April 6, 2022

The Honorable Bill Quirk
California State Assembly
1021 O Street, Suite 5120
Sacramento, CA 94814

SUBJECT: AB 2188 (QUIRK) DISCRIMINATION IN EMPLOYMENT: USE OF CANNABIS OPPOSE/JOB KILLER – AS INTRODUCED FEBRUARY 15, 2022

Dear Assemblymember Quirk:

The California Chamber of Commerce and the listed organizations are **OPPOSED** to your **AB 2188 (Quirk)** as a **JOB KILLER** as introduced on February 15, 2022, because it would create an unprecedented, protected class for marijuana users and undermines employers' ability to provide a safe and drug-free workplace.

Under California law, we believe that marijuana should be treated like alcohol – its use is legal in certain settings, but impairment must be kept out of the workplace. We see **AB 2188** as going far beyond that by interfering with an employer's ability to conduct pre-employment and post-accident testing under the bill's present language, as well as creating new litigation concerns related to its new protections for marijuana use.

AB 2188 Makes Marijuana Use a Protected Class Under FEHA and Outlaws Metabolite-based Testing

AB 2188 would elevate marijuana use to a protected trait under California's Fair Employment and Housing Act (Gov Code Section 21900 *et seq*., "FEHA") – in line with protections against discrimination that are provided for such important traits as race, color, national origin, religion, age, disability, sex, gender, sexual orientation, marital status, or military status.[1] Specifically, **AB 2188** would prohibit employers from taking any disciplinary action against an employee based on the employee's "use of cannabis off the job and away from the workplace."[2]

For context, it is important to remember that California already has very strict laws regarding when drug testing is permitted by an employer. Generally, such testing is limited to: (1) pre-employment suspicion-less drug testing; (2) reasonable-suspicion testing; and (3) post-accident testing.[3]

[1] For reference, see DFEH's website listing protected traits here: https://www.dfeh.ca.gov/employment/#whoBody.
[2] See proposed Gov. Code Section 12954(a)(1).
[3] To be clear – reasonable-suspicion testing means testing when an employer has reasonable suspicions that an employee may be impaired on the job. This testing often overlaps with post-accident testing but can occur separately as well.

AB 2188 also outlaws utilizing metabolite-based testing[4] for marijuana by making any discipline based on a metabolite test a violation under FEHA.[5] We have concerns about the feasibility and cost of the alternative tests pushed by **AB 2188** – specifically, saliva and impairment-based testing. These tests are relatively new, and we are concerned about their reliability in identifying marijuana use. Particularly, we have concerns with the efficacy of saliva-based testing for marijuana consumed in an edible form.[6]

AB 2188 Will Result in Lawsuits Over Necessary Pre-Employment Testing for Marijuana

Pre-employment testing is a necessary component of maintaining a drug-free workplace, ensuring both the safety of employees and (for certain workplaces) the public. Without pre-employment drug testing, there is no way the employer can protect against a new employee bringing impairment and danger into their workplace. This testing protects other employees, the workplace's equipment, and members of the public. This is particularly important in workplaces with heavy equipment or vehicles, such as manufacturing or construction, where a mistake can result in catastrophe. Notably, pre-employment testing is permitted by voters' recent actions on this topic, including the Compassionate Use Act and Prop 64 (2016). However, **AB 2188**'s broad language also draws into question the legality of pre-employment testing by creating a protected classification for workers who used marijuana regularly and had marijuana in their system at their pre-employment drug test.

By way of example: if **AB 2188** were to pass, and an employee's pre-employment drug test[7] came back positive for marijuana – the employer could likely not take any action with that information. Because **AB 2188** creates FEHA protections for marijuana use that is "off the job and away from the workplace," an employer who rescinded their offer of employment based on the test would likely be sued by the employee, claiming that their use before the drug test was "away from the workplace" – and therefore could not result in discipline.

