California Legislature Asks: Is What You Smoke at Home Your Boss's Business?

California Lawmakers Consider Bill to Stop Employers from Discriminating Based on Marijuana Use. by Christopher Hazlehurst

TUSTIN, CALIFORNIA, UNITED STATES, July 30, 2021 /EINPresswire.com/ -- Untold Californians are currently basking in the rapidly expanding recreational marijuana industry. Pot has become so mainstream in California that dispensaries are offering home delivery and advertising on billboards. Yet some California employers are still, rightly or wrongly, against the practice. State agencies continue to drug-test prospective employees and disqualify those who turn up positive for marijuana. Many private companies, likewise, reject applicants based on marijuana usage. Cannabis advocates and employees around the state gripe that these sorts of restrictions limit their free agency outside the workplace, can be enforced arbitrarily to deny employment for more nefarious reasons, and may constitute disability discrimination. A bill recently introduced to the California legislature would put a stop to the practice entirely, rendering it illegal to "discriminate" against employees based on marijuana usage.

> "Many employers create and implement policies which prohibit the use of marijuana during working hours."
>
> *Jon McGrath, California Employment Law Attorney*

Assembly Bill 1256 is a relatively bare-bones bill that gets right to the point. The bill is intended to "prohibit an employer from discriminating against a person in hiring, termination, or any term or condition of employment because a drug screening test has found the person to have tetrahydrocannabinol [THC] in their urine." The bill essentially removes marijuana usage as a reason for any adverse employment decision, whether that means refusing to hire a prospective employee, firing an employee, or otherwise subjecting them to penalties based on testing positive for THC.

AB 1256 gives employees who are discriminated against due to marijuana usage the right to sue the employer for damages, obtain injunctive relief, and even recover attorney fees and costs. Notably, the bill does not restrict these protections to disabled employees relying on medicinal marijuana as opposed to recreational users. AB 1256 broadly prohibits any employer from acting against any employee based on the presence of THC in their system.

When can employers test their employees for drugs under current law? As California

employment law attorney Jon McGrath of Coast Employment Law explains, for most California employers, there are no requirements to test employees for drugs and alcohol. “Nevertheless,” he says, “many employers create and implement policies which prohibit the use of illegal drugs, alcohol, marijuana and/or certain abuses of prescription drugs during working hours.” Under such policies, according to McGrath, employers can lawfully test new employees as a condition of their employment as well as test more long-term employees if the employer possesses an objectively held “reasonable suspicion” that an employee is under the influence of such drugs and/or alcohol.
Although marijuana has been legalized in California, McGrath explains, employees can still be prohibited from being “high” while at work. “The issue with marijuana,” he says, “is that traces of the drug can remain in one’s system for a significant amount of time.” According to attorney McGrath, the Supreme Court has ruled that drug tests that show the presence of the drug, regardless of when it was used, are a lawful basis for excluding an applicant from employment. AB 1256 could change that.

AB 1256 does permit certain employers to continue drug testing, including for marijuana. Employers who are required to drug test for THC under federal law or regulations, or who would suffer a monetary or license-related loss for failing to test employees for THC, are exempt. The bill also exempts employers in construction and building trades from coverage. Under existing California law, employers are generally allowed to conduct “suspicionless” drug screening as a condition of employment, but they are not allowed to perform random drug testing except under certain, narrowly defined circumstances.

AB 1256 is not California’s first attempt to protect an employee’s right to toke up. In February 2018, a California assembly member introduced AB 2069, dubbed the “Medical Cannabis Worker Protections Act.” The Act would have amended the Fair Employment and Housing Act (FEHA) to require employers to reasonably accommodate employees who relied upon medicinal marijuana to treat a disability. AB 2069 originally went bigger, prohibiting employment discrimination based on any positive drug test. Even as amended, the bill died. A similar bill prohibiting discrimination against medical marijuana usage, AB 2355, was introduced in 2020 and likewise never made it out of committee. Cannabis-inclined employees and activists hope that AB 1256 will be the one to finally get the support necessary to break through.

Attorney McGrath notes that under current law, FEHA does not protect the use of medical marijuana, and traces of the drug can provide a basis for excluding an applicant, even if taken for medicinal use. Other legally prescribed medications, on the other hand, can be used during work hours as long as they are not being abused and are being taken by the individual with the prescription. McGrath cautions employers to analyze the workplace safety issues which can arise as a result of employees taking certain medications.

For many around the state, the bill is a long time coming. Cannabis has been legal in California for five years now. Employers do not police employee’s private lives with regard to any other legal, recreational habits. While employers are free to punish employees whose performance

suffers because of drug use, or who show up to work drunk or high, drug screening tests are not directly related to performance. As argued by Dale Gieringer, the Director of California NORML, urine and hair tests “don’t detect anything related to impairment.” NORML is a sponsor of the bill.

As attorney McGrath observes, “there has been an ongoing push to decriminalize marijuana in many states and on the federal level.” By maintaining strong drug and alcohol policies in the workplace while making it easier to enjoy a more readily accepted drug outside of working hours, AB 1256 appears to be a step in the right direction for decriminalization advocates.

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