
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 2136 **Hearing Date:** June 18, 2024
Author: Jones-Sawyer
Version: April 15, 2024
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled substances: analyzing and testing*

HISTORY

Source: Drug Policy Alliance
California Women's Foundation

Prior Legislation: AB 1598 (Davies), Ch. 201, Stats. 2022

Support: ACLU California Action; Balanced Imperfection; Bienestar Human Services; California Consortium of Addiction Programs and Professionals; California Public Defenders Association; Californians United for a Responsible Budget; Drug User Health Advisory Committee of Santa Clara County; Drug User Health Advisory Committee of South Alameda County; Ella Baker Center for Human Rights; Felony Murder Elimination Project; Friends Committee on Legislation of California; GLIDE; Healthright 360; Hotties of Harm Reduction; Initiate Justice; Initiate Justice Action; Smart Justice California; Tenderloin Neighborhood Development Corporation; The Gubbio Project; Treatment on Demand Coalition; Women's Foundation of California, Dr. Beatriz Maria Solis Policy Institute

Opposition: None known

Assembly Floor Vote: 46 - 5

PURPOSE

The purpose of this bill is to authorize drug checking services, and provide immunity from criminal prosecution and civil liability to a person engaged in providing or using those services.

Existing law establishes the California Uniform Controlled Substances Act, which regulates controlled substances. (Health & Saf. Code, § 11000 et seq.)

Existing law classifies controlled substances into five schedules according to their danger and potential for abuse. Provides that Schedule I controlled substances have the greatest restrictions and penalties, including prohibiting the prescribing of a Schedule I controlled substance. (Health & Saf. Code, §§ 11054-11058.)

Existing law defines “drug paraphernalia” as all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human a body a controlled substance. (Health & Saf. Code, §§ 11014.5, subd. (a), 11364.5, subd. (a).)

Existing law provides that drug paraphernalia includes testing equipment designed for use or marketed for use in identifying, or in analyzing the strength, effectiveness, or purity of controlled substances. (Health & Saf. Code, §§ 11014.5, subd. (a)(4), 11364.5, subd. (d)(4).)

Existing law provides that “drug paraphernalia” does not include any testing equipment designed, marketed, intended to be used, or used, to test a substance for the presence of fentanyl, ketamine, gamma hydroxybutyric acid, or any analog of fentanyl. (Health & Saf. Code, §§ 11014.5, subd. (d), 11364.5, subd. (g).)

Existing law prohibits a person from maintaining or operating any place of business in which drug paraphernalia is kept, displayed or offered in any manner, sold, furnished, transferred or given away unless such drug paraphernalia is completely and wholly kept, displayed or offered within a separate room or enclosure to which persons under the age of 18 years not accompanied by a parent or legal guardian are excluded. (Health & Saf. Code, §11364.5, subd. (a).)

Existing law defines “controlled substance analog” as either of the following:

- A substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance classified in Section 11054 or 11055 or a synthetic cannabinoid compound defined in Section 11357.5.
- A substance that has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance classified in Section 11054 or 11055 or a synthetic cannabinoid compound defined in Section 11357.5. (Health & Saf. Code, §11401, subd. (b).)

This bill removes testing equipment from the list of equipment and products included in the definition of “drug paraphernalia.” Removes analyzing and testing from the definition of drug paraphernalia.

This bill removes analyzing and packaging from a separate codified definition of drug paraphernalia.

This bill includes the following definitions:

- “Controlled substance analog” has the same meaning as described in Section 11041.
- “Controlled substance checking” means the process of identifying, analyzing, or testing a substance, controlled or otherwise, or residue on drug paraphernalia or controlled substance packaging, to determine its chemical composition to assist in determining whether the substance contains contaminants, toxic substances, hazardous compounds, or other adulterants within a substance.
- “Controlled substance checking equipment” means equipment, products, technologies, or materials used, designed for use, or intended for use to perform chemical analysis of

controlled substances or controlled substance analogs, including materials and items used by the person operating the equipment or products to store, measure, or process samples for analysis. Includes, but is not limited to, fentanyl test strips, other controlled substance or controlled substance analog immunoassay strips, colorimetric reagents, spectrometers such as Fourier transform infrared and Raman spectrometers, and equipment that uses high-performance liquid chromatography, gas chromatography, mass spectrometry, or nuclear magnetic resonance techniques.

