

SENATE BILL REPORT

ESSB 5318

As Amended by House, April 16, 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: Senate Committee on Labor & Commerce (originally sponsored by Senators Rivers, Palumbo and Wagoner).

Brief History:

Committee Activity: Labor & Commerce: 1/31/19, 2/20/19 [DPS-WM].

Ways & Means: 2/28/19, 3/01/19 [DPS (LBRC), DNP].

Floor Activity:

Passed Senate: 3/11/19, 41-5.

Passed House: 4/16/19, 88-8.

Brief Summary of Engrossed First Substitute Bill

- Specifies when the Liquor and Cannabis Board (LCB) may issue a notice of correction under the technical assistance program.
- Expands existing programs for compliance education and requires a program for voluntary compliance.
- Requires rulemaking on enforcement procedures, with specific components.
- Requires rulemaking regarding penalties, with limits, such as on the effect of cumulative violations.
- Specifies the types of violations which may result in license cancellation.
- Requires consideration of aggravating and mitigating circumstances.
- Requires the LCB to define regulatory violations that have no direct or immediate relationship to public safety.
- Allows a licensee to correct violations not related to public safety within a reasonable amount of time.

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.

- Limits the authority to issue violations involving unpreventable employee misconduct, under certain circumstance.
- Modifies the settlement conference and agreement process.
- Establishes a legislative work group on cannabis enforcement and training processes and procedures.

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: That Substitute Senate Bill No. 5318 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Keiser, Chair; Conway, Vice Chair; King, Ranking Member; Saldaña, Walsh and Wellman.

Staff: Richard Rodger (786-7461)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Operating, Capital Lead; Mullet, Capital Budget Cabinet; Braun, Ranking Member; Brown, Assistant Ranking Member, Operating; Becker, Billig, Carlyle, Conway, Darneille, Hasegawa, Keiser, Liias, Palumbo, Pedersen, Rivers, Schoesler, Van De Wege, Wagoner, Warnick and Wilson, L..

Minority Report: Do not pass.

Signed by Senator Honeyford, Assistant Ranking Member, Capital.

Staff: Alia Kennedy (786-7405)

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 Engrossed First Substitute 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.

Conditions are specified under which the LCB may issue a notice of correction, similar to the process identified for other regulatory agencies with a technical assistance program.

LCB's adoption of rules must perfect and expand existing programs for compliance education for licensed marijuana businesses, and institute a program for voluntary compliance solely through the use of advice and consultation, including recommendations of methods to abate violations. A program of voluntary compliance and the provision of advisory and consultative services is set forth.

The LCB may issue a civil penalty without first issuing a notice of correction in the following three circumstances:

- when a person has previously been given notice of, or been subject to, an enforcement action for the same or similar violation of the same statute or rule;
- when compliance is not achieved by the date established by the LCB in a previous notice of correction and if the LCB has responded to a request for review of the date by reaffirming the original date or establishing a new date; or
- when the LCB can prove by a preponderance of the evidence any of the following violations have occurred: (a) diversion of marijuana product to the illicit market or sales across state lines; (b) furnishing marijuana products to minors; (c) diversion of revenue from the sale of a marijuana product to criminal enterprises, gangs, or cartels; (d) use of firearms in a facility licensed by the LCB that poses a direct and significant threat to public safety; or (e) the commission of nonmarijuana-related crimes.

The LCB must prescribe procedures for enforcement with (1) a process for issuing written warnings or notices to correct for regulatory violations lacking a direct or immediate relationship to public safety; (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 a reasonable amount of time; and (3) a compliance program where licensees may request compliance assistance and inspections without issuance of a penalty, sanction, or other violation for 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. The cumulative effect of any escalating penalties is limited to the last two years or less. A single or cumulative violation may not result in license cancellation, unless the LCB can prove by clear, cogent, and convincing evidence that the administrative violation evidences intentional or grossly negligent action or inaction that results in a high probability of:

- a diversion of product to the illicit market or across state lines;

- furnishing 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
- the commission of nonmarijuana-related crimes.

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 employee misconduct that led to the violation if the licensee documents that before the date of the violation the licensee established a compliance program designed to prevent the violation, performed meaningful training with employees designed to prevent the violation, and had not enabled or ignored the violation or other similar violations in the past.

No violation from before April 30, 2017, may be considered as grounds for denial, suspension, revocation, cancellation, or nonrenewal of a marijuana license, unless the LCB can prove by clear, cogent, and convincing evidence that the prior administrative violation is any of the following violations:

- diversion of marijuana product to the illicit market or sales across state lines;
- furnishing of marijuana product to minors;
- diversion of revenue from the sale of marijuana product to criminal enterprises, gangs, or cartels;
- use of firearms in a facility licensed by the LCB that poses a direct and significant threat to public safety; or
- the commission of nonmarijuana-related crimes.

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 criminal arrests or conviction.

Authorization is provided so the administrative law judges may consider mitigating and aggravating circumstances in any case and may deviate from any prescribed penalties.