Instead, the employer would be compelled to allow the potentially-impaired employee to show up for work. Even knowing this increased risk, under California's restrictive testing laws, the employer could not conduct a drug test on the first day until after the new-hire showed signs of impairment – which might be too late. The first sign of impairment might be when an accident occurs – such as a slowed call out to warn a coworker of a hazard, or a delayed reaction to a moving piece of heavy equipment. In addition to this tragic and unnecessary accident, the employer could also face liability for negligent hiring of the employee, given their knowledge of such a potential harm.

We must maintain such pre-employment testing to protect the safety of our workplaces, workers, and the public.

AB 2188 Will Lead to Litigation After Legitimate, Safety-related Discipline

Because of this new protected status for marijuana use under **AB 2188**, California employers will face liability when they take legitimate disciplinary measures against their employees. For example: if an employee has an accident early in their shift, and they appear impaired to their supervisor, they can properly be tested for drug use given the supervisor has reasonable suspicion of impairment. We will assume that

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[4] For context, "metabolite testing" is testing which identifies past consumption of a drug by finding the chemical components that linger *after the body has processed the drug*. By way of a metaphor – a snake will shed its skin periodically – and though the remaining skin does tell us that it was shed at some time in the past, it does not tell us how recently that act occurred. Similarly, metabolite-based testing for marijuana (including hair, urine, or blood tests) identifies the remnants of marijuana use that can remain in a person's body for months, but does *not indicate recent use or impairment.*

[5] See proposed Gov. Code Section 12954(a)(2).

[6] Though there does not yet appear to be conclusive science on this point and testing continues to evolve, many marijuana-friendly publications suggest that edibles may be less detectable than smoked marijuana. *See* https://cbdoracle.com/cannabis/how-long-edibles-stay-in-your-system/ ("Saliva tests aren't hugely effective for edibles…")

[7] Notably, under **AB 2188**'s provision prohibiting metabolite testing, such testing would need to be saliva-based (discussed below), but the hypothetical still serves.

the tested employee used marijuana four hours prior to work that morning, and tests positive for marijuana.[8] In that event, the employer would presumably move to discipline or terminate the employee. However, under **AB 2188**'s protection for "use of cannabis off the job and away from the workplace," the employee would have a fair argument that their use was not "on the job" and claim that impairment had not persisted to this point – though the employer would contend otherwise. The employer would then be forced to litigate the discipline of the employee because of **AB 2188**'s insertion of marijuana use into FEHA.

Put simply: marijuana use is not the same as protecting workers against discrimination based on race or national origin and should not be in FEHA. California employers should not have to fight out proper, impairment-based terminations in FEHA. Moreover, employers must be able to keep their workplace safe by disciplining employees who arrive at work impaired.

AB 2188 Exposes Federal Contracting Entities to Particular Risk

Federal law continues to treat Marijuana as a Schedule 1 Drug - and though California policymakers may disagree, businesses with federal contracts must comply with federal requirements to maintain a drug-free workplace. To that end, we are concerned that **AB 2188**'s inclusion of marijuana in FEHA poses particular risks for these employers – who must operate simultaneously under two sets of drug laws.

Conclusion

If California policymakers wish to force a shift towards newer testing technologies – that is one thing. But we do not believe marijuana should be elevated to a legally-protected status above comparable drugs (like alcohol). Moreover, employers should certainly not face liability for disciplining impaired employees – and must be able to protect their workplaces from habitually-impaired employees with pre-employment drug testing.

For these reasons, we are **OPPOSED** to your **AB 2188 (Quirk)** as a **JOB KILLER**.

Sincerely,

Robert Moutrie
Policy Advocate
California Chamber of Commerce
on behalf of

Acclamation Insurance Management Services
Allied Managed Care
California Attractions and Parks Association
California Business Properties Association
California Chamber of Commerce
California Farm Bureau
California Landscape Contractors Association
California Manufacturers & Technology Association
California Restaurant Association
California Retailers Association
Coalition of Small and Disabled Veteran Businesses
Flasher Barricade Association
National Federation of Independent Business
Official Police Garages of Los Angeles
Public Risk Innovation, Solutions and Management

[8] The testing method is unimportant for this hypothetical as any form of testing would likely show use, and the legal issue would exist regardless of the testing used.