consumption. As recognized in AB 2188, there remains a consensus

that employees should not arrive at a worksite high or impaired; however, drug test results showing only the presence of non-psychoactive cannabis metabolites may have little to no correlation to an employee's actual impairment on the job.

Accordingly, the law prohibits employers from discriminating against applicants and employees in hiring, termination, or any term of condition, or otherwise penalizing a person based on:

(i) cannabis use that occurs off-the-job and away from the worksite; and

(ii) a drug test that returns a positive result for non-psychoactive cannabis metabolites.

There are a few important exemptions—as the law does not apply to employees in the building or construction trades or to employees hired for positions that require federal government background investigation or security clearance.

Separately, the California legislature also amended existing law to prohibit employers from requesting or relying upon information regarding prior cannabis use obtained through a criminal history or background check (unless otherwise permitted by state/federal law).

## Practical Steps for Employers

With AB 2188 now in effect in California, and more states likely to follow suit, there are several things you can do to ensure compliance:

- *Update Drug Policies:* Update employee handbooks and drug-free workplace policies to reflect the new requirements of AB 2188 to make clear that employment decisions will not be made based on off-duty cannabis use or the existence of non-psychoactive metabolites.

- *Update Recruiting/Hiring Practices:* Advise recruiting and hiring personnel to refrain from discussing and/or collecting information regarding off-duty conduct and review employment applications for any questions that could illicit such information.
- *Review Background Check Practices:* Work with background check agencies on procedures to remove/shield information related to prior cannabis use (e.g., cannabis-related criminal history) to the extent it is part of your background screening process.
- *Contact Your Drug Testing Vendor:* Confirm that your vendor does not test for or report on non-psychoactive cannabis metabolites when conducting pre-employment or “good cause” drug tests on applicants and employees and identify alternative tests for cannabis impairment.

If you would like help updating your company policies or have any questions about managing employee cannabis use in your workplace, feel free to contact an Akerman Labor & Employment attorney.

**Disclaimer:**

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states’ laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

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