CALIFORNIA'S NEW CANNABIS PROTECTIONS FOR EMPLOYEES: WHAT PEOS NEED TO KNOW

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As more and more states legalize the use of cannabis for both medical and recreational purposes, worker advocates have increasingly pushed for corresponding employment legislation that protect employees' right to use cannabis without the fear of adverse employment action. This is a growing area of the law that can create real compliance challenges for PEO clients on issues ranging from hiring decisions to workplace drug testing.

A number of states, including Connecticut, Montana, Nevada, New Jersey, New York, and Rhode Island have enacted some version of legislation limiting the ability of employers to take action against employees based on their lawful use of cannabis. PEOs and their clients can now add California to that growing list. Governor Gavin Newsom recently signed legislation (AB 2188) that greatly expands cannabis users' rights to fight discrimination in the workplace and prevents employers from taking adverse action against employees and applicants based on off-duty recreational use of cannabis.

While the new California law does not take effect until 2024, California is likely a bellwether of more state laws to come. As the saying goes, what happens in California does not stay in California.

What do PEOs need to know when assisting California clients in complying with this new law?

CANNABIS USE SOON PROTECTED UNDER STATE EMPLOYMENT DISCRIMINATION LAW

The California Fair Employment and Housing Act (FEHA)—which is California's predominant civil rights law—currently protects employee rights "without discrimination, abridgment, or harassment on account of race, religious creed, color, national origin, ancestry,

physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status." However, recreational cannabis use outside of the workplace is not currently protected under FEHA or elsewhere.

AB 2188 bridges this perceived gap by making it unlawful for an employer to take adverse action against an employee (1) due to the individual's use of cannabis off the job and away from the workplace, or (2) when an employer-required drug test finds non-psychoactive cannabis in the individual's system.

Specifically, AB 2188 prohibits the use of drug tests that rely on finding non-psychoactive cannabis, as the California legislature found that these tests do not reflect the individual's impairment, but rather an individual's cannabis usage. This means that employers will be prohibited from firing employees or denying applicants job positions if drug test results merely detect cannabis metabolites in hair, blood, urine, or other bodily fluids.

COMPLIANCE CHALLENGES FOR PEO CLIENTS

Both new prohibitions mentioned above will create compliance challenges for PEO clients.

First, the law will prohibit adverse action against employees for the use of cannabis off the job and away from the workplace. The law specifies that it does not permit an employee to possess or use cannabis on the job or to "be impaired by" cannabis on the job. However, measuring "impairment" will be difficult for PEOs and their clients as there is generally not a readily-available test for impairment like there is for alcohol via blood alcohol content (BAC) measurements. Without such clear measurement tools, how can an employer determine whether that individual employee is "impaired" or merely feeling the "hangover" effects from the use of cannabis the night before?

The legislative history of AB 2188 reflects some of this concern, which is why the effective date of the law was delayed until 2024. However, it remains to be seen whether that one-year delay will provide enough time for such impairment testing to become widely available.

Second, AB 2188 prohibits metabolite testing on the grounds that such metabolites may remain in an individual's system for weeks or months but may not demonstrate active impairment. While metabolite testing may be prohibited, AB 2188 does not prohibit testing that measures for THC, the psychoactive element present in cannabis. However, again here the challenge may be the science not keeping up with the policy. Testing for the active presence of THC is not widespread due to a variety of issues, and where it is available it may be very expensive and cost prohibitive.

These two areas represent compliance challenges that PEOs and their clients will need to consider and address before the law goes into effect in 2024.

PARTICULAR CHALLENGES FOR PEOS REGARDING WORKERS' COMPENSATION AND RISK MANAGEMENT

These challenges may create particular concerns for PEOs, particularly in the areas of post-accident testing and workers' compensation claims management. If there is not readily available THC testing (that does not merely measure cannabis metabolites), the viability of post-accident testing may be in jeopardy as a practical matter.

This in turn could have significant impacts on claims management for the PEO industry, particularly for those that utilize large deductible or similar workers' compensation programs that may be exposed to additional risk if there are practical limitations on post-accident drug testing. California workers' compensation law contains an affirmative defense that allows claims to be denied when employee intoxication was a proximate cause or substantial factor in causing the employee's injury, which is one reason post-accident drug testing is a common practice. However, if the viability of such post-accident drug testing is in doubt for the foreseeable future (as discussed above), there could be significant downstream effects for risk management and costs for PEOs.

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It may take time for these issues to shake out and this could compel advances in the ability to scientifically test for THC or impairment. PEOs should be aware that this could have significant financial ramifications that will need to be monitored closely and planned for.

WHAT DOES AB 2188 NOT CHANGE?

Importantly, AB 2188 will not take away an employer's right to maintain a drug-free workplace. You can continue to issue disciplinary actions against employees who possess or use cannabis on the clock. However, as discussed above, measuring "impairment" may be a difficult task.

Additionally, AB 2188 does not allow for a free-for-all in all trades and industries. In fact, the bill specifies that the cannabis use protections do not apply to employees in building or construction trades, or for individuals applying to positions that require federal background investigations and clearance.

The law also does not preempt state or federal laws requiring employees to be tested for controlled substances, such as those required for receiving federal funds, licensing, or federal contracts. For example, some federal laws require testing for cannabis use, including Department of Transportation (DOT) regulations for pilots, truck drivers, and other safety-sensitive transportation employees. To the extent the testing is required by the terms of a federal contract, the new California legislation would be in conflict, and those specific provisions of the state law would be unenforceable. PEO clients that are federal contractors will likely need assistance navigating these waters.

HOW SHOULD PEOS AND THEIR CLIENTS PREPARE FOR AB 2188?

To prepare for AB 2188, PEOs and their clients should review current processes for drug testing to determine if they are compliant under the new legislation. If current testing methods rely on the finding of non-psychoactive cannabis metabolites, then you should research and consider alternative testing methods to the extent they are available.

Additionally, PEOs and clients are encouraged to review current policies on drug and alcohol use to ensure that they comply with AB 2188. While AB 2188 does not allow employees to be "impaired" while at work, it does complicate the ability of employers to determine if an employee is impaired while working.

Specifically, as discussed above, the availability of tests that measure THC levels (as opposed to mere metabolite presence) may be limited and such tests may be expensive. This issue is what compelled the legislature to include a one-year delay in the effective date of the law. However, it remains to be seen whether such tests will be readily available and affordable by 2024. As such, you will have to implement policies and practices that comply with AB 2188 while also ensuring the health and safety of other employees in the workplace.

Finally, even if your PEO does not do business in California, you should keep tabs on this area of the law. A growing number of states now regulate this issue, and that list is sure to grow. As California often sets the template for future legislation in other states, your PEO and your clients may be looking at similar prohibitions in the near future. ■

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