AOC | Association of Oregon Counties

Written Testimony of Rob Bovett, AOC Legal Counsel,
before the House Committee on Business and Labor
in opposition to House Bill 2655

Thursday, February 13, 2019

Dear Chair Barker, Vice-Chairs Barreto and Bynum, and Representatives Boles, Bonham, Boshart Davis, Clem, Doherty, Evans, Fahey, and Holvey,

Thank you for the opportunity to share a few thoughts with you regarding House Bill 2655. While I can certainly understand the impetus for HB 2655, for a number of very real legal, practical, and fiscal reasons, the Association of Oregon Counties (AOC) is opposed to the bill.

HB 2655 would make it unlawful for an employer to prohibit an employee from using, during nonworking hours, any substance that is lawful to use in this state, except in three circumstances: (1) When the prohibition relates to a "bona fide occupational qualification;" (2) when the employee is performing work while impaired; or (3) when an applicable collective bargaining agreement prohibits off-duty use of the substance. The bill is obviously targeted to the use of marijuana, which is lawful under state law, but prohibited under federal law.

Ballot Measure 91, which decriminalized recreational marijuana under state law, promised Oregonians that it would not be construed to "amend or affect state or federal law pertaining to employment matters." *See* 2015 Oregon Laws, Chapter 1 (2014 Ballot Measure 91) §4(1), now codified as ORS 475B.020(1). There were, and are, very good reasons for that promise. If enacted, the bill would immediately present direct conflicts of law, including, but not limited to:

1. Global preemption under the federal Controlled Substances Act (CSA), 21 USC § 801 *et seq*, per the Oregon Supreme Court decision in *Emerald Steel v BOLI*, 348 Or 159 (2010).[1] That decision is squarely on point. Although many counties, and many Oregon employers, treat

[1] The Oregon Supreme Court did, however, leave a legislative window open for possibly protecting certain disabled workers who use medical marijuana:

> "The only issue that employer's preemption argument raises is whether federal law preempts ORS 475.306(1) to the extent that it authorizes the use of medical marijuana. In holding that federal law does preempt that subsection, we do not hold that federal law preempts the other sections of the Oregon Medical Marijuana Act that exempt medical marijuana use from criminal liability. We also express no opinion on the question whether the legislature, if it chose to do so and worded Oregon's disability law differently, could require employers to reasonably accommodate disabled employees who use medical marijuana to treat their disability. Rather, our opinion arises from and is limited to the laws that the Oregon legislature has enacted." - *Emerald Steel v BOLI*, 348 Or 159 (2010) (footnote 12).

However, HB 2655 does not even attempt to utilize that possible legislative window.

marijuana like alcohol, and have personnel rules in place that might comply with HB 2655 to some extent, some counties, and many Oregon employers, do not. HB 2655 would unavoidably lead to litigation that, in my legal opinion, would result in the nullification of HB 2655 under the *Emerald Steel* precedent.

2. Specific preemption under federal law that mandates random drug testing of persons performing certain safety sensitive functions, such as holders of Commercial Driver Licenses (CDLs), and mandates policies that sanction employees that test positive. *See* Omnibus Transportation Employee Testing Act of 1991, PL 102-143, 105 Stat 917, 49 USC § 31306, 49 CFR Part 40, 49 CFR Part 382. Counties have many employees that fall within the mandates of those federal laws and rules, such as heavy equipment operators that work for county road departments. This would unavoidably lead to litigation that, in my legal opinion, would result in the nullification of HB 2655 to the extent the "bona fide occupational qualification" or "collective bargaining agreement" exceptions in HB 2655 do not cover those employees.

In addition, there is no scientific testing standard for establishing marijuana impairment. Certain police officers have received extensive training to become Drug Recognition Experts (DREs), using observations grounded in science. This bill would functionally impose the cost of time and training upon all employers to become DREs. Otherwise, employers would face litigation over whether a user was properly terminated for being "impaired" at work, versus merely having marijuana in their system. Also, there is no specific exception in the bill for safety sensitive jobs, such as first responders, teachers, medical providers, and utility workers. Because "impairment" is not an exact science, jobs that provide the crucial infrastructure for our community should be specifically excepted from the bill.

The fiscal impacts of HB 2655 on counties and cities would not be trivial. City County Insurance Services (CIS), which insures most counties and cities, estimates that it would spend between $1.15 million and $1.6 million in one-time litigation costs, plus additional litigation and other costs of $925,000 to $1.2 million each year thereafter. Those costs would directly impact and increase liability and other insurance rates charged to CIS members. These estimates by CIS are detailed in the SB 379 (the Senate version of HB 2655) Fiscal Impact Statement (FIS) provided to the Legislative Fiscal Office (LFO). It would be fair to double those fiscal impact estimates when considering self-insured counties and cities.

Again, while I can certainly understand the impetus for HB 2655, for the legal, practical, and fiscal reasons set forth above, AOC is opposed to the bill.

Sincerely,

Rob Bovett
AOC Legal Counsel