SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2188 (Quirk)
Version: June 13, 2022
Hearing Date: June 21, 2022
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Discrimination in employment: use of cannabis

DIGEST

This bill, with specified exceptions, makes it an unlawful employment practice for an employer to discriminate against applicants or employees because of either: (1) cannabis use off of the job and away from the jobsite; or (2) the detection of nonpsychoactive cannabis metabolites during a drug test.

EXECUTIVE SUMMARY

Recreational use of cannabis has been legal in California since 2016 when a majority of voters approved it. In many circumstances, however, California employers can still lawfully refuse to hire someone because they use cannabis, and workers can still be disciplined or fired for cannabis use, even when that use takes place off of the job, away from the worksite, and does not jeopardize safety or otherwise impair the worker's performance. With some specified exceptions, this bill would instead prohibit employers from discriminating against applicants or employees on the basis of this kind of cannabis use. In a similar vein, the bill prohibits employers from holding the results of a drug test against an applicant or employee if all that the test reveals is evidence of past cannabis use. Employees could still be fired or disciplined for using cannabis at work. Likewise, applicants and employees could still be disciplined or fired based on test results showing impairment or the presence of psychoactive chemical compounds from cannabis.

The bill is sponsored by California NORML (National Organization for the Reform of Marijuana Laws). Support comes from advocates of worker's rights and fewer restrictions on cannabis use. Opposition comes from a coalition of business and insurance trade associations who contend that the bill unwisely limits pre-employment and post-accident drug screening and creates inappropriate litigation risks for businesses. The bill passed off of the Assembly Floor by a vote of 42-23. If the bill passes out of this Committee, it will next be heard in the Senate Labor, Public Employment and Retirement Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides, pursuant to the California Constitution, that all people have inalienable rights, including the right to pursue and obtain privacy. (Cal. Const., article I, § 1.)

2) Makes it an unlawful employment practice, under the Fair Employment and Housing Act (FEHA), for an employer to refuse to hire, discharge from employment, or otherwise discriminate against a person in compensation or in the terms, conditions, or privileges of employment on account of that person's race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status. (Gov. Code § 12940 (a).)

3) Defines employer under FEHA to mean any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities except a religious organization or a corporation not organized for private profit. (Gov. Code § 12926.)

4) States that nothing in the Adult Use of Marijuana Act (AUMA) amends or affects the rights and obligations of employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace, or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees, or prevent employers from complying with state or federal law. (Health & Saf. Code § 111362.45.)

This bill:

1) Makes findings and declarations about the unreliability of cannabis metabolite tests to identify impairment on the job.

2) Provides it is 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 any of the following:
   a) the person's use of cannabis off the job and away from the workplace;
   b) an employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their urine, hair, or bodily fluids.

3) Exempts from (2), above, pre-employment drug testing conducted using methods other than screening for nonpsychoactive cannabis metabolites.

4) Specifies that the bill does not:
   a) apply to an employee performing work associated with construction, as specified;
   b) permit an employee to be impaired by, use, or possess cannabis on the job;
   c) affect the rights or obligations of an employer to maintain a drug and alcohol-free workplace, as specified under the Control, Regulate and Tax Adult Use of Marijuana Act;
   d) supersede state or federal laws requiring applicants or employees to be tested for controlled substances, including laws and regulations requiring applicants and employees to be tested, or a specific manner of testing, as a condition of receiving federal funding, receiving federal licensing-related benefits, or entering into a federal contract; or
   e) apply to applicants or employees hired for positions that require a federal government background investigation or security clearance, as specified.

COMMENTS

1. Cannabis use is legal and common in California

California legalized cannabis use for medicinal purposes in 1996. (Proposition 215, the Compassionate Use Act.) A decade later, Californians voted to legalize recreational cannabis use by adults 21 years or older. Cannabis use is now commonplace in the state. The California Department of Public Health estimates that approximately 20 percent of California adults use the drug.[1]

2. What the bill prohibits

This bill is designed to ensure that adults cannot be punished at work for exercising their legal right to use cannabis, so long as that use has no impact on the workplace.