- “Controlled substance checking service provider” means an individual or group that provides controlled substance checking services.
- “Controlled substance packaging” means the materials or items used by persons selling, buying, or ingesting controlled substances or controlled substance analogs to store, contain, cover, or transport small amounts of one or more controlled substances or controlled substance analogs.
- “Harm reduction” has the same meaning as described in subdivision (a) of Section 1954.08 of the Civil Code.
- “Harm reduction service provider” means a community-based organization, nonprofit organization, homeless service organization, mutual aid group, harm reduction organization, or outreach worker that works with individuals who use controlled substances or controlled substance analogs.
- “Person” means an individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal, commercial, or informal entity or group.

This bill provides that it is not a violation for a controlled substance checking service provider or a harm reduction service provider to do any of the following solely for the purpose of providing controlled substance checking services:

- Receive voluntarily provided samples of substances potentially containing controlled substances or controlled substance analogs.
- Possess, transport, transfer, or store a sample of a controlled substance or a controlled substance analog solely for the purpose of analyzing the substance to determine its chemical composition.
- Use available technologies to analyze the contents of samples to obtain timely and accurate information regarding the composition of controlled substances or controlled substance analogs.
- Provide results of analysis obtained from controlled substance checking equipment to the person requesting controlled substance checking services.
- Provide information and harm reduction services and advice to help individuals make informed decisions about use of controlled substances and controlled substance analogs.
- Disseminate data containing only the results of analysis and containing no personally identifiable information to community members at risk of overdose.
- Arrange for a sample of a substance to be tested by a laboratory for secondary verification, including transportation of samples, if necessary.
- Purchase, obtain, possess, provide, transport, distribute, use, or evaluate the use of controlled substance checking equipment.
- Provide training and technical assistance concerning controlled substance checking equipment, the process of controlled substance checking, and the purpose of controlled substance checking.

- Work in collaboration with a county health officer, the State Department of Public Health, or a research institution to conduct or engage in any activities authorized by the provisions of this bill.

This bill provides that in operating a controlled substance checking service, personally identifiable information may be collected from a service user providing a controlled substance or a controlled substance analog to a controlled substance checking service provider or harm reduction service provider only as necessary to communicate controlled substance checking results to the service user. Prohibits personally identifiable information collected solely for the purposes of communicating controlled substance checking results from being retained after delivery of results.

This bill prohibits a program, employee, contractor, volunteer, owner, or other person acting in the good faith provision of controlled substance checking services and acting in accordance with established protocols from being subjected to any of the following:

- Arrest or prosecution for a violation of the provisions of this bill, including for attempting to, aiding and abetting in, or conspiracy to commit a violation of those provisions.
- Forfeiture of property.
- Any civil or administrative penalty or liability of any kind, including disciplinary action by a professional licensing board, credentialing restrictions, contractual or civil liability, or employment action.
- Denial of a right or privilege for actions, conduct, or omissions relating to the operation of a controlled substance checking service and any rules adopted pursuant to the provisions of this bill.

This bill prohibits an individual possessing a controlled substance or a controlled substance analog who provides any portion of the substance to a controlled substance checking service provider or harm reduction service provider for the purpose of obtaining controlled substance checking services from being subject to any criminal or civil penalty, forfeiture of property, or investigation based solely on the individual's utilization of a controlled substance checking service or actions authorized by this act, including, but not limited to, any of the following:

- Arrest.
- Criminal prosecution, including a violation or revocation of a grant of probation, parole, pretrial release, or any other form of community supervision.
- Civil, disciplinary, or administrative action.
- Detention, referral, or transfer to United States Immigration and Customs Enforcement.

