OPPOSE SB 379/HB 2655

Senate Bill 379 and House Bill 2655 undermine workplace safety by prohibiting an employer from enforcing a drugfree workplace policy for individuals testing positive for cannabinoids. In some instances the legislation may be preempted by the US Constitution where it conflicts with federal and state laws, and would be almost impossible for employers to reconcile with their obligations to maintain safe workplaces that do not endanger other employees, the public or the customers they serve.

SB 379/HB 2655 puts Oregon employers in an impossible position: If the Legislative Assembly enacted SB 379/HB 2655, Oregon employers of all sizes would be in an impossible situation. SB 379/HB 2655 would force them either to employ people who are breaking federal law or to gamble that when a disciplined employee filed a lawsuit or BOLI claim, the employer could afford to defend.

SB 379/HB 2655 is preempted by the United States Constitution: SB 379/HB 2655 would run squarely into the Supremacy Clause in Article VI of the United States Constitution, which requires state statutes and constitutions, to yield where the United States Congress has spoken. In this case, Congress spoke through the Controlled Substances Act, which specifically makes the use of marijuana a federal crime and has, in the words of the Oregon Supreme Court in *Emerald Steel Fabricators v. BOLI*, "imposed a blanket federal prohibition on the use of marijuana without regard to state permission."

SB 379/HB 2655 is preempted by the Drug-Free Workplace Act: The Drug-Free Workplace Act requires employers who receive grants or contracts from the federal government (construction companies, hospitals and long term care facilities, among others) to ensure that their workplaces are drug-free. Drug testing will not reveal whether an employee with marijuana in his or her system used it during working hours or during "non-working hours" (a term in SB 379/HB 2655 that might be interpreted to include meal breaks), much less whether the marijuana was used on the employer's premises or not. Thus, an employer who is prevented by SB 379/HB 2655 from prohibiting marijuana use during non-working hours would find it impossible to comply with the federal requirements.

SB 379/HB 2655 Supposes a Testing Technology That Does Not Exist: The exception in SB 379/HB 2655 for off-duty marijuana use that impairs employees' performance on the job cannot be implemented, because currently, there is no recognized test for whether an employee is "impaired" by his or her use of marijuana (off duty or not). Current testing protocols can do no more than confirm whether an employee has marijuana in his or her system and if so in what amount, not whether the amount results in impairment or being "under the influence."

An employee's use of legal prescription drugs is already protected: Both the Americans With Disabilities Act ("ADA") and Oregon disability law require an employer to reasonably accommodate an employee's disability and the treatment of a disability with medication, including situations in which off-duty use of medication affects the employee's performance at work. A well-developed body of federal and state case law tells an employer whether an accommodation is or is not "reasonable." SB 379/HB 2655, on the other hand, imposes no such limitation: an employer may not limit employees' off-duty use of any lawful substances except to the extent it causes an impairment at work or relates to a bona fide occupational qualification.

SB 379/HB 2655 would unfairly trap employers in the no-man's land of a policy disagreement between Congress and the Oregon Legislature, while undermining the safety of Oregon's workplaces. We urge your opposition to the bill.


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