

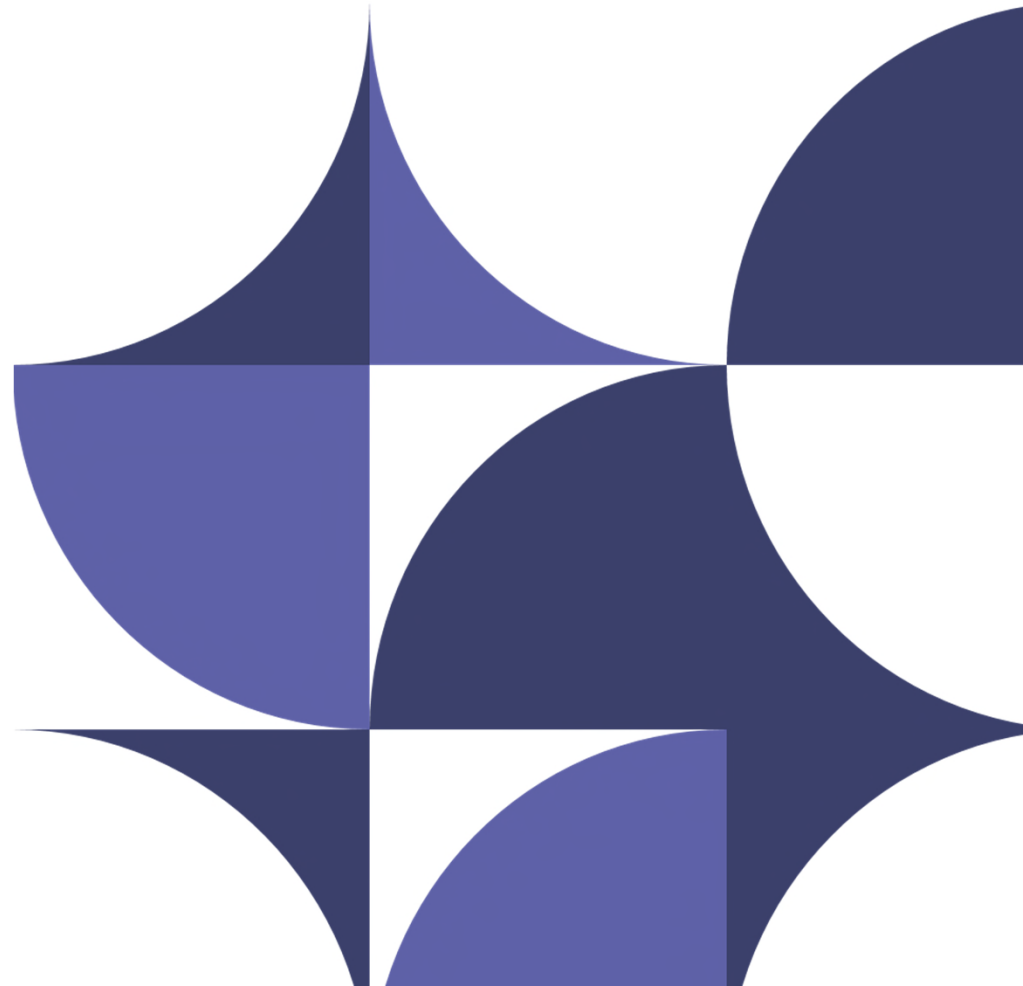


California Background Check and Cannabis Update

October 17, 2023

Seyfarth Shaw LLP

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Speakers



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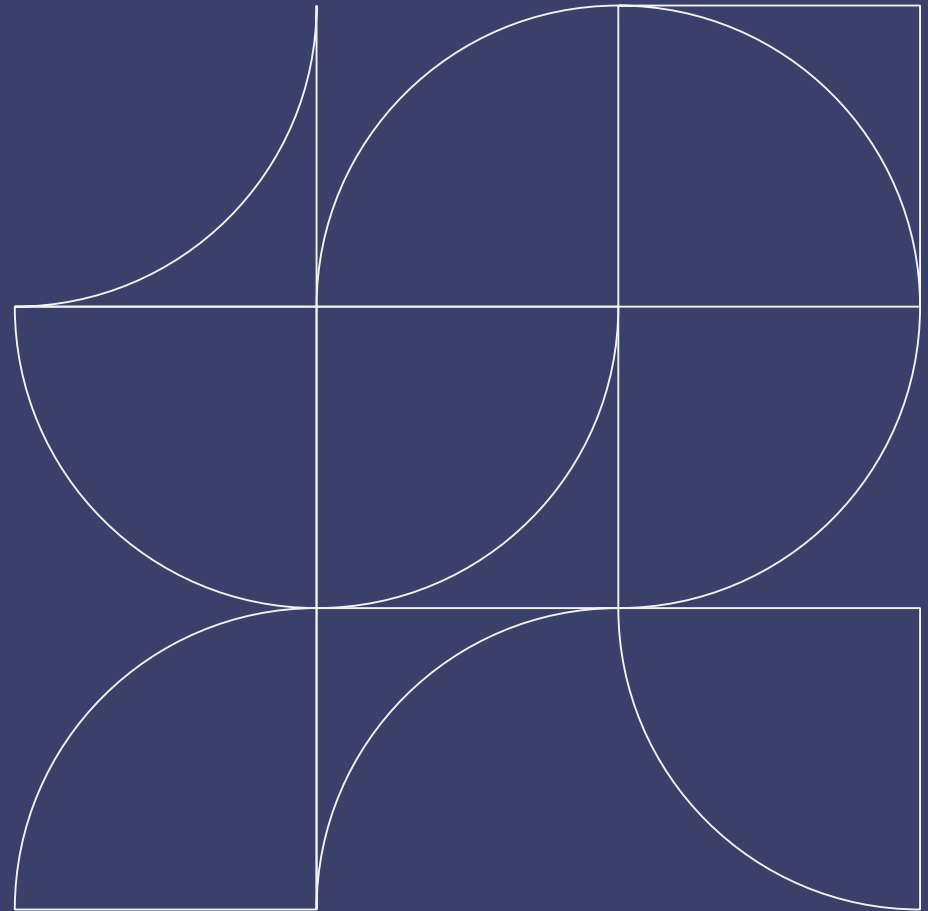


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Agenda

- 1 | California's Fair Chance Act
 - 2 | California Amends the Fair Chance Act Regulations
 - 3 | California Creates Cannabis Protections
 - 4 | Closing Thoughts
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California's Fair Chance Act



California's Fair Chance Act



- No inquiries about or consideration of criminal history until after conditional offer of employment
- Employers may not inquire about or consider:
 - Arrests or charges that did not lead to a conviction (except in very limited cases)
