
Commerce & Gaming Committee

ESSB 5318

Brief Description: Reforming the compliance and enforcement provisions for marijuana licensees.

Sponsors: Senate Committee on Labor & Commerce (originally sponsored by Senators Rivers, Palumbo and Wagoner).

Brief Summary of Engrossed Substitute Bill

- Modifies how the Washington State Liquor and Cannabis Board (LCB) may enforce laws and rules against regulated marijuana businesses, and how these businesses may comply with laws and rules.
- Creates a process for the LCB to issue notices of correction instead of civil penalties in certain circumstances.
- Requires the LCB to expand its compliance education program for licensees, including providing a process for licensees to apply to receive consultative services regarding compliance with applicable laws and rules.
- Requires rulemaking by the LCB prescribing penalties for violations, with limits, such as on what types of violations may result in license cancellation when a heightened evidentiary standard is met.
- Prohibits the LCB from considering any violation from before April 30, 2017, as grounds for negative licensing actions, except for specific types of violations, including furnishing marijuana products to minors and diversion of product, when a heightened evidentiary standard is met.
- Limits when civil penalties may be applied in circumstances involving employee misconduct.
- Modifies the LCB's settlement conference and settlement agreement process.
- Establishes a Legislative Work Group on Cannabis Enforcement and Training Processes and Procedures, with a report to the Legislature by December 2019.

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.

Hearing Date: 3/19/19

Staff: Peter Clodfelter (786-7127).

Background:

Under a process established through agency rulemaking to implement and administer Initiative Measure No. 502 (2012) and subsequent legislation, the Washington State Liquor and Cannabis Board (LCB) has adopted rules establishing penalties for violations of marijuana statutes and rules. The current rules set out a process that separates violations into five main categories: Group 1 violations (public safety); Group 2 violations (regulatory); Group 3 violations (licensing); Group 4 violations (nonretail); and Group 5 violations (transportation).

The LCB's current rules include guidelines on the use of mitigating circumstances and aggravating circumstances. Penalties include monetary penalties as well as license cancellation and suspension, and may vary according to the category of violation and how many similar violations a licensee has within a three-year window. In some circumstances, licensees may opt for a monetary fine or a license suspension.

The LCB's current rules also include a process of offering settlement conferences to licensees who have received notice of an alleged administrative violation, which may be held with a hearing examiner or LCB designee. In this process, if a settlement agreement is reached at the settlement conference, the LCB may disapprove of the terms. In this case, the LCB will notify the licensee of the decision and the licensee is provided the option to renegotiate with the hearings examiner or LCB designee, accept the originally recommended penalty, or request an administrative hearing on the charges.

Summary of Bill:

Legislative findings are included, and modifications are made to how the Washington State Liquor and Cannabis Board (LCB) may enforce laws and rules against the licensed marijuana businesses the LCB regulates, as well as to how licensees may comply with laws and rules.

Notices of Correction.

A process is created to authorize the LCB to issue marijuana licensees a notice of correction instead of a civil penalty. A notice of correction describes the noncompliant condition, the relevant text of the law or rule, a statement of what is required to achieve compliance, the date by which compliance must be achieved, notice of how to contact any technical assistance services, and notice of when, where, and to whom a request to extend the time to achieve compliance for good cause may be filed with the LCB. It is provided that a notice of correction is not a formal enforcement action, is not subject to appeal, and is a public record. Unless the responsible party fails to comply with the notice of correction, the LCB may not issue a civil penalty for the violations identified in the notice of correction.

The LCB may issue a civil penalty without first issuing a notice of correction in three circumstances. The first circumstance is when a person has previously been given notice of, or been subject to, an enforcement action for the same or similar violation of the same statute or rule. The second circumstance is when compliance is not achieved by the date established by the

LCB in a previous notice of correction and if the LCB has responded to a request for review of the date by reaffirming the original date or establishing a new date. The third circumstance when the LCB may issue a civil penalty without first issuing a notice of correction is when the LCB can prove by a preponderance of the evidence any of the following violations have occurred: (1) diversion of marijuana product to the illicit market or sales across state lines; (2) furnishing of marijuana product to minors; (3) diversion of revenue from the sale of marijuana product to criminal enterprises, gangs, or cartels; (4) use of firearms in a facility licensed by the LCB that poses a direct and significant threat to public safety; or (5) the commission of nonmarijuana-related crimes.

Compliance Education and Consultative Services.

The LCB must adopt rules to perfect and expand existing programs for compliance education for licensed marijuana businesses and their employees. The rules must include a voluntary compliance program created in consultation with licensees and their employees.

Through the LCB's compliance education program, the LCB may grant a licensee's application for advice and consultation and visit the licensee's premises. Advice and consultation services are limited to matters specified in a request affecting the interpretation and applicability of the standards in law to the conditions, structures, machines, equipment, apparatus, devices, materials, methods, means, and practices in the licensee's premises. The LCB may provide for an alternative means of affording consultation and advice other than on-site consultation.

If any areas of concern are disclosed within the scope of an on-site consultation, the LCB must recommend how to eliminate the areas of concern. A visit to a licensee's premises through the compliance education program is not considered an inspection or investigation. During the visit, the LCB may not issue notices or citations and may not assess civil penalties. However, if the on-site visit discloses a violation with a direct or immediate relationship to public safety and the violation is not corrected, the LCB may investigate.

