

Workplace Drug Testing: Recreational Marijuana Use Protections in California and Washington Have Ripple Effects

This WorkCare Fact Sheet summarizes new laws in the states of California and Washington that provide certain protections for individuals who test positive for non-psychoactive cannabis metabolites. It also features recommendations for employers on marijuana testing methods and general drug testing policies.

Effective Jan. 1, 2024, California and Washington are the first states in the country to provide protections for individuals who test positive on workplace drug tests for non-psychoactive cannabis metabolites in urine, hair, blood or other bodily fluids.

Tetrahydrocannabinol (THC), a psychoactive cannabinoid, is the active chemical in cannabis that induces a high. Non-psychoactive cannabis metabolites are components that are stored in the body after THC is metabolized. Metabolites detected on a test indicate that marijuana was consumed sometime in the last few weeks.

Recreational marijuana use is legal in California and Washington. Both state legislatures have determined that drug tests should focus on psychoactive components of marijuana and not on non-psychoactive cannabis metabolites that do not indicate current use. In California, where both job applicants and employees are covered, signs of current impairment will need to be compared to an employee's baseline performance in lieu of drug test testing. The Washington law only applies to testing of job applicants.

The state laws do not pre-empt federal laws that require applicants or employees to be tested for controlled substances as a condition of employment, for employers to receive federal funding or federal licensing-related benefits, or to enter into a federal contract.

California

[Assembly Bill 2188](#) amends the state's Fair Employment and Housing Act by making it unlawful for an employer to discriminate against an applicant or employee for the use of marijuana "off the job and away from the workplace" or for an employer-required drug screening test that finds a person to have non-psychoactive cannabis metabolites in their system.

[Senate Bill 700](#) closes a gap in AB 2188 making it unlawful for an employer to request information from a job applicant relating to their prior use of marijuana, including an applicant's criminal history. Employers are allowed to maintain drug-and-alcohol-free workplaces and prohibit possession, impairment by or use of psychoactive cannabis on the job.

In California, tests for non-psychoactive cannabis metabolites can no longer be used for pre-employment drug screening or serve as the basis for discipline or termination. Covered employers are only allowed to take disciplinary action based on test results that show present impairment and/or the presence of psychoactive compounds.



The challenge for employers is that references to present impairment remain open to interpretation. AB 2188 does not define it, nor does it explain what the state considers to be acceptable parameters for an impairment test. Consequently, it is incumbent on employers to confer with occupational health and legal experts to define present impairment and develop ways to evaluate it. The state legislature has confirmed that employers should routinely test for reasonable suspicion of psychoactive THC, and it established a level of 5ng/ml as probable cause for being under the influence.

Washington

Senate Bill 5123 adds a new section to chapter 49.44 RCW to make it unlawful for an employer to discriminate against a job applicant based on past use of cannabis off the job and away from the workplace (unless the applicant needs to meet federal guidelines), or when a required drug screen shows that an applicant has non-psychoactive cannabis metabolites in their hair, blood, urine or other bodily fluids. SB 5123 does not apply to current employees.

Other Provisions

In Washington, SB 5123 has applicant exemptions for the following job responsibilities or positions:

- Federal government background investigation or security clearance
- General authority Washington law enforcement agency as defined in RCW 10.93.020
- Fire department, fire protection district or regional fire protection service authority
- First responder, including 911 dispatchers and others who provide emergency medical services
- Corrections officer with a jail, detention facility or the department of corrections
- Airline or aerospace industries
- A safety-sensitive position for which impairment while working presents a substantial risk of death, as identified by the employer prior to submission of an employment application

In California, AB 2188 exemptions include:

- Employers in the construction and building industries
- Employees hired for positions that require federal background and clearance checks

AB 2188 does not exempt employees in other safety-sensitive industries such as transportation, health care services, manufacturing and agriculture.

Testing Methods

According to employment law attorneys, employers in states that have legalized use of recreational marijuana may opt to stop testing for marijuana entirely and instead base employment decisions on observations of performance and conduct. When testing is conducted, oral fluid testing to detect psychoactive THC is recommended because saliva does not undergo metabolic processes that break down THC to its metabolites. Many employers have the option of using either rapid oral or lab-based saliva tests that detect psychoactive components.

California AB 2188 states that employers can use a rapid test during a job interview or while an employee is on duty; the law does not specify whether a positive rapid needs to be verified by a lab before taking any disciplinary action. WorkCare recommends confirmatory lab testing as a best practice. For employers subject to U.S. Department of Transportation rules, saliva testing is allowed pending the certification of labs qualified to meet DOT specimen testing standards.

Urine or hair testing for non-psychoactive metabolites of marijuana aren't used to determine present impairment in job applicants or employees. A breathalyzer for marijuana that detects active THC and isolates it within an approximate three-hour window of use may be an option to detect present impairment, but neither California nor Washington define a breathalyzer level that indicates impairment.

WorkCare Recommendations

WorkCare offers the following state-specific and general recommendations to U.S. employers:

1. Train supervisors and managers on the symptoms of impairment from marijuana use to distinguish them from alcohol and other substances.

2. Regarding pre-employment testing, only test for psychoactive components of THC.
3. For periodic and random testing, focus on present impairment. In California, employers who continue to test urine or hair will be prohibited from taking any adverse employment action on an employee with a positive result for marijuana use.
4. Be aware of applicable and proposed laws in all of the jurisdictions where you have employees. It is always advisable to review workplace substance use policies with a legal expert to ensure compliance and consistency in the way rules are applied. Written drug policies should clearly state that being impaired by marijuana or other drugs at work or on company property is strictly prohibited. The policy should:
 - Ensure that test methods and documentation of results comply with applicable laws
 - Identify drugs for which a person will be tested and any related cutoff levels
 - Define impairment and under the influence
 - Describe how all positive marijuana results will be consistently handled
 - Distinguish between medical and recreational use of marijuana
 - Prohibit discrimination against medical marijuana cardholders where medical use is legal
 - Require confirmation of a positive marijuana test associated with medicinal use
 - Verify whether the test subject has a valid medical certification

WorkCare has a team dedicated to helping clients comply with substance testing laws and deliver drug-free workplace programs to protect and promote employee health. If you are a WorkCare client, please speak with your Customer Success Manager. Otherwise, contact us at info@workcare.com to learn more.