



January 24, 2024

### **Clarity On State Law & Drug Testing In The Construction Industry**

In 2022, Governor Newsome signed legislation (AB 2188) making cannabis users a protected class of employee. AB 2188 contained a delayed implementation date and took effect on January 1, 2024. The measure prohibited employers from discriminating in hiring, firing or setting conditions of employment based upon a person's use of cannabis away from the workplace; or, an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

Industry was successful in securing a broad exemption for construction in AB 2188, in an effort to keep construction sites as safe as possible. **Simply, the statute contains language stating that the law "does not apply to an employee in the building and construction trades."** This is highlighted in **green** below.

Also, the law does not permit an employee to possess, be impaired, or use cannabis on the job, nor does it affect the rights or obligations of an employer to maintain a drug and alcohol-free workplace, highlighted in **blue** below.

The only recent change to the law came in the form of SB 700 in 2023, which also took effect on January 1, 2024. That measure added that it is unlawful for an employer to request information from an applicant for employment relating to the applicant's prior use of cannabis. This is highlighted in **yellow** below.

**To be clear, the construction industry carveout that allows testing via non-psychoactive cannabis metabolites in the hair, blood, urine, or other bodily fluids and discipline for drug use still stands. In addition, current state law does not require construction industry testing programs to transition away from hair, blood, urine, or other bodily fluid based drug testing for construction workers.**

#### **CALIFORNIA GOVERNMENT CODE § 12954**

*(a) (1) Except as specified in subdivision (c), it is unlawful 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 paragraph 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 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.*

*(2) This subdivision does not apply to an employee in the building and construction trades.*

*(b) Except as specified in subdivision (c), it is unlawful for an employer to request information from an applicant for employment relating to the applicant's prior use of cannabis.*

*(c) Information about a person's prior cannabis use obtained from the person's criminal history is subject to subdivisions (a) and (b), unless the employer is permitted to consider or inquire about that information under Section 12952 or other state or federal law.*

*(d) This section does not permit an employee to possess, to be impaired by, or to use, cannabis on the job, or affect 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 state or federal law or regulation.*

*(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 employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.*

*(f) 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.*

*(g) This section shall become operative on January 1, 2024.*