

SENATE BILL REPORT

SB 5318

As of February 3, 2019

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: Senators Rivers, Palumbo and Wagoner.

Brief History:

Committee Activity: Labor & Commerce: 1/31/19.

Brief Summary of Bill

- Modifies how the 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.
- Requires the LCB to consider aggravating and mitigating circumstances, and to deviate from prescribed penalties accordingly.
- 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 June 30, 2018, 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.
- Modifies the settlement conference and agreement process to make settlement agreements binding in certain circumstances.

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.

- Expires certain new provisions on August 1, 2024.

SENATE COMMITTEE ON LABOR & COMMERCE

Staff: Richard Rodger (786-7461)

Background: The LCB has adopted rules establishing penalties for violations of marijuana statutes and rules. The rules separate the 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 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 four-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 hearings examiner or LCB designee, accept the originally recommended penalty, or request an administrative hearing on the charges.

Summary of Bill: Legislative findings are included, and modifications are made to how the 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 (1) a process for the issuance of written warnings for de minimis violations lacking a direct or immediate relationship to public safety, and (2) a process for waiving any fines, civil penalties, or administrative sanctions for violations having 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. Additionally, a single or cumulative violation may not result in license cancellation unless the LCB can prove by clear, cogent, and convincing evidence 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:

- a diversion of product to the illicit market or across state lines;
- involving sales of marijuana to minors;
- a diversion of revenue to criminal enterprises;
- involving the use of firearms in a facility licensed by the LCB that poses a direct and significant threat to public safety; or
- any other nonmarijuana-related criminal behavior.

The LCB's rules may include license cancellation for cumulative violations only when a licensee has 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 leading 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 June 30, 2018, as grounds for denial, suspension, revocation, cancellation, or nonrenewal, unless the LCB can prove by clear, cogent, and convincing evidence the prior administrative violation is any of the following:

- a diversion of product to the illicit market or across state lines;
- involving sales of marijuana to minors;
- a diversion of revenue to criminal enterprises;
- involving the use of firearms in a facility licensed by the LCB that poses a direct and significant threat to public safety; or
- other nonmarijuana-related criminal behavior.

All of the above modifications to the enforcement and compliance process expire on August 1, 2024.

For the purposes of reviewing any application for a license and for considering the denial, suspension, revocation, cancellation, or renewal or denial of any license, the LCB may consider any prior administrative violation history record. However, any prior administrative violation occurring before June 30, 2018, must not be considered, unless the LCB can prove by clear, cogent, and convincing evidence the prior administrative violation evidences:

- diversion of product to the illicit market or across state lines;
- sales of marijuana to minors;
- diversion of revenue to criminal enterprises;
- trafficking of a controlled substance; or
- use of firearms in a facility licensed by the LCB.

Authorization is provided so 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.

A "settlement conference" is defined as a meeting or discussion between a licensed marijuana producer, processor, retailer, researcher, transporter, or authorized representative of any of the preceding licensees, and a hearing examiner or designee of the LCB, held for purposes such as discussing the circumstances surrounding an alleged violation of law or rules by the licensee, the recommended penalty, and any aggravating or mitigating factors, and is intended to resolve the alleged violation before an administrative hearing or judicial proceeding is initiated.

A "settlement agreement" is defined as the agreement or compromise between a licensed marijuana producer, processor, retailer, researcher, or transporter, and the hearing examiner or LCB designee with authority to participate in the settlement conference; it includes the terms of the agreement or compromise regarding an alleged violation or violations by the licensee of laws or rules, as well as any related penalty or licensing restriction. A settlement agreement must be in writing and signed by the licensee and the hearing examiner or LCB.

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

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: I never thought I would ever look to L&I for a solution for anything, but in this case I think they get it right. L&I welcomes business owners to come to the regulator and ask them for assistance in doing things correctly. The LCB needs a nudge from the Legislature to create an enforcement program that creates an objectively level playing field. LCB currently operates on compliant basis where competitors or disgruntled employees can just file complaints to get rid of a business. There are people out there that are losing their livelihood and investment due to de minimis violations.

We need LCB to have compliance mindset, not a criminal mindset. These are serious issues that the Legislature needs to address. Often times a licensee will just settle a case to avoid expensive litigation; however, that creates problems when they accumulate infractions with cumulative penalties. The LCB has recently been rejecting our settlement agreements more frequently. The licensees are afraid to speak out for fear of retribution. If the LCB issues too many violations, our banks will potentially drop us as clients. There should be a grace period for the early penalties that were issued with the industry was just learning its business. This

bill could make a positive change in the culture of the LCB and allow mitigation of some of the de minimis penalties.

CON: The bill raises a very important issue that appears to be the culture of the LCB enforcement arm being complaint driven. There are many examples of where the LCB's lack of enforcement is not protecting the public's safety. The bill is too broad and should not give amnesty to the early violations.

OTHER: We understand the concerns being raised, but do not want to see the enforcement undermined. We are hopeful that the LCB can work out a better system. We recognize the concerns and want to talk further about how we can address some of these concerns. The LCB provides assistance and information to assist the licensees and we are open to talking about restructuring and expanding those efforts. A lot of our work is not complaint driven and we do a lot of compliance work. Sixty percent of the times we see violations we do not write them up. The public safety standard creates ambiguities and the clear, cogent, and convincing standard will be difficult to demonstrate.

Persons Testifying: PRO: Senator Ann Rivers, Prime Sponsor; Senator Guy Vicki Christophersen, Washington CannaBusiness Association; Chris Masse, Miller Nash; Brooke Davies; Andy Brassington, Evergreen Herbal; Wendy Hull, Fairwinds.

CON: Jim MacRae, Straight Line Analytics.

OTHER: Seth Dawson, Washington Association for Substance Abuse & Violence Prevention; Chris Thompson, Liquor and Cannabis Board.

Persons Signed In To Testify But Not Testifying: No one.