This bill prohibits a government agency from collecting, maintaining, using, or disclosing any personal information relating to an individual from whom the agency receives a controlled substance or controlled substance analog for checking or disposal and prohibits the agency from providing this information to law enforcement.

This bill authorizes the collection and disclosure of aggregate information that is not linked to an individual and does not contain a personal identifier and its released to clinicians, public health officials, researchers, or other local and state agencies as requested and may be stored or uploaded onto an internet website.

COMMENTS

1. Need For This Bill

According to the author:

AB 2136 would clarify existing law to protect individuals obtaining or providing drug checking services. Drug checking refers to the use of technology to gain insight into the chemical composition of a controlled substance in order to determine whether the substance contains contaminants.

As the state continues to address the unprecedented fentanyl crisis, our response must be guided by evidence, and AB 2136 clears the path for a proven strategy to help us reduce drug related mortality and other harmful consequences related to the adulterated drug supply. Drug checking will lead to long-term public health monitoring to continue informing our response to the ongoing overdose crisis that continues to claim the lives of members of our community at an alarming rate.

2. Overdose Deaths

The number of deaths involving opioids, and fentanyl in particular, has increased significantly over the course of the last decade. In California, between 2019 and 2022, the number of opioid-related deaths in the state increased by 121 percent. (Ibarra et al., *California's opioid deaths increased 121% in 3 years. What's driving the crisis?*, CalMatters.org (July 25, 2023) <<https://calmatters.org/explainers/california-opioid-crisis/>>.) In 2022, the year for which the most recent data is available, there were 21,316 emergency room visits resulting from an opioid overdose, 7,385 opioid-related overdose deaths, and 6,473 overdose deaths from fentanyl. (CDPH, *Overdose Surveillance Dashboard* <<https://skylab.cdph.ca.gov/ODdash/?tab=Home>>.)

3. Harm Reduction Approach to Drug Use

Initially developed for adults with substance use disorders for whom abstinence was not feasible, harm reduction is a public health strategy in which the primary objective is to minimize the adverse consequences of the problematic behavior. Examples of harm reduction strategies employed by the state to address the ongoing opioid epidemic include the expansion of access to medication-assisted treatment services and the naloxone distribution program. The legalization of pharmacists to furnish hypodermic needles and syringes without a prescription or a permit to a person who is 18 or older as well as the legalization of a person who is 18 or older to obtain hypodermic needles and syringes from a physician or pharmacist without a prescription or license are additional examples of harm reduction strategies designed to minimize the spread of HIV, hepatitis B, and hepatitis C among people who inject drugs.

Fentanyl test strips (FTS), used to detect fentanyl in illicit or unregulated drugs, are another harm reduction strategy that can reduce the risk of overdose. FTS can be used to test injectable drugs, powders, and pills. (<https://harmreduction.org/issues/fentanyl/>) Their use has become more common in recent years as drug overdose deaths, often attributable to fentanyl, have increased significantly. In 2021, the CDC and Substance Abuse and Mental Health Services Administration announced that federal funding could be used by grantees, including state, county, and city health departments, to purchase FTS. (<https://www.cdc.gov/media/releases/2021/p0407-Fentanyl-Test-Strips.html>)

FTS have historically been prohibited under drug paraphernalia laws although many states have recently legalized them. Similar products exist to test for the presence of other controlled substances. In 2022, AB 1598, Chapter 201, Statutes of 2022, was enacted which excluded from the definition of “drug paraphernalia” any testing equipment that is designed, marketed, used, or intended to be used, to test for the presence of fentanyl or any fentanyl analog. AB 1598 also applied to testing equipment that is designed, marketed, used, or intended to be used, to test for the presence of ketamine and GHB which are often surreptitiously placed into a person’s drink.

