

HOUSE BILL REPORT

HB 1237

As Reported by House Committee On:
Commerce & Gaming
Appropriations

Title: An act relating to reforming the compliance and enforcement provisions for marijuana licensees.

Brief Description: Reforming the compliance and enforcement provisions for marijuana licensees.

Sponsors: Representatives Kirby, MacEwen, Stanford, Vick, Blake, Eslick and Appleton.

Brief History:

Committee Activity:

Commerce & Gaming: 1/28/19, 2/21/19 [DPS];

Appropriations: 2/28/19 [DP2S(w/o sub COG)].

Brief Summary of Second Substitute Bill

- Modifies how the Washington State Liquor and Cannabis Board (LCB) may enforce laws and rules against regulated marijuana businesses, and how these businesses may comply with laws and rules.
- Requires rulemaking by the LCB regarding enforcement procedures, with specific components, such as to address de minimis violations.
- Requires and authorizes rulemaking by the LCB regarding penalties, with limits, such as on the effect of cumulative violations, and on what types of violations may result in license cancellation when a heightened evidentiary standard is met.
- Limits the LCB's authority to issue violations in certain circumstances involving unpreventable employee misconduct, if the licensee has a documented, thorough internal-compliance program.
- Prohibits the LCB from considering any violation from before April 30, 2017, as grounds for negative licensing actions, except for specific types of violations, including sales to minors and diversion of product, when a heightened evidentiary standard is met.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Designates the LCB's officers and employees who enforce marijuana laws as inspectors with authority to issue notices of violations but who do not have law enforcement authority.

HOUSE COMMITTEE ON COMMERCE & GAMING

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Stanford, Chair; Reeves, Vice Chair; MacEwen, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Blake, Jenkin, Kirby, Morgan, Vick and Young.

Minority Report: Without recommendation. Signed by 1 member: Representative Kloba.

Staff: Peter Clodfelter (786-7127).

Background:

Under a process established through agency rulemaking to implement Initiative 502 (2012) and subsequent legislation, the Washington State Liquor and Cannabis Board (LCB) has adopted rules establishing penalties for violations of marijuana statutes and rules. The current rules set out a process that separates violations into five main categories: Group 1 violations (public safety); Group 2 violations (regulatory); Group 3 violations (licensing); Group 4 violations (nonretail); and Group 5 violations (transportation).

The LCB's current rules include guidelines on the use of mitigating circumstances and aggravating circumstances. Penalties include monetary penalties as well as license cancellation and suspension, and may vary according to the category of violation and how many similar violations a licensee has within a three-year window. In some circumstances, licensees may opt for a monetary fine or a license suspension.

The LCB's current rules also include a process of offering settlement conferences to licensees who have received notice of an alleged administrative violation, which may be held with a hearing examiner or LCB designee. In this process, if a settlement agreement is reached at the settlement conference, the LCB may disapprove of the terms. In this case, the LCB will notify the licensee of the decision and the licensee is provided the option to renegotiate with the hearing examiner or LCB designee, accept the originally recommended penalty, or request an administrative hearing on the charges.

Summary of Substitute Bill:

Legislative findings are included, and modifications are made to how the Washington State Liquor and Cannabis Board (LCB) may enforce laws and rules against the licensed marijuana businesses the LCB regulates, as well as to how marijuana licensees may comply with laws and rules. The LCB must prescribe procedures for enforcement with the following

components: (1) a process for the issuance of written warnings for de minimis violations that lack a direct or immediate relationship to public safety; (2) a process for waiving any fines, civil penalties, or administrative sanctions for violations that have no direct or immediate relationship to public safety and are corrected by the licensee within seven days or an earlier time specified by the LCB; and (3) a compliance program where licensees may request compliance assistance and inspections without issuance of a violation, if any noncompliant issues are resolved within a specified time.

The LCB must adopt rules establishing penalties for violations of marijuana law and may establish escalating penalties. However, the cumulative effect of any escalating penalties must last two years or less. Also, a single or cumulative violation may not result in license cancellation unless the LCB can prove by clear, cogent, and convincing evidence that either the licensee has engaged in a pattern or practice of intentional and flagrant disregard of the law, or the current or prior administrative violation is any of the following: (1) diversion of product to the illicit market or across state lines; (2) sales of marijuana to minors; (3) diversion of revenue to criminal enterprises; (4) use of firearms in a facility licensed by the LCB that poses a direct and significant threat to public safety; or (5) other nonmarijuana-related criminal behavior.