 - Referral to or participation in a pretrial or posttrial diversion program if probation has been completed and the case has been dismissed
 - Convictions that have been sealed, dismissed, expunged, or eradicated
 - Certificate of rehabilitation
 - Pardoned cases

California's Fair Chance Act



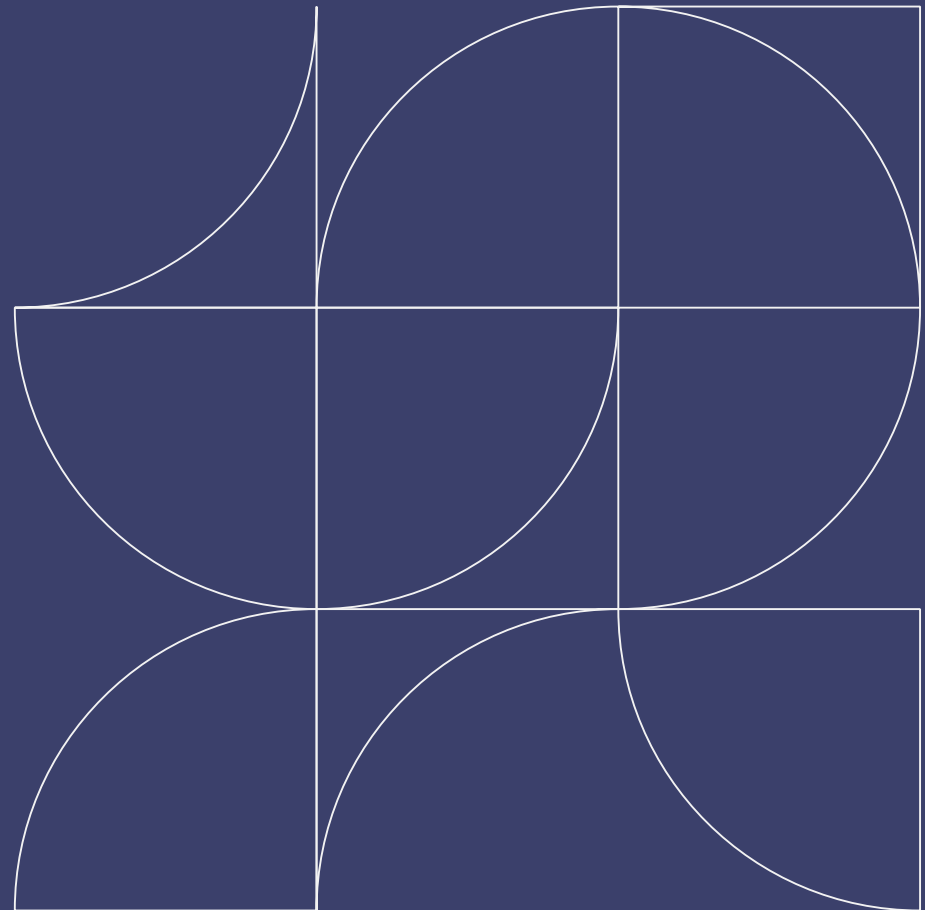
- Individualized assessment
 - Los Angeles city-mandated assessment form
- Pre-adverse and adverse action notices
 - Requires more than the FCRA
 - identify the conviction at issue
 - include a copy of any conviction history report (FCRA requires this)
 - explain the applicant's right to respond to the notice before the employer's decision becomes final
 - state the deadline for that response
 - tell the applicant that the response may include evidence challenging the accuracy of the conviction history and evidence of rehabilitation or mitigating circumstances
- Required even if no background check report (e.g., self-disclosure, etc.)

