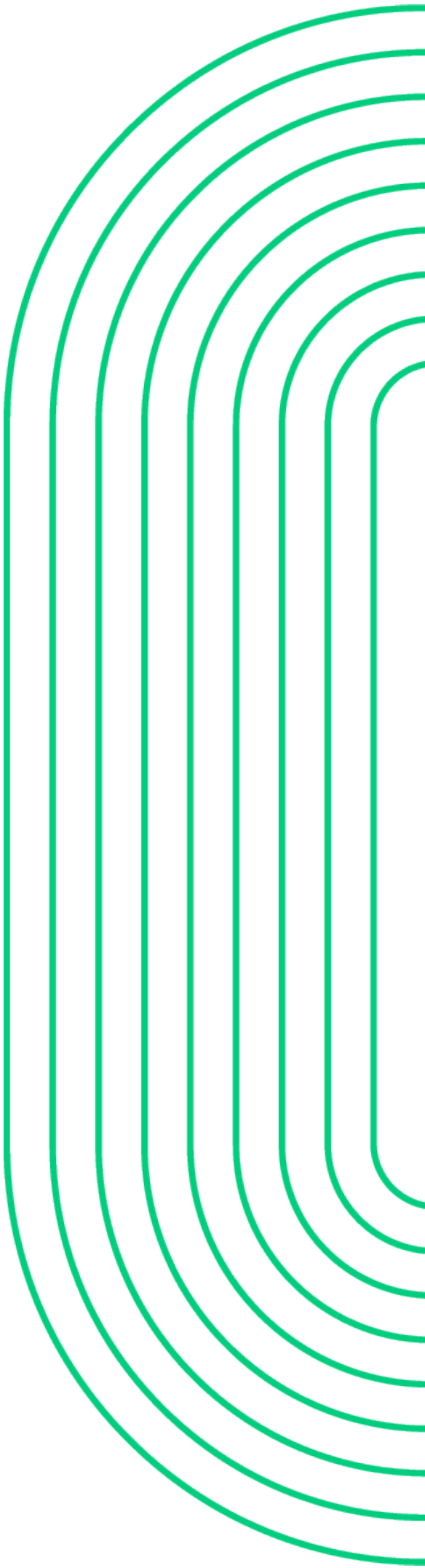


# Navigating California's New Marijuana Landscape

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# What's New?

## **AB 2188 – Prohibits Adverse Employment Action for Off-Duty Marijuana Use**

- Last year, Assembly Bill (AB) No. 2188 amended the Fair Employment and Housing Act (the “FEHA”), to prohibit employers from engaging in any **adverse employment action** against employees for **off-duty marijuana use**.
- The amendment takes effect on January 1, 2024.



# What's New?

## **SB 700 - Prohibits Employers From Requesting Information From Job Applicants Relating to Their Prior Use of Cannabis**

- On October 7, 2023, California Governor Gavin Newsom signed Senate Bill (SB) No. 700 into law, expanding the FEHA to protect **applicants** from **discrimination** based on **prior cannabis use**, with certain **exceptions**.
- The amendment takes effect on January 1, 2024.





# What Does the Amended Law Say?

California Government Code Section 12954 is amended to read:

“...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...**”







# Off the Job and Away from the Workplace

“...**use of cannabis off the job and away from the workplace**...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.**”





# Off the Job and Away from the Workplace

“...it is unlawful for an employer to **request information from an applicant** for employment relating to the applicant’s **prior use of cannabis.**”





Let's Break This Down

# Discrimination

California Government Code Section 12940(a) defines Discrimination:

“...for an employer, **because of an employee’s [protected status]**... to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or **in terms, conditions, or privileges of employment.**”







# Disparate Treatment

The employer **treats** an applicant or employee **less favorably** than others **because of** the individual's protected status.