Additionally, the LCB's rules may include license cancellation for cumulative violations only when a licensee commits at least four violations within a two-year period. The LCB must consider aggravating and mitigating circumstances and deviate from prescribed penalties accordingly, and must authorize enforcement officers to do the same. The LCB may not issue a violation if there is unpreventable employee misconduct that led to the violation, if the licensee shows the existence of a thorough compliance program, including rules, training, and equipment designed to prevent the violation, adequate communication of the rules to employees, steps to discover and correct violations of the rules, and effective enforcement of its compliance program as written in practice and not just in theory.

Further, the LCB is prohibited from considering any violation from before April 30, 2017, as grounds for denial, suspension, revocation, cancellation, or nonrenewal, unless the LCB can prove by clear, cogent, and convincing evidence that the prior administrative violation is any of the following: (1) diversion of product to the illicit market or across state lines; (2) sales of marijuana to minors; (3) diversion of revenue to criminal enterprises; (4) use of firearms in a facility licensed by the LCB that poses a direct and significant threat to public safety; or (5) other nonmarijuana-related criminal behavior.

All of the above modifications to the enforcement and compliance process expire on August 1, 2024. In another section of law without an expiration date, it is provided that for the purposes of reviewing any application for a license and for considering the denial, suspension, revocation, cancellation, or renewal or denial thereof, of any license, the LCB may consider any prior administrative violation history record with the LCB. However, any prior administrative violation that occurred before April 30, 2017, must not be considered unless the LCB can prove by clear, cogent, and convincing evidence that the prior administrative violation evidences any of the following: (1) diversion of product to the illicit market or across state lines; (2) sales of marijuana to minors; (3) diversion of revenue to criminal enterprises; (4) trafficking of a controlled substance; or (5) use of firearms in a facility licensed by the LCB.

Authorization is provided so that the administrative law judges may consider mitigating and aggravating circumstances in any case and may deviate from any prescribed penalties. Requirements are added related to the LCB's use of settlement conferences and settlement agreements, which may occur after a licensee receives a notice of an alleged administrative violation. If a settlement agreement is entered into between a marijuana licensee and a hearing examiner or LCB designee at or after a settlement conference, the terms of the settlement agreement are binding on the LCB and the LCB may not subsequently disapprove, modify, change, or add to the terms of the settlement agreement, including terms addressing penalties and license restrictions. Definitions of "settlement conference" and "settlement agreement" are included.

The Washington State Liquor and Cannabis Board is defined as the "board" in the Controlled Substances Act, and various references are changed accordingly.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following changes to the original bill:

- The Washington State Liquor and Cannabis Board (LCB) is prohibited from considering any violation by a marijuana licensee that occurred before April 30, 2017, as grounds for negative licensing decisions except for the certain circumstances provided in the original bill, rather than generally prohibiting the consideration of violations occurring before June 30, 2018, as grounds for negative licensing decisions.
- Officers and employees of the LCB, while enforcing marijuana laws and rules, are designated as inspectors who have authority to issue notices of violations but who have no authority to otherwise enforce penal laws or act as a law enforcement officer as is authorized with respect to enforcement of liquor laws.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Enforcement practices of marijuana laws by the Washington State Liquor and Cannabis Board (LCB) are in need of reform. The goal of enforcement should be compliance, not to hurt businesses for inadvertent de minimis violations. The situation is reminiscent of a previous enforcement reform effort by the Legislature in the context of the Department of Labor and Industries. There are examples of overly aggressive enforcement and licensees are afraid to ask a question about compliance, for fear of being issued a violation. The system should be structured so there are incentives to self-report so

compliance can be reached. One disintegrated tag on a marijuana plant should not be counted against a licensee and result in risk of losing a license, and five untagged plants should not count the same as hundreds of untagged plants. Currently, the system is abused because businesses will submit complaints about their competitors to trigger investigations. Licensees feel they get different answers to enforcement questions depending on who they talk to at a given time. The bill allows for greater nuance in the enforcement process. The current situation is exacerbated by the ongoing problems with the traceability system that licensees must use but which is not fully functional. An example occurred where an owner made a personal loan to the business to avoid bankruptcy due to the disruption to business caused by the traceability system failures, and the loan was used to initiate an enforcement action. A new interim policy allows for this type of loan, but it was not then available to the individual licensee in that example. Because cumulative violations within several years may result in license cancellation, hundreds of jobs are at risk of loss over relatively minor violations. There is a better enforcement culture within the restaurant and hospitality industry. Licensees are told there is a process for mitigating violations, but licensees do not see it in use in situations where it seems warranted. Licensees all want to follow the law and rules, and expend significant effort doing so and staying up to date on the fast changing rules.