Recently, providers of harm reduction services to drug users, such as needle exchange programs, have started offering drug checking services as well. For example, Community Health Project Los Angeles and UCLA have partnered to offer weekly drug checking services at two sites in Los Angeles. (Emily Alpert Reyes, *What’s in illegal drugs?: A UCLA team takes testing to the streets to find out* (Jul. 24, 2023) available at <<https://www.latimes.com/california/story/2023-07-24/drug-checking>>.) In order to test and analyze drugs, the team uses a machine that employs a technique called Fourier-transform infrared spectroscopy. (*Ibid.*) The machine uses light which results in wavelengths produced by chemicals within the sample, and a computer program offers suggestions for the closest matches. (*Ibid.*) This method allows the analyst to check the substance against multiple drugs for matches. (*Ibid.*) Because the machine cannot detect substances that are present in amounts of 5% or less, the team also uses testing strips to check the samples. (*Ibid.*) Testing a sample with the machine and testing strips takes around 10 minutes. (*Ibid.*)

4. Effect of This Bill

Current law includes testing equipment designed for use or marketed for use in identifying, or in analyzing the strength, effectiveness, or purity of controlled substances in the definition of drug paraphernalia. (Health & Saf. Code, §§ 11014.5, 11364.5.) However, if the drug testing equipment is designed, marketed, and intended to be used to test for ketamine, GHB, or fentanyl and its analogues, it is not considered drug paraphernalia. (*Ibid.*) This bill would remove drug testing equipment from the definition of drug paraphernalia altogether rather than keep it within the definition of drug paraphernalia but with the above described exemption.

This bill creates authorizes a controlled substance checking service provider or a harm reduction service provider to engage in specified conduct for the purpose of providing controlled substance checking services, including receiving voluntarily provided samples of substances potentially containing controlled substances or controlled substance analogs; possessing, transporting, transferring, or storing a sample of a controlled substance or a controlled substance analog solely for the purpose of analyzing the substance to determine its chemical composition; and using available technologies to analyze the contents of samples to obtain timely and accurate information regarding the composition of controlled substances or controlled substance analogs, among others. In other words, a controlled substance checking service provider would be provided exempt from prosecution for any drug offenses for the conduct delineated in the bill if done for the purposes of providing drug checking services.

With respect to a program, employee, contractor, volunteer, owner, or other person acting in the good faith provision of controlled substance checking services, the entity or individual would not be subject to arrest or prosecution for violating any drug offense, forfeiture of property, any civil or administrative penalty or liability of any kind. With respect to a person possessing a controlled substance or a controlled substance analog who provides any portion of the substance to a

controlled substance checking service provider or harm reduction service provider for the purpose of obtaining controlled substance checking services, the person would not be subject to any criminal or civil penalty, forfeiture of property, or investigation based solely on the individual's utilization of a controlled substance checking service, including, but not limited to, arrest, criminal prosecution, including a violation or revocation of a grant of probation, parole, pretrial release, or any other form of community supervision, civil, disciplinary, or administrative action, or immigration detention.

5. Argument in Support

The California Consortium of Addiction Programs and Professionals writes:

Treating drug testing equipment as paraphernalia perpetuates a punitive approach toward drug policy that has long proven to be ineffective and have deadly consequences. With contaminants and toxic substances becoming increasingly ubiquitous in the illicit drug supply, the criminalization of drug testing equipment merely serves to propel overdose morbidity rates to new highs. ...

AB 2136 will decriminalize all drug testing equipment by excluding testing equipment from the definition of drug paraphernalia. It also explicitly provides immunity for individuals and organizations providing testing services to protect those offering the opportunity to test substances for potential dangers.

As the previous sponsors of a similar measure to remove fentanyl testing equipment from the definition of drug paraphernalia, we believe AB 2316 is the next logical step in moving towards a harm reduction response in our ongoing drug epidemic.

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