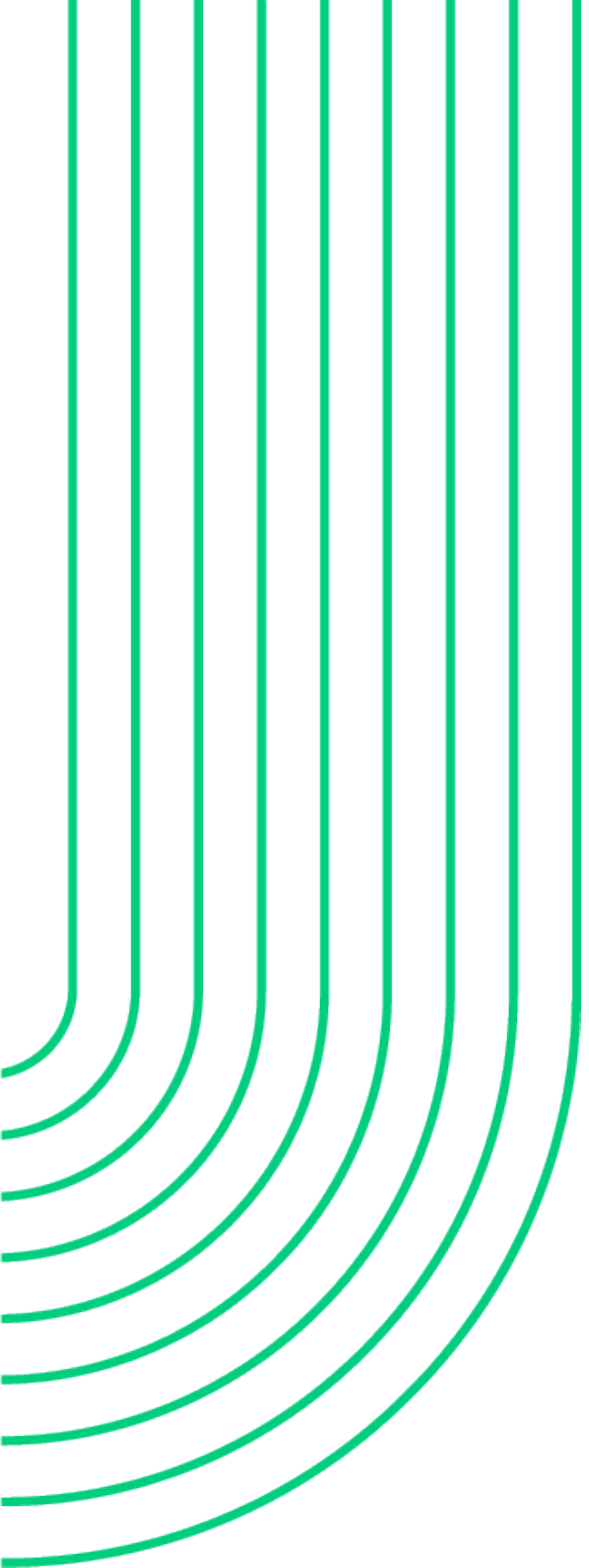




# Disparate Impact

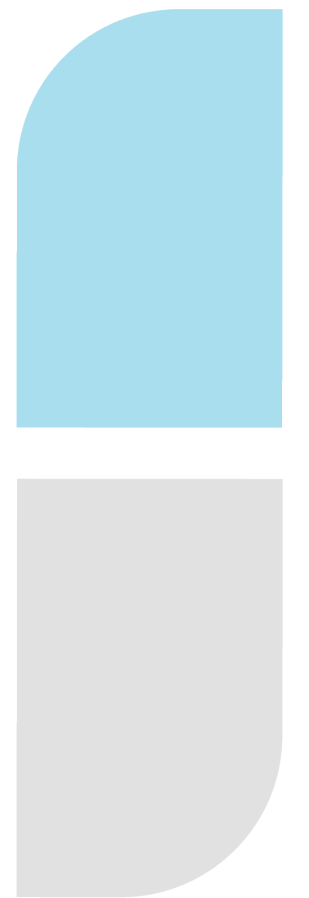
The employer has an employment practice that appears **neutral** but has an **adverse impact** on members of a protected group.