California's Fair Chance Act



- Applicant dispute process
 - The applicant has 5 business days to respond
 - The employer may, but need not, explain the reasoning for its final decision
 - If the applicant timely notifies the employer that the applicant disputes the accuracy of the conviction history and is taking specific steps to obtain evidence, then the applicant has an additional 5 business days to respond
 - The employer must consider any information the applicant submits before the employer can make a final decision
- Adverse action notice
 - the final denial or disqualification
 - any existing procedure the employer has to challenge the decision or request reconsideration
 - the right to file a complaint with the California Civil Rights Department

California Amends the Fair Chance Act Regulations



Key Amendments



- Post-conditional offer requirement applies to current employees
 - Promotion, training, discipline, etc.
 - Change in company ownership
- Job postings cannot indicate those with criminal records will not be considered
- Volunteered information must be ignored
- Regulated employers
 - Clarifies the exemption does not apply to an employer if another entity (e.g., federal agency, etc.) required to check criminal history
- Expanded definition of “employer”
 - directly or indirect employer, acts as an agent or staffing agency

- Still required and provides further examples that employers should look at evidence provided relating to:
 - Nature and gravity of offense or conduct
 - Example: whether a disability, trauma, domestic or dating violence, sexual assault or stalking, human trafficking, duress or other similar factors contributed to the offense or conduct
 - Time that has elapsed since offense/conduct or completion of sentence
 - Nature of job held/sought
- Regulations now require an “initial” assessment before first pre-adverse notice
 - Amend internal process for gathering assessment information
 - Waiting until after first pre-adverse notice may not be sufficient depending on your analysis

