AMEND SB 176: PROTECT WORKPLACE SAFETY

Sections 33-35 of Senate Bill 176 undermine workplace safety by prohibiting an employer from enforcing a drugfree workplace policy for individuals testing positive for cannabinoids.

While the language provides limited exceptions, it fails to take into account the wide variety of safety concerns in workplaces. 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. Additionally, compliance with the law would require employers to inquire about job applicants' personal and private medical information which is prohibited by state and federal laws protecting the rights of individuals with disabilities.

SB 176 puts Oregon employers in an impossible position: If the Legislative Assembly enacts SB 176 without removing sections 33-35, Oregon employers of all sizes would be in an impossible situation. Employers would be forced 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 176 is preempted by the United States Constitution: These sections 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 176 Essentially eliminates the ability to enforce drug-free workplace policies: The exception in SB 176 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." This would mean that employers and employees would constantly be debating whether an individual was impaired. 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 sections 33-35 if SB 176 that might be interpreted to include meal breaks), much less whether the marijuana was used on the employer's premises or not.

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." Sections 33-35 of SB 176, on the other hand, imposes no such limitation.

Sections 33-35 of SB 176 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 you to amend the bill to remove this language.

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