

SENATE BILL REPORT

ESSB 5123

As Amended by House, March 29, 2023

Title: An act relating to the employment of individuals who lawfully consume cannabis.

Brief Description: Concerning the employment of individuals who lawfully consume cannabis.

Sponsors: Senate Committee on Labor & Commerce (originally sponsored by Senators Keiser, Frame, Hunt, Kuderer, Mullet, Nguyen, Randall, Stanford, Van De Wege and Wellman).

Brief History:

Committee Activity: Labor & Commerce: 1/10/23, 1/31/23 [DPS, DNP].

Floor Activity: Passed Senate: 2/22/23, 28-21.

Passed House: 3/29/23, 57-41.

Brief Summary of Engrossed First Substitute Bill

- Prohibits employers, with some exceptions, from discriminating against a person in hiring if the discrimination is based on the person's use of cannabis outside of work or on certain employer-required drug screening tests.

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: That Substitute Senate Bill No. 5123 be substituted therefor, and the substitute bill do pass.

Signed by Senators Keiser, Chair; Conway, Vice Chair; Saldaña, Vice Chair; Robinson and Stanford.

Minority Report: Do not pass.

Signed by Senators King, Ranking Member; Braun, MacEwen and Schoesler.

Staff: Jarrett Sacks (786-7448)

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

Background: Under federal and state law, cannabis is classified as a Schedule I substance. The manufacture, possession, or distribution of Schedule I substances is a criminal offense. Since 1998, Washington has allowed qualifying patients to use limited amounts of cannabis for medicinal purposes. Since 2012, adult-use, recreational cannabis has been legal in Washington.

Under state law, employers may establish drug-free workplace policies. Regardless of workplace policy, employers are not required to accommodate on-site medical use of marijuana. In general, there is no limitation on pre-employment drug screening in state law. Under federal law, some contractors and grantees are required to take steps to maintain a drug-free workplace, such as preparing a drug-free workplace policy and establishing a drug-free awareness program. Federal law requires certain safety and security sensitive positions be subject to drug and alcohol testing.

Summary of Engrossed First Substitute Bill: Employers are prohibited from discriminating against a person in hiring if the discrimination is based upon:

- the person's use of cannabis off the job and away from the workplace; or
- an employer-required drug screening test that identifies non-psychoactive cannabis metabolites in the person's hair, blood, urine, or other bodily fluids.

The bill does not:

- prohibit an employer from basing initial hiring decisions on scientifically valid drug screening conducted through methods that do not screen for non-psychoactive cannabis metabolites;
- apply to testing for controlled substances other than pre-employment, such as post-accident testing or testing because of suspicion of impairment or being under the influence of alcohol, controlled substances, medications, or other substances;
- affect the rights or obligation of an employer to maintain a drug and alcohol free workplace, or any other right or obligation of an employer required under federal law or regulation;
- apply to applicants in the airline or aerospace industries, or applicants applying for a position that requires a federal government background investigation or security clearance; or
- apply to safety-sensitive positions for which impairment while working presents a substantial risk of death.

Safety-sensitive positions that are excluded from the bill must be identified by the employer prior to the applicant's application for employment.

The bill also does not preempt state or federal law requiring an applicant to be tested for controlled substances as a condition of receiving employment, receiving federal funding or licensing-related benefits, or as required by federal contract. This includes laws requiring applicants to be tested or specifying the way they are tested. Employers may require an applicant to be tested for a spectrum of controlled substances, which may include cannabis,

as long as the cannabis results are not provided to the employer.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: The bill takes effect on January 1, 2024.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The bill protects people who use cannabis legally. It is limited to pre-employment screening and tests that detect compounds in the body that last for weeks after use. Cannabis metabolites are in the body for weeks, which is different from alcohol and other drugs. The status quo currently discriminates against medical cannabis patients.

CON: There are many jobs beyond just the building trades that should also have exclusions. Provisions should be added clarifying the bill is only about preemployment and employers policies should not be limited by the bill. Employers have an obligation to maintain safe workplaces and the current tests are the only tool to deal with cannabis use. The industry should invest in better tests first. Cannabis creates an unsafe workplace and the employer is responsible.

OTHER: While an exclusion for law enforcement is implied in the bill, the exclusion should be explicit. Cannabis helps people who work in construction with pain from their job, so the bill should not exclude the construction trades. Instead, impairment should be tested rather than testing for cannabis itself. The exclusion of construction trades harms worker recruitment.

Persons Testifying: PRO: Micah Sherman, Raven; Burl Bryson, The Cannabis Alliance.

CON: Bob Battles, Association of Washington Business (AWB); Jim King, Independent Business Association; Bruce Chattin, WA Aggregates & Concrete Assoc..

OTHER: Ahmed King, Black excellence in Cannabis; Peter Manning, Black excellence in Cannabis; Mike Asai, Black excellence in Cannabis; Damian Mims, Black excellence in Cannabis; Taylor Gardner, WASPC; Matthew Hepner, IBEW/ceww.

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

EFFECT OF HOUSE AMENDMENT(S):

Excludes from the bill persons seeking positions:

- with a general authority law enforcement agency;

- with a fire department, fire protection district, or regional fire protection service authority;
- as a position as a first responder; and
- as a position as a corrections officer.

Codifies the underlying bill in chapter 49.94 RCW, rather than chapter 49.44 RCW, subjecting its provisions to enforcement by the Attorney General and other limitations provided under the Fair Chance Act.