

# New Washington State Law Will Protect Job Applicants From Discrimination Based on Off-Duty Marijuana Use

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Employers in Washington will soon be prohibited from making hiring decisions based on preemployment testing for off-the-job cannabis use or test results showing nonpsychoactive cannabis metabolites in an applicant's hair, blood, urine, or other bodily fluids. Washington's new law, [Senate Bill 5123](#), signed by Governor Jay Inslee on May 9, 2023, takes effect on January 1, 2024.

## Quick Hits

- Effective January 1, 2024, Washington employers will be prohibited from discriminating in initial hiring decisions based on job applicants' lawful, off-the-job use of cannabis or test results indicating the presence of nonpsychoactive cannabis.
- An employer may base initial hiring decisions on scientifically valid drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites.
- The law does not preempt state or federal laws requiring an applicant to be tested for controlled substances, and it does not apply to applicants seeking positions requiring a federal background investigation or security clearance, certain public safety positions, or certain safety-sensitive positions previously identified by the employer.

The law notes that recreational cannabis use was legalized in Washington in 2012, and that "[m]any tests for cannabis show only the presence of nonpsychoactive cannabis metabolites from past cannabis use, including up to 30 days in the past, that have no correlation to an applicant's future job performance." Likening legal cannabis use to legal alcohol use, the Washington Legislature has removed some restrictions on job opportunities based on an applicant's past use of cannabis.

Employers can still base hiring decisions on scientifically valid drug testing that screens for other types of controlled substances but not nonpsychoactive cannabis metabolites. An employer can also continue to use drug tests that detect a range of controlled substances, including cannabis, as long as the findings related to past cannabis use are not provided to the employer. Additionally, the law expressly excludes from its coverage other types of controlled-substance testing, "such as postaccident testing or testing because of a suspicion of impairment or being under the influence of alcohol, controlled substances, medications, or other substances." Nothing in the law affects an

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employer's right or obligation to maintain a drug and alcohol-free workplace, "or any other rights or obligations of [the] employer required by federal law or regulation." Although not specifically addressed in the law, employer testing for more recent marijuana use or psychoactive cannabis metabolites may be valid and more indicative of impairment versus historical use.

Washington's new law does *not* apply to job applicants seeking

- positions requiring a federal government background investigation or security clearance;
- certain law enforcement positions or fire department, first-responder, and corrections positions;
- positions in the airline or aerospace industries; or
- safety-sensitive positions "for which impairment while working presents a substantial risk of death," which were "identified by the employer prior to an applicant's application for employment."

The law also "does not preempt state or federal laws requiring an applicant to be tested for controlled substances." This includes laws requiring testing, or a way that testing is to be performed, "as a condition of employment, receiving federal funding or federal licensing-related benefits, or as required by a federal contract."

California [enacted a similar law](#) last year that will go into effect on January 1, 2024. With the ongoing passage of state laws legalizing cannabis, it is likely that additional laws prohibiting preemployment testing for cannabis will follow across the country. In addition, a growing number of large employers have already enacted policies that do not subject prospective employees to preemployment testing for cannabis in states in which the drug is legal, citing access to an expanded pool of talent as motivation for such policies.

## Key Takeaways

Employers in Washington may want to review their drug-testing policies to ensure that they are in compliance with the new law. Employers must ensure that any preemployment drug test does not screen for the presence of nonpsychoactive cannabis metabolites or, if a test does screen for such substances, that they do not receive communications regarding the detection of nonpsychoactive cannabis metabolites. If employers will continue to test employees for the presence of psychoactive cannabis metabolites to detect on-the-job use, they may want to consult their testing facilities/laboratories to ensure that the test methodologies relied upon will only screen for the presence of tetrahydrocannabinol (THC) rather than for the presence of nonpsychoactive cannabis metabolites.

Employers may also want to start updating job postings for positions they consider "safety sensitive," where impairment could result in significant injury or death, to reflect such a designation in order to comply with the law's requirement that these positions be identified prior to an applicant's applying.

Finally, employers may want to ensure that their policies reflect that use or being under the influence of marijuana in the workplace or during working hours continues to be prohibited.

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