To accomplish that intent, the bill prohibits employers from discriminating against applicants or employees for use of cannabis off of the job and away from work.

Relatedly, the bill prohibits employers from taking adverse action against applicants or employees based exclusively on the results of a drug test that detects nothing more than the presence of nonpsychoactive cannabis metabolites in the applicant or worker's urine, hair, or bodily fluids. This makes sense, because while such a test result does suggest whether or not the worker has used cannabis at some point in the recent past, it does not tell the employer anything at all about whether the worker is presently impaired from cannabis. According to the Mayo Clinic, metabolites can be detected in a

[1] *Marijuana Use Among California Adults* (2020) California Department of Public Health https://www.cdph.ca.gov/Programs/CCDPHP/sapb/CDPH%20Document%20Library/Factsheet_Marijuana_Use_Among_CA_Adults-ADA.pdf (as of Jun. 15, 2022).

user's body for up to three days after a single use of cannabis, and for up to 10 days for regular users, despite the user no longer being under the influence of cannabis.[2]

3. What the bill does not prohibit

The bill is not intended to prevent employers from taking action against employees who use or possess cannabis on the job or whose use of cannabis elsewhere jeopardizes workplace safety or otherwise impairs the worker's ability to perform the job. Specifically, the bill states that it does not permit an employee "to possess, to be impaired by, or to use, cannabis on the job […]." The opposition to the bill has requested that this language be amended to clarify that it applies during the pre-employment stage as well and the author proposes to offer a responsive amendment in Committee.

Most obviously, this language means that, under this bill, an employer could discipline or fire any employee who has cannabis with them at work, or who uses cannabis during work hours,[3] without the employer's authorization. What it means to be "impaired by" cannabis use at work is less immediately obvious. The author proposes to offer an amendment in Committee that provides some additional clarity in this aspect.

As to employee testing specifically, employers would be free under this bill to utilize any otherwise lawful means of checking workers for indications of actual, on-the-job impairment. If the worker showed signs of impairment, the employer could take adverse action against that employee.

Under the bill, employers would also be able – where otherwise lawful – to use tests for cannabis use that detect the presence of any chemical compounds that are still psychoactive. In particular, there are apparently tests that can detect the presence of tetrahydrocannabinol (THC) in saliva or in the bloodstream. Because THC, unlike cannabis metabolites, is a psychoactive chemical compound, its presence can be indicative of current impairment. In their letter opposing the bill, the California Chamber of Commerce and its coalition appears to acknowledge that these testing alternatives would better focus on the key issue – actual impairment – but they express practical concerns about the availability and reliability of these tests. In response, the proponents of the bill indicate willingness to offer an amendment in Committee that delays implementation of the bill for a year. This should provide sufficient time for THC-based tests become more readily available as an alternative to cannabis metabolite tests.

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[2] *Marijuana – Tetrahydrocannabinol (THC)*. Mayo Clinic https://www.mayocliniclabs.com/test-catalog/drug-book/specific-drug-groups/marijuana (as of Jun. 15, 2022).

[3] To avoid any confusion, the author may wish to amend the bill to specify that cannabis use "on the job" includes cannabis use during meal or rest breaks.

4. Exemptions from the bill

The bill includes two primary exemptions from its overarching rule.

First, through multiple clauses, the bill makes plain that it is not intended to apply to any situation in which an employer must discriminate against applicants or employees for cannabis use in order to comply with federal law or in order to have access to federally-funded contracts or benefits. Recent amendments have fortified these clauses and should remove the specific opposition concern about federal preemption and situations in which employers might otherwise have been caught between their federal legal obligations and the prohibitions in this bill.

Second, the bill exempts employers in the building and construction trades. Recent amendments to the bill spell out the scope of this exception more precisely. In general, since building and construction activity is frequently subject to a variety of federal regulations, this exemption could be viewed as a sub-category of the broader exemption for employers who have to discriminate and test for cannabis use pursuant to federal mandates.

5. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- delay implementation for one year in light of the fact that there is a current THC test shortage;
- provide further definition of the phrase "impaired by"; and
- clarify the pre-employment application of the bill.

A mock-up of the amendments in context is attached to this analysis.

However, to accommodate scheduling concerns, these amendments will not be formally taken in the Senate Judiciary Committee, but rather in the Senate Labor, Employment and Public Retirement Committee, where the bill is headed next, assuming it passes out of this Committee.

6. Arguments in support of the bill

According to the author:

> When most employers conduct a drug test, they typically screen for the presence of non-psychoactive cannabis metabolites, which can remain present in an individual's bodily fluids for weeks after cannabis use and do not indicate impairment. While there is consensus that no one should ever show up to work high or impaired, testing positive for this metabolite has no correlation to

> workplace safety or productivity. AB 2188 will ban employers from using this test, and clarify that they can continue to test for Tetrahydrocannabinol (THC). Testing for THC may indicate an individual is impaired at work and is a better way to maintain work place safety. AB 2188 is a balanced solution that will protect the rights of employees and employers. It will allow California to continue being a progressive leader on cannabis issues.

As sponsor of the bill, California NORML writes:

> Although cannabis is legal in California, countless workers and job applicants are losing job opportunities or being fired because they test positive for legal, off-the-job use of cannabis on account of indiscriminate urine and hair metabolite tests that don't measure actual impairment, but rather past use days or weeks before testing. AB 2188 would clarify that employers may not discriminate against employees or prospective employees who use cannabis when they are not at work, in accordance with CA LC 96(k), which protects employees for "lawful conduct occurring during nonworking hours away from the employer's premises.

7. Arguments in opposition to the bill

In opposition to the bill, a coalition of 27 business and insurance trade associations led by the California Chamber of Commerce writes:

> [AB 2188] would create an unprecedented, protected class for cannabis users and undermines employers' ability to provide a safe and drug-free workplace. Under California law, we believe that cannabis should be treated like alcohol – its use is legal in certain settings, but impairment must be kept out of the workplace. We see AB 2188 as going far beyond that by interfering with an employer's ability to conduct pre-employment and post-accident testing under the bill's present language, as well as creating new litigation concerns related to its new protections for cannabis use.

SUPPORT

California NORML (sponsor)
Americans for Safe Access
California Board of Registered Nursing
California Cannabis Industry Association
California Employment Lawyers Association
California Nurses Association

Cannabis Equity Policy Council
Drug Policy Alliance
Good Farmers Great Neighbors
Last Prisoner Project
Los Angeles Housing Compliance
Origins Council
The Parent Company
Service Employees International Union California
United Domestic Workers, AFSCME Local 3930
United Cannabis Business Association
United Food and Commercial Workers

OPPOSITION

Allied Managed Care
Acclamation Insurance Management Services
California Apartment Association
California Asian Pacific Chamber of Commerce
California Association of Winegrape Growers
California Association of Joint Powers Authorities
California Attractions and Parks Association
California Business Properties Association
California Business Roundtable
California Chamber of Commerce
California Farm Bureau
California Landscape Contractors Association
California League of Food Producers
California Manufacturer & Technology Association
California Narcotic Officers' Association
California Restaurant Association
California Retailers Association
California Special Districts Association
California State Association of Counties
California Travel Association
Coalition of Small and Disabled Veteran Businesses
Glendora Chamber of Commerce
Family Business Association of California
Flasher Barricade Association
National Federation of Independent Business
Official Police Garages of Los Angeles
Public Risk Innovation, Solutions, and Management
Rural County Representatives of California

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 1256 (Quirk, 2021) would have prohibited employers from discriminating against an applicant or employee based on the result of a drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their urine, hair, or bodily fluids. AB 1256 died in the Assembly Labor and Employment Committee.

AB 2355 (Bonta, 2020) would have prohibited employers from discriminating against applicants or employees for medicinal cannabis use that can be reasonably accommodated. AB 1256 died in the Assembly Labor and Employment Committee.