Individualized Assessment



Additional Amendments



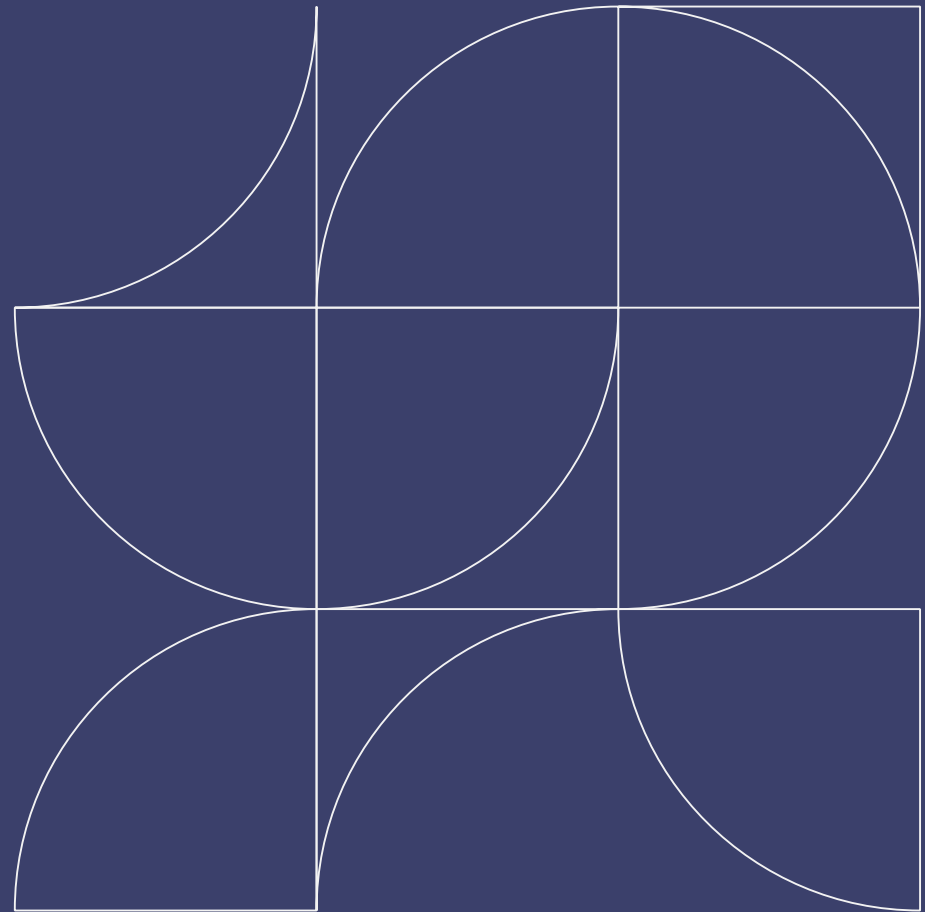
- Added more substance to types of evidence that applicant can submit relating to rehabilitation and mitigating evidence
 - Examples:
 - trauma, domestic or dating violence, sexual assault, stalking, human trafficking, duress, or other similar factors contributed to the offense or conduct
 - whether a disability, including but not limited to past drug addiction or mental impairment, contributed to the offense or conduct, and, if so, whether the likelihood of harm arising from similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation, or whether the disability has been mitigated or eliminated by treatment or otherwise
- Employers cannot mandate certain information or that it be in a specific form
- Reassessment still required if additional information is provided by applicant/employee

- Applicants or employees have at least five business days from **receipt of the pre-adverse notice to respond**.
- The regulations remove any ambiguity over when the notice is “received” by clarifying that if an employer sends the notice through a format that does not provide a confirmation of receipt, then the notice is deemed received based on the method of delivery:
 - five calendar days if mailed within California
 - 10 calendar days if mailed outside of California
 - 20 calendar days if mailed outside of the United States
 - two business days if emailed

Timing



California Creates Cannabis Protections



AB 2188



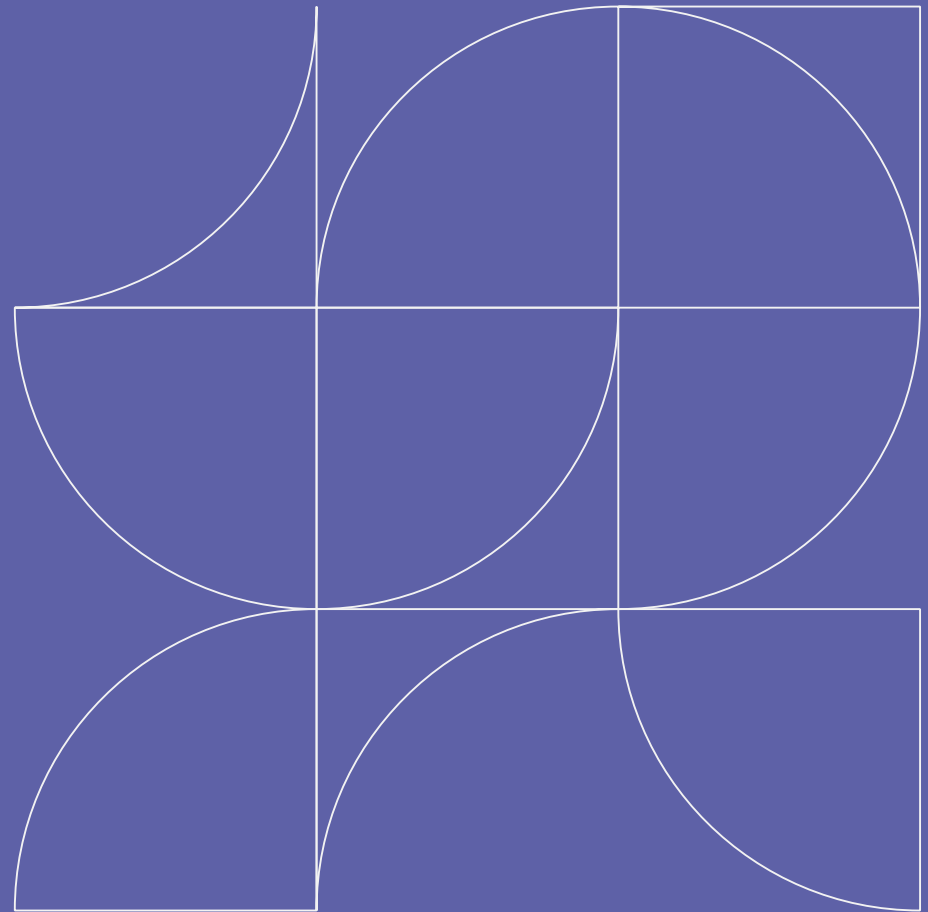
- Effective January 1, 2024
- Unlawful for most employers to discriminate against a person in connection with hiring, termination, or another employment decision if the discrimination is based upon either:
 - The person’s use of cannabis off the job and away from the workplace. This paragraph does not 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
 - An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids
- Exceptions : (1) employees in the building and construction trades; (2) positions that require a federal government background investigation or security clearance in accordance with Department of Defense regulations, or equivalent regulations applicable to other agencies; and (3) individuals required to be tested under state or federal laws and regulations or as a condition of an employer receiving federal funding or federal-licensing benefits or entering into a federal contract