A "settlement conference" is defined as a meeting or discussion between a licensed marijuana business and a hearing examiner or designee of the LCB. The conference is held to discussing the circumstances surrounding an alleged violation of law or rules by the licensee, the recommended penalty, and any aggravating or mitigating factors. The conference 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 licensee and the hearing examiner or LCB designee with authority to participate in the settlement conference. Terms of the settlement agreement must be given substantial weight and the LCB may only disapprove, modify, change, or add to the terms of the settlement agreement

including terms addressing penalties and license restrictions if it finds the agreement to be clearly erroneous.

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

A legislative work group on cannabis enforcement and training processes and procedures (work group) is established, with members as follows:

- one member from each of the two largest caucuses of the Senate, appointed by the President of the Senate;
- one member from each of the two largest caucuses of the House of Representatives, appointed by the Speaker of the House of Representatives;
- members representing each of the trade associations representing licensed cannabis businesses and one representative of a labor union representing employees who are enforcement officers for the LCB, appointed jointly by the President of the Senate and the Speaker of the House of Representatives;
- one member representing the Governor, appointed by the Governor; and
- one member representing the LCB, appointed by the chair of the LCB.

The work group must review the following issues:

- the use of anonymous complaints to initiate enforcement actions;
- the uniform qualifications and experience that should be established for enforcement officers;
- the training and guidelines given to enforcement officers;
- whether the LCB should create an ombuds position where licensees may register concerns about the LCB's procedures, actions, or employees, without threat of retaliation; and
- other issues identified by the cochairs of the work group.

A legislative member must convene the work group's initial meeting, and the work group must choose its cochairs from among its legislative membership. Staff support for the work group must be provided by Senate Committee Services and the House Office of Program Research. The work group must report its findings and recommendations to the appropriate committees of the Legislature by December 15, 2019.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: Yes.

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

Staff Summary of Public Testimony on Original Bill (Labor & Commerce): *The committee recommended a different version of the bill than what was heard.* 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 (Labor & Commerce): PRO: Senator Ann Rivers, Prime Sponsor; 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 and Violence Prevention; Chris Thompson, Liquor and Cannabis Board.

Persons Signed In To Testify But Not Testifying (Labor & Commerce): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): PRO: The intent of this bill is to create consistency around marijuana business compliance and enforcement rules. Some licensees have put their lifesavings into starting this business and want to be in compliance. This bill does not seek to change anything as it relates to public safety. The bill models successful programs from other agencies that have a compliance first mentality. The process established in the bill would give licensees a chance to correct actions that are not a threat to public safety so that those businesses can achieve compliance without

receiving a violation that can result in cancellation of their license. There may be areas that need perfection as it moves through the process.

Persons Testifying (Ways & Means): PRO: Senator Ann Rivers, Prime Sponsor; Vicki Christophersen, Washington CannaBusiness Association.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.

EFFECT OF HOUSE AMENDMENT(S):

- Changes the terms "responsible party" and "person" to the term "licensee" in the context of notices of corrections and civil penalties.
- Codifies the provisions relating to the LCB's issuance of civil penalties, in chapter 69.50 RCW instead of in chapter 43.05 RCW.
- Amends the enumerated circumstances in which the LCB may: (1) issue a civil penalty without first issuing a notice of correction, (2) cancel a license for a single violation, or (3) consider certain prior violations when making licensing decisions, so the LCB may do so if it can prove, by a preponderance of the evidence, the violation is the diversion of revenue to criminal enterprises, gangs, cartels, or parties not qualified to hold a marijuana license based on criminal history requirements. Eliminates the associated enumerated circumstance concerning the act of using firearms in a facility licensed by the LCB that poses a direct and significant threat to public safety. Includes the licensee's knowing misrepresentation of fact related to a violation as a factor in the LCB actions against a licensee.
- Amends the escalating penalties so it only applies to multiple violations that are the same or similar in nature.
- Replaces the clear, cogent, and convincing evidence standard with a preponderance of the evidence standard for proving violations that are punishable with license cancellation, denial, suspension, revocation, or nonrenewal.
- Provides the LCB may not consider any violation that occurred more than two years prior, rather than occurred before April 30, 2017, as grounds for denial, suspension, revocation, cancellation, or nonrenewal, unless one of the enumerated circumstances applies.
- Authorizes consideration of a public safety administrative violation history record when reviewing an application and considering the denial, suspension, revocation, cancellation, or nonrenewal of a license.
- When considering a cancellation of a license, the LCB must give substantial consideration to mitigating any penalty when there is employee misconduct that lead to the violation.
- Changes the term "hearing examiner" to "hearing officer" in the context of the settlement conferences. Eliminates the provision that the LCB may only disapprove, modify, change, or add to the terms of a settlement agreement if the LCB finds an agreement to be clearly erroneous.
- Eliminates the creation of the Legislative Work Group on Cannabis Enforcement and Training Processes and Procedures.
- Modifies the confidentiality provisions and adds a provision that valuable formulae or financial or proprietary commercial information records received during a consultative

visit, or while providing consultative services, are not subject to inspection under the Public Records Act.