# Adverse Employment Action

Actions that affect the terms, conditions, or privileges of the employment.





# Cannabis

**REEFER  
MADNESS**







# Cannabis

Contains psychoactive cannabinoids (THC) and nonpsychoactive cannabinoids (CBD).



# Psychoactive v. Nonpsychoactive

THC causes impairment and psychoactive effects, or the “*high*” effect.







When cannabis is consumed, the human body metabolizes the THC compound and breaks it down into **nonpsychoactive cannabis metabolites**. These metabolites are then **stored** in the body for **extended periods of time**.



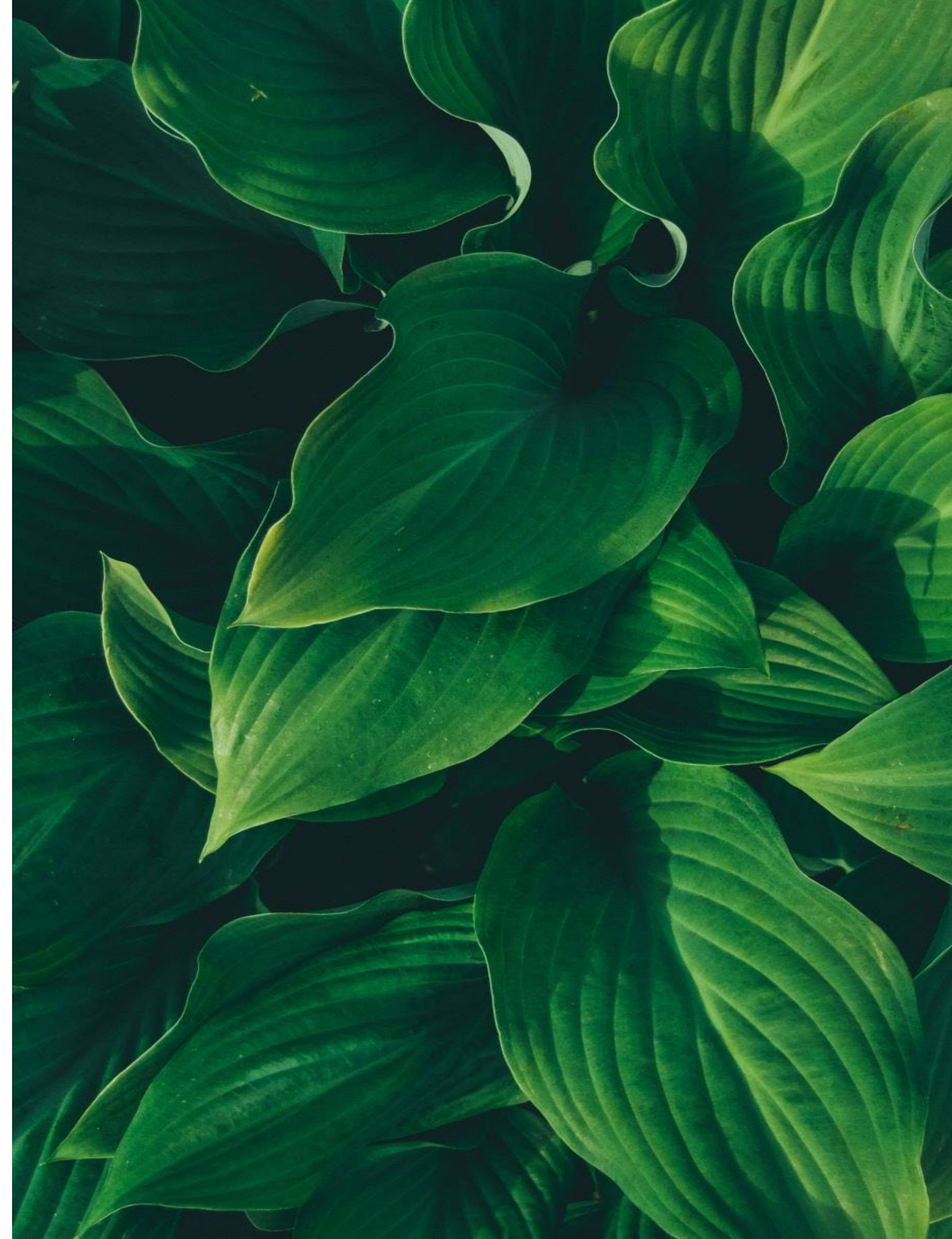
# Testing...Testing!