AB 2188

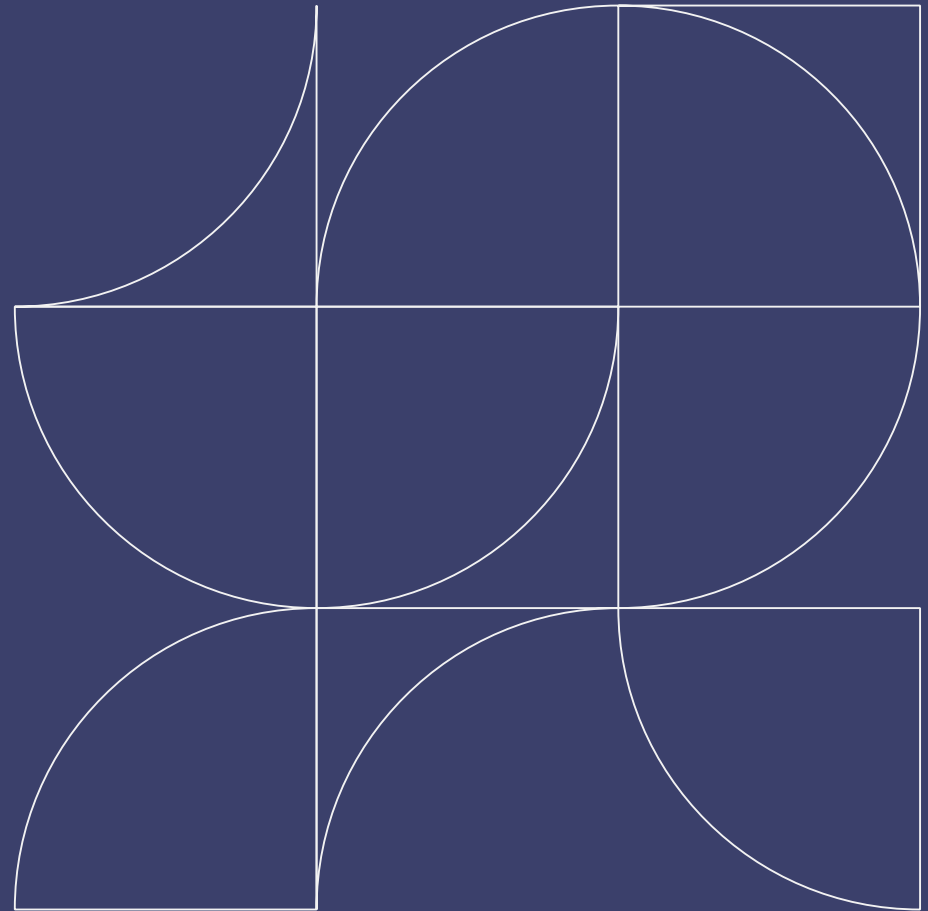


- Covered employers who wish to test for cannabis should consider discontinuing urine testing on or before January 1, 2024, regardless of whether the test is for a job applicant or a current employee
- Saliva/oral fluids
 - Job applicants – suggests employers can consider and take action on a positive test based on saliva/oral fluids
 - Employees – significant risk!
 - Off-duty protections
- Law recently amended to prohibit employers from considering any past marijuana use
 - Update criminal history questionnaire

