

## New Cannabis Law Calls for New Pot Policies

A new “breathalyzer” to detect the active use of marijuana is on its way to market after pandemic-induced delays. The rollout of Hound Labs’ unique technology and similar products from other manufacturers comes as just-signed legislation in California changes the game for employers and likely for safety in the workplace.



*Bill Quirk*

AB 2188 by Assemblyman Bill Quirk (D-Hayward), recently signed into law, will, beginning in January 2024, prohibit many employers from discriminating against a person in hiring, firing, and the “terms and conditions” of employment if a drug screen detects past marijuana use in the form of “non-psychoactive cannabis metabolites.” It also prohibits discrimination based on “off-the-job” cannabis use.

The law exempts building trades and construction, as well as federal laws requiring testing as a condition of employment. It also does not apply to state and federal laws requiring drug testing.

Non-psychoactive metabolites store in the body fat and can be detected for weeks in body fluids. “Testing positive for this metabolite has no correlation to workplace safety or productivity,” says Assemblyman Quirk, who worked as a climate change scientist and taught physics. He says testing for the presence of THC can continue under the new law and is “a better way to maintain workplace safety.”

There is a context to his bill, which was sponsored by the National Organization for the Reform of Marijuana Laws (NORML). It is a March 2021 ruling by the State Personnel Board reversing the termination of a Caltrans employee who was fired after testing positive on a drug screening after returning from a leave of absence. The employee was in a safety-sensitive position. The board said there was no evidence of impairment from the test and that the safety-sensitive designation only applies to state workers when they are on duty or standby.

Employers under the new law still have the right to discipline or fire employees for on-the-job use or possession of marijuana. It simply prohibits such actions based on a test detecting non-psychoactive cannabis metabolites.

### Creates a Protected Status

The California Chamber of Commerce opposed the law, arguing that it will create a “protected status” for marijuana use

in California’s Fair Employment and Housing Act. The organization adds that employers could be liable for “legitimate disciplinary actions against employees.”

### Beyond Zero Tolerance?

Nina M. French, president of employer and law enforcement solutions for Hound Labs, based in Oakland, which is about to roll out its marijuana breathalyzer, says the traditional “pee test” has never been about addressing impairment because it can’t measure that. The breathalyzer measures THC in the breath in parts per trillion. They can detect if a person has used marijuana within a couple of hours, meaning they are likely actively stoned.



*Nina French*

THC is metabolized into the breath for one to three hours, regardless of how it was ingested, aligning with the peak impairment period. In 2019, the University of California, San Francisco, confirmed in a clinical trial using Hound Labs’ device that THC is present in the breath for two to three hours and that the technology is capable of detecting THC in parts per trillion.

Researchers at the University of Pittsburgh have developed a tool to detect THC using carbon nanotubes. British Columbia’s Cannabix Technologies has also worked on a breathalyzer prototype, and SannTek Labs in Ontario, Canada, has been working on a similar device.

Hound Labs appears the closest to market.

French, a drug policy expert of some 30 years, says the company’s planned rollout comes as “workplace testing is getting more and more challenging. There are tons of employers who still don’t even have a written policy addressing cannabis.”

So what should a modern marijuana policy look like? “Can you introduce in your policies the idea of recent use?” she says. “Modern policy has to change. In the past, the idea of zero tolerance worked, for the most part.” The model of behavior and policy has the federal Department of Transportation involved. “The irony of that is the DOT does not actually look for impairment in drug testing, never has,” French says. We believe for cannabis, employers’ policies need to focus on recent use.”

French opines that a fair policy could state, “You cannot use any products containing cannabis immediately before or

while at work,” coupled with a breathalyzer if an employee is exhibiting signs and symptoms of marijuana use or is involved in an accident or incident. “You can do it in parallel with, say, an oral fluid test to do all the other drugs. As an employer, you can say, ‘We took an added measure to ensure that the use was recent and could have been a contributing factor to the incident.’” French adds, “You have to look at your state law. California has some restrictions.”

**“Can you introduce in your policies the idea of recent use?”**  
– Nina French

She also suggests that instead of the traditional (and now restricted) pre-employment testing, employers could require new hires to submit to breathalyzer tests for the first 30 days of employment, “showing that they’re adhering to the policy of not using immediately before or during work.”

“California employers should be mindful of their drug testing policies in light of AB 2188,” says Rob Moutrie, policy advocate for the Chamber. Employers will be able to conduct testing at all the same times – but need to utilize saliva-based testing or other non-blood/urine-based testing. The biggest thing is to start planning well before 2024 to make sure you have the right contracts (or supplies) for using saliva or other non-metabolite testing. Also, if employers had previously discriminated against at-home, non-workplace, legal use of marijuana in hiring, then they will likely want to re-examine that policy with counsel.”

Moutrie says employers will still be able to terminate for marijuana use, “but the testing will need to show usage was so recent that it likely effected at-work performance. However, the laws around when testing is permissible are not changed. Workplaces that can presently use randomized drug testing could still do so. Conversely, workplaces that presently perform reasonable suspicion testing will be able to do so to continue to keep marijuana impairment out of their workplace. However, they will need to use the non-metabolite testing to do so.”

**“California employers should be mindful of their drug-testing policies in light of AB 2188.”**  
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French says the company’s breathalyzer will be rolled out in the final quarter of 2022.

Rav Mlait of Cannabix Technologies in British Columbia says that the company’s product is in the “advanced prototype” stage and is conducting studies in the United States and Canada. “The company is actively seeking groups in California to pilot its technology,” he adds.

The two other entities developing similar technology, SannTek Labs and Star Research Group at the University of Pittsburgh, did not reply to *Cal-OSHA Reporter’s* request for comment.

Future studies, if conducted, may determine the outcomes of permissive marijuana use in society and on safety in the workplace.



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