

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

SB 700 (Bradford)
Version: March 20, 2023
Hearing Date: April 11, 2023
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Employment discrimination: cannabis use

DIGEST

This bill adds to the prohibitions under the Fair Housing and Employment Act (FEHA), set to take effect January 1, 2024, on employment discrimination on the basis of an employee's or potential employee's cannabis use, to prohibit an employer from requesting information about an applicant's past cannabis use, subject to specified exceptions.

EXECUTIVE SUMMARY

Cannabis has been legal in this state for medical purposes since 1996 and for recreational purposes since 2016. Until last year, however, California law permitted, employers, under some circumstances, to refuse to hire someone, or to discipline or fire an employee, 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), which made it unlawful under FEHA, with certain exceptions, 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.

This bill adds an additional prohibition to those enacted in AB 2188, to make it unlawful for an employer to request information from an applicant for employment about the applicant's prior use of cannabis. This prohibition is subject to AB 2188's exemptions for jobs that are required, under state or federal law, to test for controlled substances as a condition of employment, as specified, and does not affect an employer's rights and obligations to maintain a drug- and alcohol-free workplace. The author has agreed to minor amendments to ensure the bill is consistent with federal law.

This bill is sponsored by the author and is supported by California NORML. There is no known opposition. If this Committee passes this bill, it will be next by 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 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).)
- 6) Beginning January 1, 2024, makes it an unlawful employment practice under 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 upon any of the following:

- a) The person's use of cannabis off the job and away from the workplace; this provision does not prevent an employer from engaging in an employment action based on a scientifically preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis 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), (f).)
- 7) Provides exceptions and clarifications to 6), as follows:
- a) Provides that 6) does 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 6) does not apply to an employee in the building and construction trades.
 - c) Provides that 6) does not apply to applicants or employees hired for positions that require a federal government background investigation or security clearance in accordance with federal regulations.
 - d) Provides that 6) 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 employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract. (Gov. Code, § 12954(b)-(e).

This bill:

- 1) Adds, to the FEHA prohibition on discrimination on the basis of cannabis use, a provision making it unlawful for an employer to request information from an applicant relating to the applicant's prior use of cannabis.
- 2) Provides that 1) is subject to the existing limitations on the FEHA prohibition on discrimination on the basis of cannabis use set forth in 7)(a) and 7)(d).

COMMENTS

1. Author's comment

According to the author:

SB 700 strengthens existing law to protect employees and prospective applicants from employment discrimination based on legal cannabis use. Although recent changes to state law have prohibited employers from discriminating based on

one's cannabis use off the job, clarity is required to ensure that prospective applicants are not being dissuaded or rejected for using cannabis in a legal and responsible way.

2. This bill cleans up prior legislation that prohibits employment discrimination on the basis of off-the-job cannabis use

California has permitted medical cannabis use since 1996, when the voters approved Proposition 215.¹ Adult recreational cannabis use was approved by the voters in 2016,² 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.³ Until 2022, however, employers were still permitted to discriminate on the basis of entirely legal cannabis usage that was off the job and did not affect an applicant's or 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), which made it unlawful under FEHA, with certain exceptions, 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. The bill exempted from its scope employers who require federal security clearances or whose cannabis usage may otherwise be at issue under federal law or hiring practices.

According to the author, despite AB 2188's clear prohibition on discrimination on the basis of a person's off-the-job workplace, certain employers have continued to ask about applicants' past cannabis use. California NORML, writing in support, reports the same issue, and notes that "this practice is clearly inconsistent with the intent of AB 2188, since prior cannabis use is irrelevant to a worker's present use of cannabis on the job or in the workplace."

Given that AB 2188 expressly prohibits an employer from *acting on* information about an applicant's cannabis use – a person's use of cannabis in the past is, of course, one temporal component of their overall use of cannabis – it is unclear why employers continue to ask this question. Nevertheless, to avoid any possible confusion or inadvertent discrimination, this bill expressly prohibits an employer from requesting information from an applicant about the applicant's prior use of cannabis.

¹ Compassionate Use Act (Prop. 215), as approved by voters, Gen. Elec. (Nov. 5, 1996).

² The Control, Regulate, and Tax Adult Use of Marijuana Act (Prop. 64), as approved by voters, Gen. Elec. (Nov. 8, 2016).

³ SB 94 (Senate Committee on Budget and Fiscal Review, Ch. 27, Stats. 2017).

To be clear, this bill does not prevent an employer from asking about criminal convictions, to the extent those might involve cannabis; the bill simply prohibits an employer from asking about the applicant's past *use*. The author has agreed to amendments that will ensure that the bill does not interfere with federal background checks or the ability to ask about criminal histories where not otherwise prohibited by law. This measure, as amended, should thus further the original goal of AB 2188.

3. Amendments

The author has agreed to amend the bill to (1) clarify that the prohibition on asking for information about past cannabis use does not prohibit an employer from inquiring about an applicant's criminal history where otherwise permitted by law, and (2) provide that the prohibition on asking for information about past cannabis use does not apply to applicants or employees hired for positions that require specified government background checks or security clearances, as specified, to avoid conflicting with federal law. The amendments are as follows, subject to any nonsubstantive changes the Office of Legislative Council may make:

Amendment 1

On page 2, strike out lines 26 to 31, inclusive.

Amendment 2

On page 2, in line 32, after "(b)" insert "(1)"

Amendment 3

On page 2, between lines 34 and 35, insert:

(2) This subdivision does not prohibit an employer from inquiring about an applicant's criminal history if otherwise permitted by law.

Amendment 4

On page 3, between lines 7 and 8, insert:

(e) 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.

Amendment 5

On page 3, in line 9, strike out “(e)” and insert “(f)”

SUPPORT

California NORML

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

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.

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.
