

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 1264 (Grove)
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Fiscal: Yes
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AWM

SUBJECT

Employment discrimination: cannabis use

DIGEST

This bill exempts, from the prohibitions under the Fair Housing and Employment Act (FEHA) on employment discrimination on the basis of an employee's or potential employee's past or present cannabis use, applicants to or employees of law enforcement agencies performing specified tasks or roles.

EXECUTIVE SUMMARY

Cannabis has been legal in this state for medical purposes since 1996 and for recreational purposes since 2016. Until this year, however, California law permitted employers, under some circumstances, to refuse to hire someone, or to discipline or fire an employee, for their off-the-job cannabis use or past cannabis use, even when the cannabis use was not on the job site, did not jeopardize safety, and did not affect the employee's job performance. To prevent adverse employment outcomes from being taken against Californians who used cannabis as permitted by state law, the Legislature enacted AB 2188 (Quirk, Ch. 392, Stats. 2022) and SB 700 (Bradford, Ch. 408, Stats. 2023), which made it unlawful under FEHA for an employer: to discriminate against a person in hiring, termination, or terms and conditions of employment because of (1) the person's off-the-job cannabis usage, or (2) a drug-screening test that found nonpsychoactive cannabis metabolites in the person's system; or to inquire about past cannabis use. The bill contains exceptions for circumstances where existing federal or state law require drug testing or other more stringent anti-cannabis measures, including a provision that employees in the building and construction trades may suffer adverse employment actions for off-the-job cannabis use and may be required to drug test, as specified.

The FEHA statute does not, however, expressly exempt employees of law enforcement agencies. According to stakeholders, law enforcement agencies believed, when AB 2188

and SB 700 were passed, that they were already covered by exemptions for employers subject to more stringent state and federal laws. But at some point in the process, a question was raised about the certainty of the exemption, and now some law enforcement agencies are no longer confident that they can continue activities such as drug testing current employees.

This bill exempts law enforcement agency employees performing a wide range of tasks – including criminal enforcement, civil enforcement, evidence gathering and processing, animal control, community service duties, and coroner functions – from all of the FEHA cannabis antidiscrimination provisions set forth above. Under this bill, law enforcement would be allowed to drug test covered employees, to require them not to use cannabis while off the job, and to inquire about employees’ and applicants’ past cannabis use and take negative employment actions on the basis of that past use. The author has agreed to eliminate the exemption for past use, so that the law enforcement exemption is the same as the exemption for the building and construction trades.

This bill is sponsored by the California State Sheriffs’ Association and is supported by California Police Chiefs Association the Los Angeles Police Protective League. This bill is opposed by California NORML. If this Committee passes this bill, it will then be heard by 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) Establishes the Compassionate Use Act (CUA) of 1996, also known as Proposition 215, which protects patients and their primary caregivers from criminal prosecution or sanction for obtaining and using marijuana for medical purposes upon the recommendation of a physician, with the goal of ensuring that seriously ill Californians have the right to obtain and use marijuana for medical purposes where the medical use is deemed appropriate and has been recommended by a physician, as specified. (Health & Saf. Code, § 11362.5.)
- 3) Authorizes, pursuant to Proposition 16 and subsequent Legislative measures, persons aged 21 and older to possess specified quantities of cannabis, products containing cannabis, and cannabis plants for personal use. (Health & Saf. Code, §§ 11362.1.)
- 4) Provides that 3) does not override laws prohibiting the operation of a vehicle while impaired by a controlled substance, laws prohibiting the use of cannabis while within a prison or other carceral facility, laws establishing that it would constitute professional malpractice or negligence to undertake any task while impaired, or

laws allowing any state or local entity or private individual to prohibit or restrict the use of cannabis on their property. (Health & Saf. Code, § 11362.45.)

- 5) Makes it an unlawful employment practice, under the FEHA, for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based on any of the following:
 - a) The person's use of cannabis off the job and away from the workplace. This provision does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person based on scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive metabolites.
 - b) 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. (Gov. Code, § 12954(a)(1).)
- 6) Provides that 5) does not apply to any employee in the building and construction trades. (Gov. Code, § 12954(a)(2).)
- 7) Makes it unlawful for an employer to request information from an applicant for employment relating to the applicant's prior use of cannabis, and for an employer to discriminate on the basis of past cannabis use, unless the information about a person's prior cannabis use is obtained from a person's criminal history and the employer is permitted to consider or inquire about that information under other state or federal laws. (Gov. Code, § 12954(b), (c).)
- 8) Provides exceptions and clarifications to 5)-7), as follows:
 - a) Provides that 5)-7) do not permit 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 under existing law.
 - b) Provides that 5)-7) do not apply to applicants or employees hired for positions that require a federal government background investigation or security clearance in accordance with federal regulations.
 - c) Provides that 5)-7) do 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 employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract. (Gov. Code, § 12954(d)-(f).)

