Date of Hearing: May 11, 2022

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Chris Holden, Chair
AB 2188 (Quirk) – As Amended April 7, 2022

Policy Committee:	Labor and Employment	Vote:	5 - 2
	Judiciary		6 - 2

Urgency: No State Mandated Local Program: No Reimbursable: No

SUMMARY:

This bill makes it unlawful for an employer to discriminate against a person in hiring, termination or any other employment condition, based upon: (a) the person's use of cannabis off the job and away from the workplace; or (b) the results of an employer-required drug screening test showing non-psychoactive cannabis metabolites in the employee's urine, hair or bodily fluids. This bill also provides an exemption for employees in the building and construction trades and does not preempt state or federal laws requiring employee testing for controlled substances.

FISCAL EFFECT:

1) Annual General Fund (GF) costs of approximately $3.1 million to the Department of Fair Employment and Housing (DFEH) for 19 positions, including investigators, mediators, attorneys and other support staff, to enforce this bill's employment protections. Although DFEH cannot estimate the precise number of potential cannabis-related discrimination complaints, DFEH reasons approximately 500 new complaints annually taking into account the percentage of employers that conduct drug screenings, percentage of employees who test positive for cannabis and general volume of complaints DFEH receives.

2) GF or Trial Court Trust Fund (TCTF) cost pressures of an unknown, but potentially significant, amount to the courts in additional workload, by creating a new protection under the Fair Employment and Housing Act (FEHA) subject to a cause of action. The estimated workload cost of one hour of court time is $1,000. If additional 10 cases are filed statewide resulting in 20 hours of court time for each case, costs would be approximately $200,000. Although courts are not funded on the basis of workload, increased pressure on the TCTF and staff workload may create a need for increased funding for courts from the GF to perform existing duties.

COMMENTS:

1) **Purpose.** According to the author:

> When most employers conduct a drug test, they typically screen for the presence of non-psychoactive cannabis metabolites, which can remain present in an individual's bodily fluids for weeks after cannabis use and do not indicate impairment. While there is consensus that no one should ever show up to work high or impaired, testing positive for this

metabolite has no correlation to workplace safety or productivity. AB 2188 will ban employers from using this test, and clarify that they can continue to test for Tetrahydrocannabinol (THC).

2) **Support and Opposition.** This bill is sponsored by the California Chapter of the National Organization for the Reform of Marijuana Laws (NORML), arguing, "Not a single, scientifically controlled [U.S. Food and Drug Administration] study has shown cannabis metabolite testing to be effective in improving workplace safety or productivity." Other supporters, including cannabis industry stakeholders and labor organizations, highlight that adult-use cannabis has been legal in California for over five years and the right of employees to use cannabis while off the job should be protected. This bill is opposed by a large coalition of business groups, led by the California Chamber of Commerce, arguing "employers will face liability when they take legitimate disciplinary measures against their employees" and that "marijuana use is not the same as protecting workers against discrimination based on race or national origin and should not be in FEHA."

3) **Cannabis Testing in the Workplace.** Despite legalization of adult-use cannabis in California by Proposition 64 (2016), testing for cannabis use is permitted in both public and private workplaces and is mandated in numerous federal workplaces. There are numerous types of tests, which range from testing bodily fluids, like urine or blood, to testing hair follicles, which may retain marijuana-compounds for a much longer period of time. According to the Mayo Clinic, metabolites can be detected in a user's body for up to three days after a single use, and up to 10 days for regular users, despite the user no longer being under the influence. Thus, testing a person for the presence of metabolites does not prove whether the person is currently impaired.

   In March 2021, the State Personnel Board (SPB) heard a case regarding the dismissal of a California Department of Transportation worker who tested positive for THC upon their return to duty after a leave of absence. The SPB upheld an Administrative Law Judge's decision to revoke the employee's termination, ruling a positive urinalysis test for marijuana, on its own, is not grounds for dismissal and there was no evidence that the employee was under the influence or in possession of marijuana when the employee was on duty or on standby for duty.

   This bill establishes a protection, under FEHA, making it unlawful for an employer to discriminate against or penalize an employee or potential employee based on: (a) the person's use of cannabis off the job and away from the workplace or (b) the presence of metabolites in the person's urine, hair or bodily fluids after a drug trust. As reiterated in the Assembly Judiciary Committee's analysis of this bill, "the bill is not prohibiting employers from taking an adverse action against marijuana users because they are marijuana users. Rather, the bill would make it unlawful for an employer to discriminate against an employee for their legal use of marijuana *away from work*." Although this bill does not outright prohibit the use of metabolite tests by an employer, eliminating an employer's ability to make decisions based off such test results, which is presumably why testing is required in the first place, requires an employer to utilize an alternative testing method if the employer plans to base an employment decision around the test result. To the extent any federal law requires specific types of drug tests, such as metabolite tests, to be used, this bill provides that such federal law would prevail.

4) **Prior Legislation.** AB 2355 (Bonta), of the 2019-20 Legislative Session, would have made it an unlawful employment practice for an employer to discriminate against an employee who is a medical cannabis patient. AB 2355 was referred to, but not heard by, the Assembly Labor Committee.

   AB 2069 (Bonta), of the 2017-18 Legislative Session, would have provided a medical cannabis patient the right to a reasonable accommodation by an employer. AB 2069 was held on this committee's Suspense file.

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