(1) Screen for **Active** THC

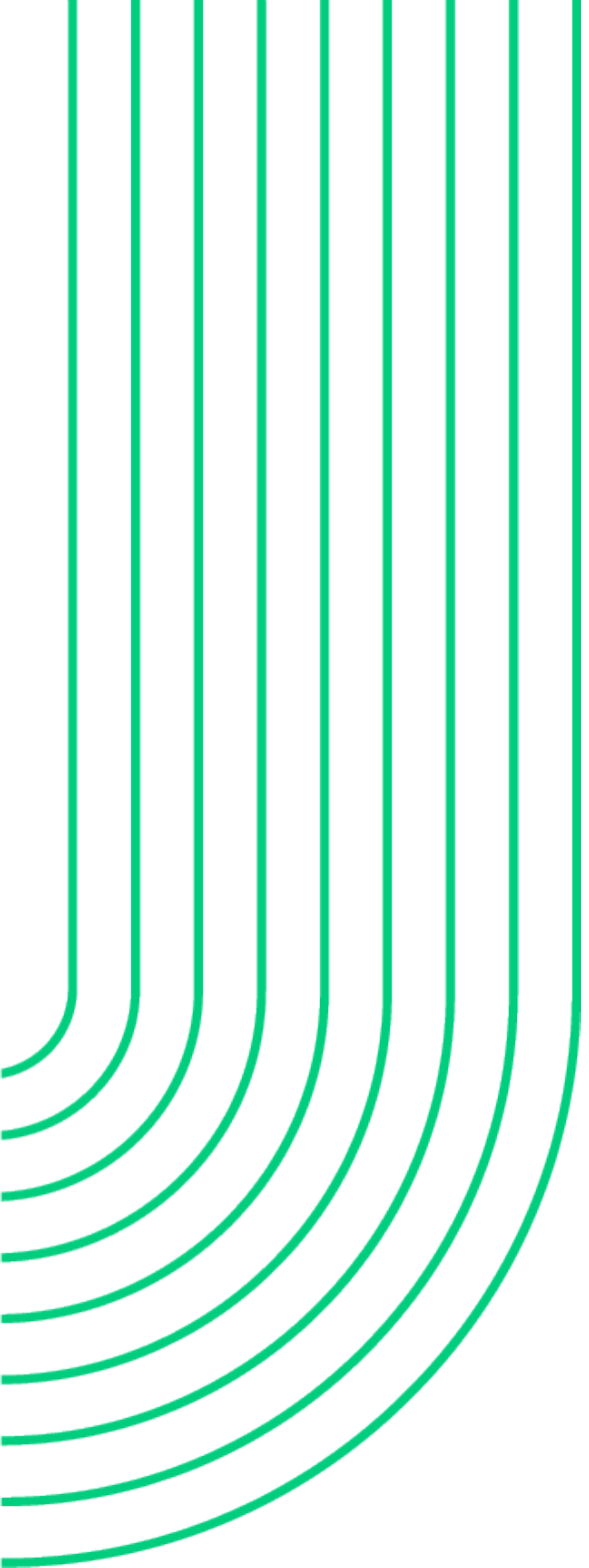
A. Saliva, oral fluids, and blood tests

B. Breathalyzers

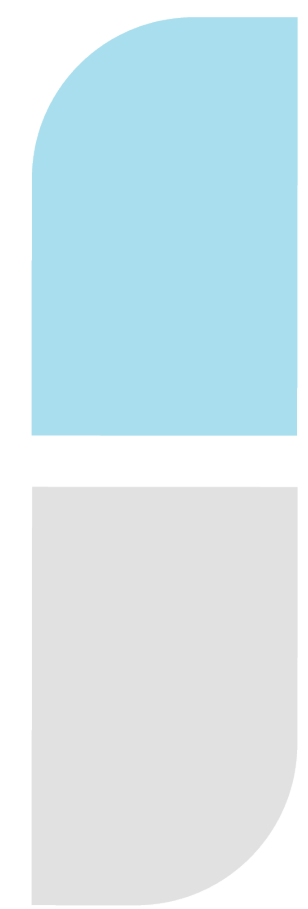
(2) Impairment Test



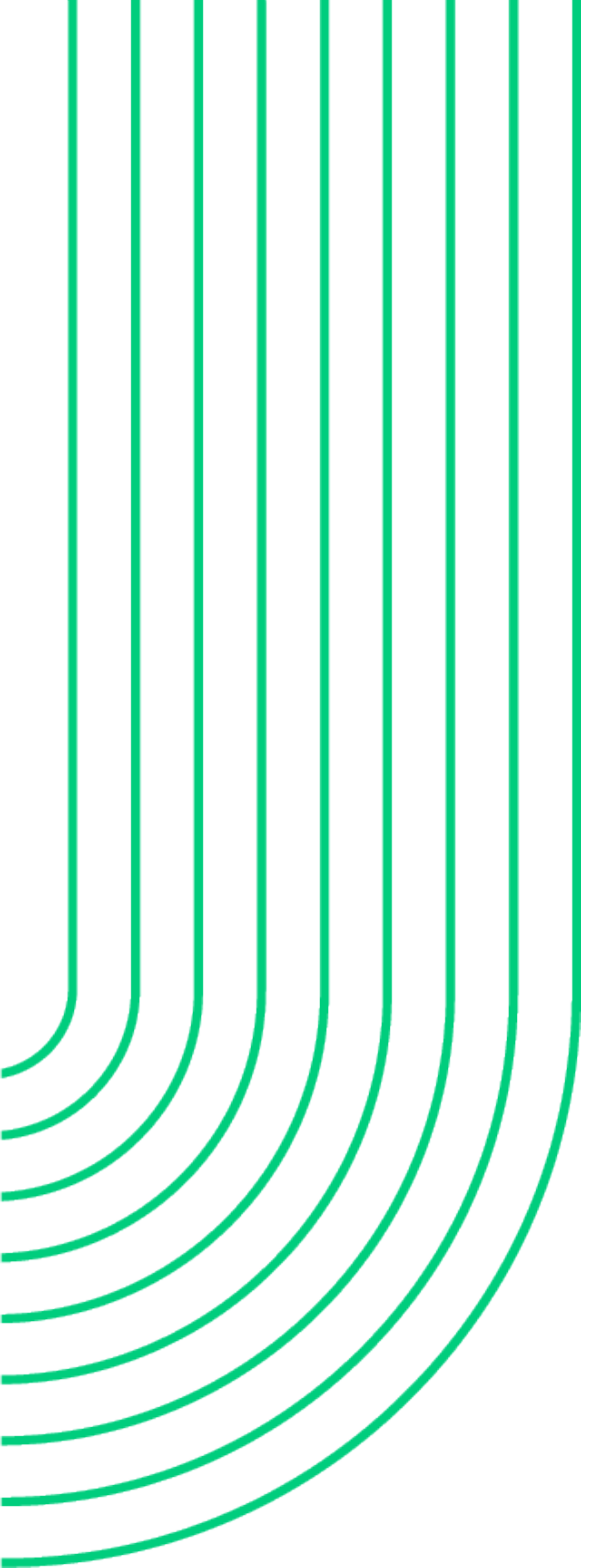




## **Maintain Drug- and Alcohol-Free Workplace**

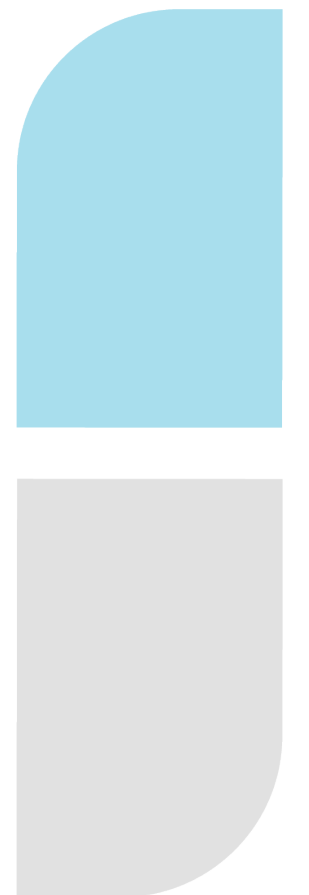






# Exemptions & Exclusions

- Employees in the building and construction trades.
- Positions required to be tested for drugs pursuant to other state or federal laws, government contracts, or federal funding.
- Positions requiring a federal background investigation or security clearance.





## Exemptions & Exclusions?

- Does not address employees who drive regularly as part of their job duties.
- Does not address employees with safety-sensitive functions.

## Consider:

- Vehicle Code section 23152 – Prohibits driving under the influence of drugs and/or alcohol.
- Department of Transportation rule, 49 CFR Part 40, describes required procedures for conducting workplace drug and alcohol testing.