(Opposed) None.

(Other) When voters enacted Initiative 502 (2012) and tasked the LCB with developing a tightly regulated marijuana market within the state, the LCB looked to, and still does, the federal Cole Memorandum and the enforcement priorities and policies expressed within it. Although the Cole Memorandum was rescinded, the priorities including preventing youth access, diversion of product, and preventing criminal elements from participating in the regulated market, all still guide the LCB's actions and enforcement priorities. Currently, the LCB is engaged in rulemaking to modify the penalty structure for marijuana violations. Proposed changes include making violations stay with a licensee for a two-year period rather than a three-year period. The LCB is currently working on addressing some of the issues raised, and is willing to engage in additional restructuring, but the LCB has significant concerns with parts of the bill, and feels the situation and the LCB's actions have not been fairly represented. The LCB does not cancel a license for clerical errors, and licensees have opportunities for fair hearings when violations are alleged. There is no definition of a "de minimis" in the bill, or what it means for a violation to have a relationship to public safety. This could make implementation challenging. The proposed changes will have a major fiscal impact on the agency, and will choke the agency's enforcement system. The reason Washington's marijuana system has been so successful relative to other states is because the system is so tightly regulated. Some licensees feel the LCB's enforcement is fair, and have found there is a process for verbal warnings, written warnings, and then violations. It is true there are businesses who violate the law, some habitually, and these cases deserve strong enforcement. If the bill continues in the legislative process, remove the provisions providing amnesty for certain violations, which goes too far. While reforming enforcement culture, it is important that bad actors are still held accountable. Bright-line standards are necessary to differentiate technical violation from true violations. There should be more opportunities for education of laws and rules. Consider creating a work group or holding more hearings on these issues, but the bill is not needed.

Persons Testifying: (In support) Representative Kirby, prime sponsor; Vicki Christophersen, Washington CannaBusiness Association; Chris Masse, Miller Nash Graham & Dunn, LLP; Emily Lade, Smokey Point Productions; Wendy Hull, Fairwinds Manufacturing; Andy Brassington, Evergreen Herbal; and Tammi Hill, Cannex.

(Other) Chris Thompson and Russ Hauge, Washington State Liquor and Cannabis Board; Caitlein Ryan, The Cannibus Alliance; Shawn Wagenseller, Washington Bud Company; Arthur West; and Seth Dawson, Washington Association for Substance Abuse Prevention.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Commerce & Gaming. Signed by 32 members: Representatives Ormsby, Chair; Bergquist, 2nd Vice Chair; Robinson, 1st Vice Chair; Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Caldier, Chandler, Cody, Dolan, Dye, Fitzgibbon, Hansen, Hoff, Hudgins, Jinkins, Kraft, Macri, Mosbrucker, Pettigrew, Pollet, Ryu, Schmick, Senn, Springer, Stanford, Steele, Sullivan, Sutherland, Tarleton, Tharinger and Ybarra.

Staff: Linda Merelle (786-7092).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Commerce & Gaming:

The Appropriations Committee recommended the addition of a null and void clause, making the bill null and void if specific funding for the act is not provided by June 30, 2019.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony:

(In support) Under this bill, the Washington State Liquor and Cannabis Board (LCB) is able to address licensees in a manner that is similar to the way that the Department of Labor and Industries addresses licensees. Licensees would be able to fix problems before the LCB imposes a sanction for a violation. This bill is a work in progress, and the provisions that drive costs may be amended.

(Opposed) None.

(Other) The LCB has concerns regarding both the policy and fiscal aspects of the provisions bill.

Persons Testifying: (In support) Vicki Christophersen, Washington CannaBusiness Association.

(Other) Chris Thompson, Washington State Liquor and Cannabis Board.

Persons Signed In To Testify But Not Testifying: None.