AB 2069 (Bonta, 2018) was substantially similar to AB 2355. AB 2069 died in the Assembly Appropriations Committee.

AB 266 (Bonta, Ch. 689, Stats. 2015) established a comprehensive licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical cannabis.

AB 2279 (Leno, 2008) would have prohibited employers from discriminating against qualified medical cannabis patients employed in non safety-sensitive positions. In his message vetoing AB 2279, Governor Schwarzenegger wrote: "[…] I am concerned with interference in employment decisions as they relate to cannabis use. Employment protection was not a goal of the initiative as passed by voters in 1996."

SB 420 (Vasconcellos, Ch. 875, Stats. 2003) enacted the state's Medical Cannabis Program which provided for a voluntary medical cannabis patient card, which could be used to verify that the patient or their caregiver had state authorization to cultivate, possess, transport, or use medicinal cannabis.

PRIOR VOTES:

Assembly Floor (Ayes 42, Noes 23)
Assembly Appropriations Committee (Ayes 11, Noes 4)
Assembly Judiciary Committee (Ayes 6, Noes 2)
Assembly Labor and Employment Committee (Ayes 5, Noes 2)

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Amended Mock-up for 2021-2022 AB-2188 (Quirk (A))

Mock-up based on Version Number 97 - Amended Senate 6/13/22
Submitted by: Griffiths, SJUD

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares both of the following:

(a) Tetrahydrocannabinol (THC) is the chemical compound in cannabis that can indicate impairment and cause psychoactive effects. After tetrahydrocannabinol is metabolized, it is stored in the body as a nonpsychoactive cannabis metabolite. These metabolites do not indicate impairment, only that an individual has consumed cannabis in the last few weeks.

(b) The intent of drug tests is to identify employees who may be impaired. While there is consensus that an employee should not arrive at a worksite high or impaired, when most tests are conducted for cannabis, the results only show the presence of the nonpsychoactive cannabis metabolite and have no correlation to impairment on the job.

(c) As science has improved, employers now have access to multiple types of tests that do not rely on the presence of nonpsychoactive cannabis metabolites. These alternative tests include impairment tests, which measure an individual employee against their own baseline performance and tests that identify the presence of THC in an individual's bodily fluids.

SEC. 2. Section 12954 is added to the Government Code, to read:

12954. (a) It is 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 any of the following:

(1) The person's use of cannabis off the job and away from the workplace. This paragraph does not prohibit an employer from discriminating in hiring, termination, or any term or condition of employment, or otherwise penalize a person based on ~~apply to~~ preemployment drug screening testing conducted through methods that do not screen for nonpsychoactive cannabis metabolites.

(2) An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their urine, hair, or bodily fluids.

(b) (1) Nothing in this section permits an employee to possess, to be impaired by, or to use, cannabis on the job, or affects the rights or obligations of an employer to maintain a drug- and alcohol-free workplace, as specified in Section 11362.45 of the Health and

Safety Code, or any other rights or obligations of an employer specified by federal law or regulation.

(2) For purposes of this subdivision, an employee is “impaired by” cannabis if, while working, the employee manifests specific, objective symptoms of cannabis use that interfere with the employee’s ability to perform the employee’s tasks or duties or interfere with the employer’s obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws.

(c) This section does not apply to an employee performing work associated with construction, including work involving alteration, demolition, building, excavation, renovation, remodeling, maintenance, improvement, or repair work, a person licensed under the Contractors State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), or an employee performing work in similar or related occupations or trades.

(d) This section does not apply to applicants or employees hired for positions that require a federal government background investigation or security clearance in accordance with regulations issued by the United States Department of Defense pursuant to Part 117 of Title 32 of the Code of Federal Regulations, or equivalent regulations applicable to other agencies.

(e) This section 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 the manner in which they are tested, as a condition of receiving federal funding or federal licensing-related benefits or entering into a federal contract.

(f) This section shall not become operative until January 1, 2024