- Employers must furnish safe places to work. 29 U.S. Code section 654
- Health and Safety Code section 11362.45





## Requesting Information Regarding Prior Cannabis Use

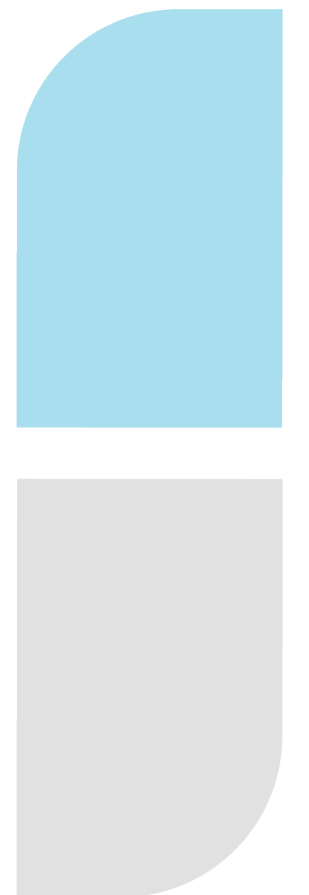
It is unlawful for an employer to request information from an applicant for employment relating to the applicant's **prior use of cannabis**.

Prohibits employers from using information obtained from a **criminal history** about an applicant or employee's prior cannabis use, unless the employer is permitted to consider or inquire about that information under the Fair Chance Act, or other state or federal law.



## Fair Chance Act

- Prohibits employers from asking about an **applicant's criminal history until after a conditional offer of employment has been made to the applicant.**
- Must perform an **individualized assessment** as to whether the applicant's criminal history "has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position."





# Prepare for Compliance

**In Effect January 1, 2024**

- Reevaluate testing applicants and employees for marijuana.
- Consider utilizing impairment tests.
- Consult with your testing administrators and/or laboratories to ensure methodologies used can be relied upon to detect the presence of THC rather than nonpsychoactive cannabis metabolites.
- Have description of test methods in place used to test.



# Prepare for Compliance

**In Effect January 1, 2024**

- Review and update antidiscrimination, drug use and drug-testing policies to be consistent with the law.
- Drug and alcohol free workplace policy.
- Update job descriptions to identify positions where safety procedures are paramount and compliance with safety requirements and maintenance of licenses (i.e. Driver's License), etc. are essential to the position.





# Always Always Always...



CONSULT WITH YOUR ATTORNEY!

*Including when drafting, reviewing, revising policies, practices, and job descriptions.*

Questions?







# Thank You

## **Legal Disclaimer**

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.