

The 12 Days of California Labor and Employment Series – Day 5 “Off Duty Marijuana Use by Employees is Basically Off Limits for Employers”

2 min read

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In the spirit of the season, we are using our annual “12 days of the holidays” blog series to address new California laws and their impact on California employers. On the fifth day of the holidays, my labor and employment attorney gave to me five golden rings and SB 700.

AB 2188 Bans Employers From Cannabis Discrimination

Although the federal government has not, many states, including California, have legalized marijuana. [Last year, AB 2188 was enacted to take effect on January 1, 2024.](#) AB 2188 makes it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment or otherwise penalize a person if the discrimination is based upon the person’s use of cannabis off the job and away from the workplace.

Exceptions include pre-employment drug screening, as specified, or upon an employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.



SB 700 Adds More Cannabis Protection Outside of the Workplace

1. SB 700 adds another layer of protection to cannabis use outside of the employment premises. With the enactment of SB 700, an employer is prohibited from requesting information from an applicant for employment relating to the applicant's prior use of cannabis. The amendment also goes into effect on January 1, 2024.
2. SB 700 also prohibits employers from using information obtained from a criminal history about an applicant or employee's prior cannabis use unless permitted under a specified provision of the California Fair Employment and Housing Act or other state or federal law. As an employer is already prevented from discriminating against job applicants or employees for prior use of alcohol and other legal drugs, SB 700 extends this to include cannabis.

Employers are still allowed to maintain drug-and-alcohol-free premises under the Health and Safety Code and maintain all other rights or obligations specified by state or federal law or regulation.

1. Neither AB 2188 nor SB 700 permits an employee to possess, to be impaired by, or to use cannabis on the job. Like AB 2188, SB 700 does not apply to applicants or employees hired for positions that require a federal government background investigation or security clearance or to anyone in the building or construction trade.
2. Finally, SB 700 does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances, including laws and regulations requiring applicants or employees to be tested or how they are tested, as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

Next Steps for Employers

California employers must be aware that drug testing that screens for nonpsychoactive cannabis metabolites may not be the best route to take going into 2024. If such testing continues, the employer cannot discriminate against an employee for any positive cannabis finding unless the employee falls under an exception. Employers should also review their drug policy to make any necessary amendments.

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