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**Health Care & Hospital Law,  
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California extends employment protection To medical and recreational cannabis consumers.



**Sarah A. K. Blitz**

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Associate, Sheppard Mullin

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Despite California's legalization of cannabis for medical purposes in 1996, and adult recreational use in 2016, cannabis users lacked employment protections for off-duty and off-site cannabis use until the passage and signing of Assembly Bill 2188 earlier this fall. The previously uneasy state of affairs in the Golden State was the result of: (1) neither of the propositions legalizing cannabis addressing employment protections, and (2) a California Supreme Court ruling in *Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal.4th 920 (Cal. 2008), holding that California's Fair Employment and Housing Act (FEHA) did not require employers to accommodate cannabis use, in part because cannabis was, and remains, a Schedule I controlled substance under federal law.

Assembly Bill 2188 amends FEHA to make it unlawful for employers to discriminate against job applicants or employees for the "use of cannabis off the job and away from the workplace." It also prevents discrimination against applicants or employees that fail drug tests detecting "nonpsychoactive cannabis metabolites in their urine, hair, or bodily fluids." The legislation does not, however, permit employees "to be impaired by, or to use cannabis on the job." Assembly Bill 2188 also includes carve outs for testing in building and construction trades employees, federal contractors, federal funding recipients, and federal licensees required to maintain drug-free workplaces.

Fundamental to understanding Assembly Bill 2188, is understanding the science of cannabis drug testing. Testing for cannabis is traditionally performed on samples of saliva, urine, hair, or blood. Historically those tests screen for the presence of  $\Delta$ -9-tetrahydrocannabinol (THC) metabolites. THC is the primary psychoactive compound in cannabis. Metabolites are the byproduct of a breakdown of any substance in the body's tissues and organs. When cannabis is consumed, it is metabolized in the liver and non psychoactive metabolites are produced. Those metabolites, if not excreted, are stored in the body. Thus, the presence of THC metabolites does not indicate present impairment by cannabis. Rather, metabolites indicate that an individual consumed, or was exposed to, cannabis at some point within the preceding 30 days. As a result, traditional cannabis drug testing for metabolites did not, and does not, correlate with the stated intent of employment-related drug tests: to identify employees who may be impaired or under the influence of cannabis at a worksite.

With the adoption of Assembly Bill 2188, California joins six other states: Nevada, New York, New Jersey, Connecticut, Montana and Rhode Island, which have passed laws in recent years protecting recreational cannabis users' employment rights, and 23 states which protect those rights for medical cannabis users. Notably, Philadelphia, Washington DC, New York City, and Atlanta have also enacted ordinances protecting the rights of workers in their cities who use cannabis. Assembly Bill 2188 was signed into law by Governor Gavin Newsom along with nine other cannabis-related legislative bills intended to "strengthen California's cannabis laws, expand the legal cannabis market and redress the harms of cannabis prohibition." Assembly Bill 2188 becomes effective Jan. 1, 2024.

#370402

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