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# Government Accountability & Oversight Committee

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## HB 2322

**Brief Description:** Prohibiting local governments from taking actions preventing or impeding the creation or operation of commercial marijuana businesses licensed by the liquor control board.

**Sponsors:** Representatives Sawyer, Condotta, Appleton, Kirby, Fey, Farrell, Fitzgibbon, S. Hunt, Reykdal, Springer and Ryu.

### Brief Summary of Bill

- Requires that cities, counties, and towns (municipalities) not discriminate against state licensed, legal, marijuana-related businesses and that municipalities treat such businesses the same as any other business with respect to licensing, zoning, and land use regulations.
- Authorizes the Liquor Control Board (LCB) to direct the State Treasurer to deny liquor related tax revenues to any municipality that discriminates against a state licensed, legal marijuana-related business by preventing or impeding it from locating within the jurisdictional boundaries of the municipality.
- Requires that liquor related tax revenue disbursements be resumed if an offending municipality later becomes compliant with the non-discrimination requirements of the act.
- Grants the State Treasurer with legal authority to withhold liquor revolving funds and liquor excise tax funds from municipalities that are noncompliant with the non-discrimination requirements of the act.

**Hearing Date:** 1/30/14

**Staff:** Thamas Osborn (786-7129).

### Background:

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*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.*

### Introduction to Initiative Measure No. 502.

Initiative Measure No. 502 ("I-502" or "initiative") was a ballot measure approved by Washington voters in November of 2012 that: (1) legalizes the production, processing, possession and personal use of marijuana by adults; (2) creates a framework for a regulatory scheme to be further developed by the Liquor Control Board (LCB) through its rule-making authority; and (3) revises provisions in criminal statute to accommodate such legalization in accordance with the requirements of the initiative.

The scope of I-502 is quite broad and contains statutory provisions that include the following:

- legalizing the personal use and possession of up to one ounce of marijuana, as well as specified products directly related to such marijuana use;
- licensing and regulating marijuana production, distribution, and retailing;
- designating the LCB as the regulatory entity responsible for the implementation of the initiative, including continuing oversight over the commercial practices and conduct of licensed marijuana producers, processors, and retailers;
- providing the LCB with very broad rule-making authority with respect to the development of the requisite regulatory scheme;
- implementing excise taxes on marijuana production, distribution, and retailing;
- creating a dedicated marijuana fund for the collection and distribution of marijuana-related tax revenues;
- deleting statutory provisions containing criminal and/or civil penalties for marijuana related activities authorized by I-502; and
- amending driving under the influence laws to include specific provisions pertaining to driving under the influence of marijuana.

The provisions of I-502 are now codified in chapter 69.50 RCW, which is Washington's Controlled Substances Act.

### Licensing of Marijuana Producers, Processors, and Retailers.

I-502 creates three categories of marijuana marketing licenses to be issued by the LCB in implementing the statutory scheme outlined in the initiative: (1) the marijuana producer's license entitles the holder to produce marijuana for sale at wholesale to licensed marijuana processors or other producers; (2) the marijuana processor's license entitles the holder to process, package, and label marijuana for sale at wholesale to marijuana retailers; and (3) the marijuana retailer's license entitles the holder to sell marijuana products at retail prices in retail outlets.

The three categories of marijuana marketing licenses are subject to identical regulations regarding initial application fees and renewal fees. The initial application fee is \$250. The subsequent issuance and renewal fee, required annually, is \$1,000.

### I-502 Directive Regarding the Outcome of LCB Rulemaking as it Affects Access to, and Availability of, Legal Marijuana Products.

Notwithstanding the broad discretionary authority granted to the LCB in promulgating its rules, the initiative explicitly directs the LCB to design and administer the regulatory scheme so as to ensure that the public has adequate access to licensed sources of marijuana, and marijuana-infused products, in order to discourage purchases from the illegal market. In effect, then, despite the otherwise sweeping regulatory authority granted to the LCB, this provision of the

initiative constitutes an explicit, goal oriented directive that the LCB must serve in developing its rules and regulatory scheme.

### Municipal Resistance to I-502 Provisions Regarding Local Siting of Licensed Marijuana Businesses.

During the latter part of 2013, some cities and counties have, or are threatening to either enact ordinances establishing moratoriums on the local siting of state licensed marijuana producers, processors, and retailers, or to ban such businesses outright. While these municipalities have articulated various arguments in support of such moratoria or bans, there appears to be two dominant legal rationales at play:

1. The legalization of marijuana under I-502 is contrary to federal law and thus the state cannot require cities and counties to authorize the operation of businesses that are federally illegal.
2. The provisions of I-502, as codified in chapter 69.50 RCW, do not in fact preempt local governments from enacting their own ordinances regulating the siting of state licensed marijuana businesses in their communities.

