

# Enforcing Substance Abuse Policies Under California's New Marijuana Anti-Discrimination Law

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## Enforcing Substance Abuse Policies Under California's New Marijuana Anti-Discrimination Law

Presented by:  
Chris Olmsted



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Yesterday – 9/2019



Note: This map was current as of September 2019

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and Today



- State law legalizes the use of marijuana for medical and recreational purposes
- State law legalizes the use of marijuana for medical purposes
- State law generally does not permit the medical or recreational use of marijuana

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# Enforcing Substance Abuse Policies Under California's New Marijuana Anti-Discrimination Law

## California: A Brief History

### 1996

- Compassionate Use Act, Proposition 215, as approved by voters, legalizes *medical* marijuana.

### 2008

- *Ross v. RagingWire* (California state court) held employer was free to discharge employee based on his marijuana use despite the state's legalization of medical marijuana.

### 2010

- California voters reject Proposition 19, which would have legalized *recreational* marijuana.



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## California: A Brief History

### 2016

- California federal court reiterated the prior holding in *Ross v. RagingWire*, and also noted that the California Fair Employment and Housing Act (FEHA) did not protect medical marijuana cardholders.

### 2018

- The Control, Regulate and Tax Adult Use of Marijuana Act (AUMA) becomes effective and legalizes recreational marijuana for individuals over the age of 21.

### 2022

- AB 2188 passed by legislature, protecting off-duty marijuana use (effective January 1, 2024).



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## California: A Brief History

### Bottom Line:

In the past, California courts have declined to recognize causes of action and/or ruled in favor of employers in cases involving medical marijuana cardholders asserting claims under either: (a) the California medical marijuana law, or (b) FEHA, **but this will soon change.**



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## AB 2188

- Effective January 1, 2024
- Amends the FEHA

### Two components:

- Anti-discrimination
- Drug testing



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## AB 2188

### Carve-Outs

#### AB 2188 includes carve-outs for:

- Building and construction trades
- Federal contractors, federal funding recipients, and federal licensees required to maintain drug-free workplaces
  - BUT ... BE CAREFUL! THIS CAN BE MISLEADING.
- Occupations that are required by federal or state laws to be tested for controlled substances (e.g., DOT drivers)
  - BUT ... BE CAREFUL! THIS CAN BE MISLEADING.



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## AB 2188

### Anti-Discrimination

#### Off-Duty Use Protected:

- Unlawful practice for an employer to discriminate against an adult applicant or employee based upon the "person's use of cannabis off the job and away from the workplace."



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## AB 2188

### Anti-Discrimination

#### On-Duty Impairment Not Protected:

- Does not permit an employee “to be impaired by, or to use cannabis on the job”
- Does not 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.”



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## AB 2188

### Drug Testing Limitations

- **Pre-Hire Testing:** AB 2188 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 pre-employment drug screening conducted *through methods that do not screen for non-psychoactive cannabis metabolites.*”
- **Other Testing:** The law prohibits acting upon 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.

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## AB 2188

### What kind of tests are allowed?

“As science has improved, employers now have access to multiple types of tests that do not rely on the presence of non-psychoactive 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.”

#### So testing can include:

- “Impairment tests”
- Active THC
- Anything else?

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## Drug Testing and Impairment Testing

- Drug tests that measure "levels" in the body: Cannot, will not, and never will be able to "establish" impairment
- Impairment tests: Theoretically possible. But...
  - Expensive?
  - Impermissible medical examination?
- Tests that measure recent use of marijuana: Possible, but still plenty of unknowns
- Tests to differentiate THC and cannabis metabolites: ???



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## AB 2188

### Remedies for Violations

Generally under FEHA, remedies could include:

- Lost wages
- Emotional distress
- Punitive damages
- Reinstatement
- Injunctive relief
- Attorneys' fees and costs



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## Marijuana Conundrum

- Compliance, versus
- Staffing, versus
- Libertarian CEO, versus
- Safety



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## BENCHMARKING

How are Ogletree's clients responding to this conundrum?

- A decreasing reliance on pre-employment and random testing
- An increasing commitment to post-accident and reasonable suspicion testing
- Training!

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## All Right, All Right, All Right...What's the Solution?

### Action Items:

*What do you want to do about marijuana?*

- ✓ Figure that out first, taking into consideration company culture, safety, risk avoidance, recruiting and retention, etc.



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## All Right, All Right, All Right...What's the Solution?

### Action Items:

*Adjust Policies and Procedures*

- ✓ Review your drug (and alcohol) testing/drug-free workplace policy. Does it need to be tweaked?
- ✓ Review your job descriptions and ensure that safety-sensitive jobs are being classified properly.



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## All Right, All Right, All Right...What's the Solution?

### Action Items:

#### Plan, Train, Learn

- ✓ Develop an internal protocol and procedure for dealing with marijuana issues in the workplace.
- ✓ Develop a reasonable suspicion checklist.
- ✓ Train your supervisors and managers in recognizing and documenting impairment.
- ✓ Learn" the topic of marijuana in the workplace as best you can. (It will help to diagnose issues as they arise).



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## All Right, All Right, All Right...What's the Solution?

### Action Items:

#### Stay Current

- ✓ Figure out a way to stay on top of the ever-changing marijuana legalization laws, court decision interpreting those laws, and other legal issues at play (e.g., disability discrimination, lawful off-duty conduct laws).



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## Ogletree Resources

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- FREE Blogs, Webinars, and Podcasts
- Multistate Drug Testing Policy
- Drug Testing and Reasonable Suspicion Training

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**Thank you!**

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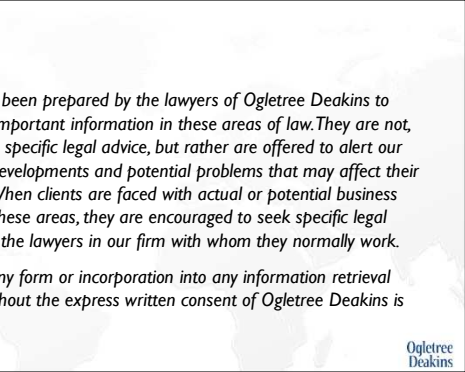
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