This bill:

- 1) Exempts, from the discrimination provisions in 5)-7), above, applicants to, or employees in, sworn and nonsworn positions within law enforcement agencies who have or would have functions or activities related to any of the following:
 - a) The apprehension, incarceration, or correction of criminal offenders.
 - b) Civil enforcement matters.
 - c) Dispatch and other public safety communications.
 - d) Evidence gathering and processing.
 - e) Law enforcement records.
 - f) Animal control.
 - g) Community service duties.
 - h) Public administrator or public guardian duties.
 - i) Coroner functions.

COMMENTS

1. Author's comment

According to the author:

Starting this year, most employers are not allowed to ask an employee about their cannabis use prior to employment, and they are not allowed to test for cannabis use in an employee's off hours. However, knowledge of cannabis use is particularly important with members of law enforcement where a mistake can result in tragic consequences. Law enforcement officers generally maintain their authority even while they are not in uniform, including the ability to carry their firearm. It makes sense that we should hold law enforcement employees to the same standards as, for example, those who operate heavy machinery, and exempt them from Government Code Section 12954.

2. Current law prohibits an employer from discriminating on the basis of off-the-job or past cannabis use, subject to exceptions

Beginning this year, employers are prohibited under FEHA from discriminating against employees or applicants on the basis of their use of cannabis off the job and away from the workplace.¹ This prohibition includes discrimination on the basis of employer-required drug tests that find nonpsychoactive cannabis metabolites in the person's hair, blood, urine, or other bodily fluids, but does not prohibit an employer from discriminating on the basis of preemployment drug screening that do not screen for

¹ Gov. Code, § 12954(a)(1).

nonpsychoactive cannabis metabolites.² Employees in the building and construction trades are exempt from these protections.³

The same FEHA statute prohibits employers from inquiring about an employee or applicant's prior cannabis use and from discriminating on the basis of past cannabis use.⁴ An employer may, however, consider an employee or applicant's past cannabis use if it was uncovered through a criminal history and the employer is permitted to consider or inquire about that information under existing state or federal law.⁵ The building and construction trades are not expressly exempt from this limitation, though they may be exempt through the application of other state and federal laws.

These provisions protecting off-the-job cannabis use come with several caveats. First, the antidiscrimination provisions do not permit an employee to possess, to be impaired, or to use cannabis on the job, and do not prevent an employer from maintaining an alcohol- and drug-free workplace.⁶ The statute also exempts from its scope positions that, pursuant to state or federal law, require testing for controlled substances as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract;⁷ as well applicants or employees hired for positions that require a federal background check or security clearance, as specified.⁸

California has permitted medical cannabis use since 1996, when the voters approved Proposition 215.⁹ Adult recreational cannabis use was approved by the voters in 2016,¹⁰ and the Legislature subsequently enacted the Medical and Adult Use Cannabis Regulation and Safety Act (MAUCRSA) to streamline and synthesize the licensing and regulatory regimes for medical and recreational cannabis.¹¹ The antidiscrimination provisions described above are intended to ensure that employers do not discriminate against applicants or employees who engage in legal cannabis activities on their own time, away from work, unless there is a compelling reason for a stricter standard.

3. This bill exempts a broad list of persons employed by law enforcement agencies from any of FEHA's cannabis antidiscrimination provisions

As noted above, employees in the building and construction trades are exempted from the FEHA provisions that prohibit employers from discriminating on the basis of off-

² *Ibid.*

³ *Id.*, § 12954(a)(2).

⁴ *Id.*, § 12954(b), (c).

⁵ *Id.*, § 12954(c).

⁶ *Id.*, § 12954(d).

⁷ *Id.*, § 12954(e).

⁸ *Id.*, § 12954(f).

⁹ Compassionate Use Act (Prop. 215), as approved by voters, Gen. Elec. (Nov. 5, 1996).

¹⁰ The Control, Regulate, and Tax Adult Use of Marijuana Act (Prop. 64), as approved by voters, Gen. Elec. (Nov. 8, 2021).

¹¹ SB 94 (Senate Committee on Budget and Fiscal Review, Ch. 27, Stats. 2017).

the-job cannabis use, including where the use was discovered by an employer-required drug screening test that has found nonpsychoactive cannabis metabolites in the employee's hair, blood, urine, or other bodily fluid. This exemption was included in AB 2188 (Quirk, Ch. 392, Stats. 2022), which added the original cannabis antidiscrimination provisions to FEHA. The exemption was generally understood to be a sub-category of the exemption granted to employers covered by federal regulations, because building and construction activity is frequently subject to a variety of federal regulations.¹²

According to the sponsor of this bill, the California State Sheriffs' Association, law enforcement agencies had believed, while AB 2188 was pending in the Legislature, that the bill's exemptions for entities authorized to drug test under state or federal law would apply to them as well. On that basis, they and other law enforcement stakeholders did not oppose AB 2188. Now, apparently, they are not so sanguine about their eligibility for an exemption.