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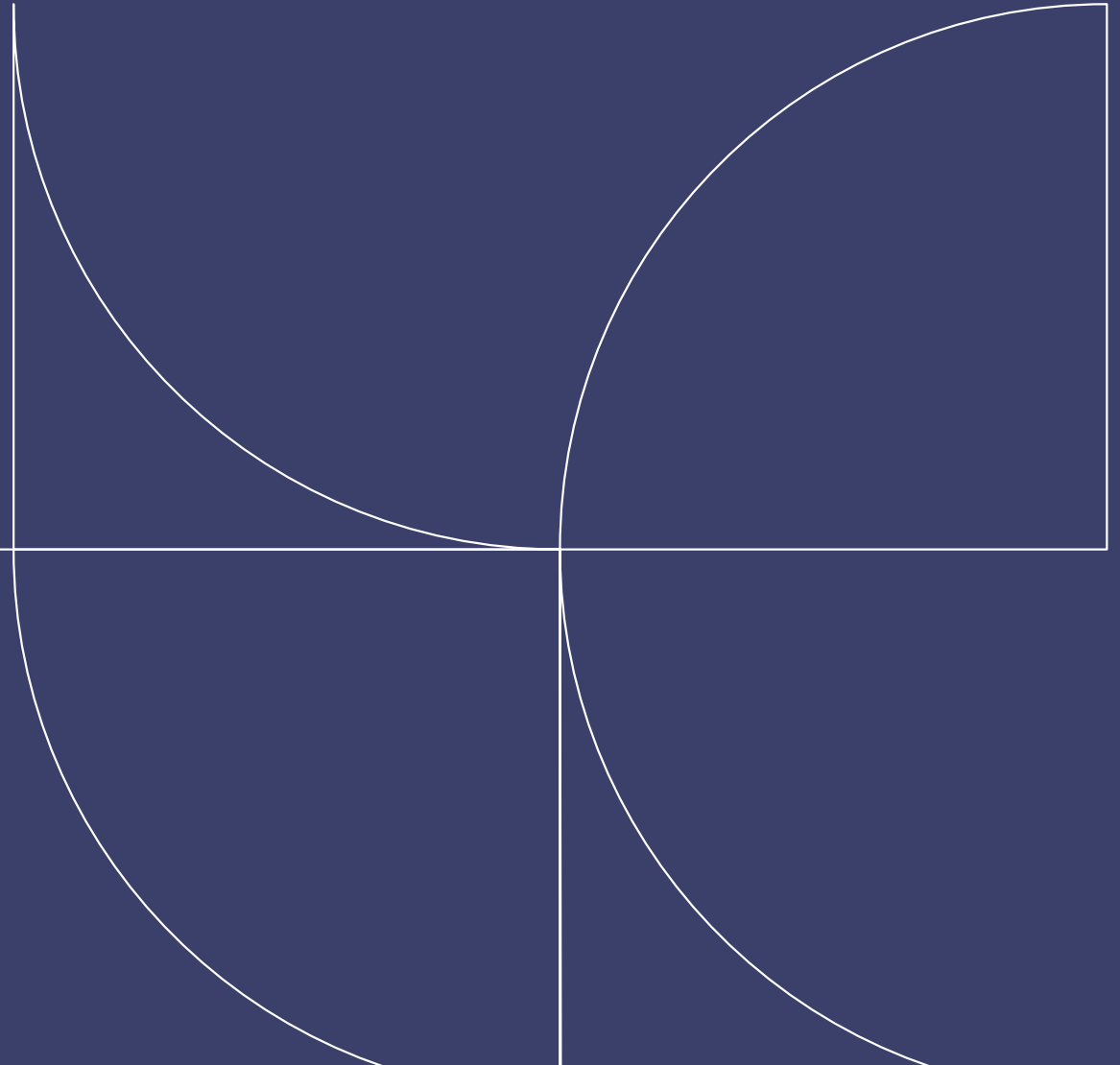
Closing Thoughts



Closing Thoughts

- **Consider a privileged review of all background check materials and policies**
 - Don't forget about the Fair Credit Reporting Act
 - Work with background check provider on process
 - Internal committee / centralized review of records
- **Consider future of cannabis testing in California (and beyond)**
 - Work with lab to change methodology
 - Train managers on reasonable suspicion

Questions?



**thank
you**

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