There is no immunity for a licensee who applies for consultative services from inspections or investigations or from any inspection conducted as a result of a complaint made before, during, or after the provision of consultative services. Additionally, nothing in the new process for consultative services requires an inspection of a licensee's premises that has been visited for consultative purposes. But if the premises are inspected after a visit, the LCB may consider any information obtained during the consultation visit in determining the nature of an alleged violation and the amount of penalties to be assessed, if any.

Rules must provide that violations with a direct or immediate relationship to public safety discovered during a consultative visit must be corrected within a specified period of time and an inspection must be conducted at the end of the time period. Information obtained by the LCB as a result of licensee-requested consultation and training services is confidential and not subject to public inspection under the Public Records Act. The LCB may adopt rules on the frequency, manner, and method of providing consultative services to licensees.

Enforcement Procedures and Civil Penalties.

The LCB must prescribe procedures for enforcement with the following components: (1) a process for the issuance of written warnings or notices to correct instead of penalties, sanctions, or other violations with respect to regulatory violations that have no direct or immediate

relationship to public safety as defined by the LCB; (2) a process for waiving any fines, civil penalties, or administrative sanctions for violations that have no direct or immediate relationship to public safety and are corrected by the licensee within a reasonable amount of time as designated by the LCB; and (3) a compliance program through which licensees may request compliance assistance and inspections without issuance of a violation, if any noncompliant issues are resolved within a specified time.

The LCB must adopt rules establishing penalties for violations of marijuana law subject to limitations. The cumulative effect of any escalating penalties must last two years or less. Also, a single violation may not result in license cancellation unless the LCB can prove by clear, cogent, and convincing evidence that the administrative violation evidences intentional or grossly negligent action or inaction that results in a high probability of any of the following violations: (1) diversion of marijuana product to the illicit market or sales across state lines; (2) furnishing of marijuana product to minors; (3) diversion of revenue from the sale of marijuana product to criminal enterprises, gangs, or cartels; (4) use of firearms in a facility licensed by the LCB that poses a direct and significant threat to public safety; or (5) the commission of nonmarijuana-related crimes.

Additionally, cumulative violations may result in license cancellation only when a licensee commits at least four violations within a two-year period. The LCB must consider aggravating and mitigating circumstances and deviate from prescribed penalties accordingly, and must authorize enforcement officers to do the same. The LCB may not issue a violation if there is employee misconduct that led to the violation if the licensee documents that before the date of the violation the licensee established a compliance program designed to prevent the violation, performed meaningful training with employees designed to prevent the violation, and had not enabled or ignored the violation or other similar violations in the past.

Further, no violation from before April 30, 2017, may be considered as grounds for denial, suspension, revocation, cancellation, or nonrenewal of a marijuana license, unless the LCB can prove by clear, cogent, and convincing evidence that the prior administrative violation is any of the following violations: (1) diversion of marijuana product to the illicit market or sales across state lines; (2) furnishing of marijuana product to minors; (3) diversion of revenue from the sale of marijuana product to criminal enterprises, gangs, or cartels; (4) use of firearms in a facility licensed by the LCB that poses a direct and significant threat to public safety; or (5) the commission of nonmarijuana-related crimes.

Administrative law judges may consider mitigating and aggravating circumstances in any case involving a licensee and may deviate from prescribed penalties. Requirements are added related to the LCB's use of settlement conferences and settlement agreements, which may occur after a licensee receives a notice of an alleged administrative violation. If a settlement agreement is entered into between a marijuana licensee and a hearing examiner or LCB designee at or after a settlement conference, the terms of the settlement agreement must be given substantial weight by the LCB and the LCB may only disapprove, modify, change, or add to the terms of the settlement agreement if the LCB finds the agreement to be clearly erroneous.

Legislative Work Group.

A Legislative Work Group on Cannabis Enforcement and Training Processes and Procedures (Work Group) is established, with members provided as follows:

- one member from each of the two largest caucuses of the Senate, appointed by the President of the Senate;
- one member from each of the two largest caucuses of the House of Representatives, appointed by the Speaker of the House of Representatives;
- members representing each of the trade associations representing licensed cannabis businesses and one representative of a labor union representing employees who are enforcement officers for the LCB, appointed jointly by the President of the Senate and the Speaker of the House of Representatives;
- one member representing the Governor, appointed by the Governor; and
- one member representing the LCB, appointed by the chair of the LCB.

The Work Group must review the following issues:

- the use of anonymous complaints to initiate enforcement actions;
- the uniform qualifications and experience that should be established for enforcement officers;
- the training and guidelines given to enforcement officers;
- whether the LCB should create an ombuds position where licensees may register concerns about the LCB's procedures, actions, or employees, without threat of retaliation; and
- other issues as identified by the cochairs of the Work Group.

A legislative member must convene the Work Group's initial meeting, and the Work Group must choose its cochairs from among its legislative membership. Staff support for the Work Group must be provided by the Senate Committee Services and the House Office of Program Research. The Work Group must report its findings and recommendations to the appropriate committees of the Legislature by December 15, 2019.

Miscellaneous.

The Washington State Liquor and Cannabis Board is defined as the "board" in the Controlled Substances Act, and various references are changed accordingly.

Appropriation: None.

Fiscal Note: Available.

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