This bill grants employees of law enforcement agencies who perform a wide range of functions a full exemption from the FEHA cannabis antidiscrimination statute – a broader exemption than that granted to building and construction trade employers. Specifically, the bill allows law enforcement employers to not only test employees and applicants for cannabis use and prohibit them from using cannabis off the job, but also to inquire about, and discriminate on the basis of, past cannabis use.

The rationale behind allowing law enforcement to test employees for cannabis use and impose negative consequences for a positive test is straightforward: members of law enforcement often carry guns, drive cars, or generally have duties that increase the risk of harm when an employee comes to work impaired. Granting law enforcement the same exemption granted to the building and construction trades, therefore, seems logical.

Less clear, however, is why law enforcement employers would need to inquire about, and discriminate on the basis of, all past cannabis use. Law enforcement agencies are already allowed to consider past cannabis use if it shows up on a criminal background check,¹³ so this bill would extend only to past cannabis use that did not result in law enforcement involvement. Given that half of all Americans have used marijuana at least once,¹⁴ granting a blanket exemption to discriminate on the basis of any past cannabis use seems impractical, and inviting the potential for using past cannabis use as a justification for less-defensible employment decisions. The author has, therefore, agreed

¹² See, e.g., Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2188 (2021-2022 Reg. Sess.) as amended Jun. 13, 2022, p. 5.

¹³ Gov. Code, §§ 12952(d), 12954(c).

¹⁴ McCarthy, *Fully Half of Americans Have Tried Marijuana*, GALLUP (Aug. 10, 2023), <https://news.gallup.com/poll/509399/fully-half-americans-tried-marijuana.aspx> (link current as of April 11, 2024).

to amend the bill to align the law enforcement exemption with that established for the building and construction trades.

4. Amendments

As noted above, the author has agreed to amend the bill to delete the full exemption set forth in subdivision (g) and replace it with a partial exemption, consistent with the exemption for the building and construction trades, which will be set forth in a new paragraph within subdivision (a) or a new subparagraph within paragraph (2) of subdivision (a).

5. Arguments in support

According to the sponsor of the bill, the California State Sheriffs' Association:

Existing law prohibits making certain employment decisions and asking certain questions about off-duty or prior cannabis use. As these bills were being considered by the Legislature, it was generally presumed that by virtue of language in those bills, law enforcement agencies were not included in the bills' reach. In the wake of the bills' passage and more refined legal analysis, it is less clear that such is the case. SB 1264 eliminates any uncertainty in this regard with a targeted exemption for law enforcement applicants and employees who would be or are undertaking duties directly related to law enforcement.

Additionally, employees in the building trades were exempted from the original bill. We agree with this exemption and argue that it supports the case for a law enforcement exemption. The work of both professions has public-facing implications for safety and responsibility. Further, though impaired persons could still be subject to testing and discipline, the work of law enforcement is rarely constrained to clear times of being on- or off-duty and the long-term impacts of cannabis use on emotional processes and decision-making are, at best, not fully understood.

6. Arguments in opposition

According to California NORML:

SB 1264 would undermine confidence in law enforcement. It suggests that unlike the general public, law enforcement can't be trusted to use cannabis responsibly off the job. It re-establishes a wall between law enforcement and the cannabis community that had been built up by years of legal repression but was legally removed by California voters in approving the Adult Use of Marijuana Act of 2016.

Nothing in current law prevents law enforcement from maintaining a strict drug-free workplace policy. Under AB 1288, employers are free to test for recent use of cannabis by means of oral swab, blood or breath tests, which detect recent exposure to THC, the psychoactive ingredient in cannabis, or by performance tests that detect actual impairment. The only thing they may not do is use urine or hair tests that report non-psychoactive metabolites of THC, which remain detectable for days and weeks after any impairment is passed.

SB 1264 is excessively broad, embracing a host of civilian positions with no enforcement duties such as communications, recordkeeping, animal control, coroner and public administration.

SUPPORT

California State Sheriffs' Association (sponsor)
California Police Chiefs Association
Los Angeles Police Protective League

OPPOSITION

California NORML

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 700 (Bradford, Ch. 408, Stats. 2023) added, to the FEHA prohibition on employment discrimination on the basis of an employee's or potential employee's cannabis use, the prohibition on an employer requesting information about an applicant's past cannabis use, subject to specified exceptions.

AB 2188 (Quirk, Ch. 392, Stats. 2022) made it unlawful, with certain exceptions, for an employer to discriminate against a person in hiring, termination, or terms and conditions of employment based on a drug screening test finding the presence of nonpsychoactive cannabis metabolites in their system or for the person's off-the-job use of cannabis.

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.