### State Preemption Under the Controlled Substances Act Chapter 69.50.RCW.

The Controlled Substances Act (Act), under RCW 69.50.608, creates a state preemption statute establishing that Washington state law "fully occupies and preempts the entire field of setting penalties" for violations of the Act. The statute goes on to state that municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with the provisions of the Act. Finally, the statute states that "...local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed..."

### Opinion of the Washington State Attorney General Regarding the Preemptive Effect of I-502.

In response to the resistance of some local governments to the siting of legal, licensed marijuana businesses within their jurisdictions, the LCB requested an advisory legal opinion from the State Attorney General's Office (AGO) regarding state preemption of local ordinances affecting or interfering with the implementation of I-502. In its request to the AGO, the LCB posed two questions: (1) Are local governments preempted by state law from banning state licensed marijuana producers, processors, and retailers from locating within their jurisdictions; and (2) Is a local government preempted by state law from enacting an ordinance that makes it impractical for a state licensed marijuana business to locate within its jurisdiction?

On January 16 of this year, the AGO issued its advisory opinion in response to the inquiry by the LCB. In its opinion, the AGO concluded that with respect to both questions, I-502 does not preempt a local government from either banning state licensed marijuana businesses from locating within its jurisdiction or passing an ordinance making it impractical for such businesses to locate within its jurisdiction. The opinion summarized its conclusions as follows: "Under Washington law, there is a strong presumption against finding that state law preempts local ordinances. Although Initiative 502 (I-502) establishes a licensing and regulatory system for marijuana producers, processors, and retailers in Washington State, it includes no clear indication that it was intended to preempt local authority to regulate such businesses. We therefore conclude that I-502 left in place the normal powers of local governments to regulate within their jurisdictions."

In rendering its opinion, the AGO relied heavily on three key points to support its conclusion that the regulatory provisions of I-502 do not preempt the types of local ordinances in question:

1. A local ordinance is presumed to be constitutional and must be given great deference absent clear evidence that a state statute or regulatory scheme is intended to preempt such ordinance.
2. I-502 does not contain any explicit indication that the state licensing and operating system set forth in the initiative preempts the field of marijuana regulation so as to preclude some form of local control.
3. Even when viewed in its totality as a comprehensive regulatory scheme for the the production, processing, possession, sale and taxation of legal marijuana, there is nothing implied in the language of the initiative to indicate ". . . an intent to preempt the entire field of regulating businesses licensed under I-502."

Although advisory legal opinions such as this from the Attorney General do not have the same force of law as would a statute or court ruling, and thus do not constitute legal precedent, they are often taken seriously by the courts and accorded significant weight in the interpretation of Washington law.

### **Summary of Bill:**

Cities, counties, and towns (municipalities) are required to cooperate with the LCB with respect to the local siting of licensed, legal marijuana producers, processors, and retailers. State licensed marijuana businesses attempting to locate within the boundaries of a municipality must be accorded the same legal treatment as any other business within that municipality with respect to the application of ordinances and regulations pertaining to local business licensing, zoning, and land use.

If a municipality is found to discriminate against a state licensed, legal marijuana-related business or otherwise acts to prevent or impede the establishment of that business within that municipality, the LCB has discretionary authority to:

- sanction the municipality by making it ineligible to receive any funds from the Liquor Revolving Fund established under either chapter 66.08 RCW and/or the liquor excise tax fund under chapter 82.08 RCW; and
- bring a legal action in superior court for injunctive relief against the municipality and, in doing so, recover all court costs and litigation-related expenses associated with such legal proceedings.

If a municipality is found to engage in discriminatory practices against a marijuana business licensee and such discrimination warrants the termination of liquor tax related funding as outlined in the act, the LCB may direct the state treasurer to withhold such tax revenues from the offending municipality.

If the LCB later determines that an offending municipality has become compliant with the requirements of this act, it must direct the state treasurer to resume the disbursement of the funding that had been previously withheld.

The state treasurer is granted legal authority to withhold, pursuant to a directive from the LCB, Liquor Revolving Funds and liquor excise tax funds from municipalities that are noncompliant with the requirements of this act.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.