

# HOUSE BILL REPORT

## ESSB 5318

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### As Passed House - Amended:

April 16, 2019

**Title:** An act relating to reforming the compliance and enforcement provisions for marijuana licensees.

**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 History:

#### Committee Activity:

Commerce & Gaming: 3/19/19, 3/26/19 [DPA];

Appropriations: 4/8/19 [DPA(APP w/o COG)].

#### Floor Activity:

Passed House - Amended: 4/16/19, 88-8.

### Brief Summary of Engrossed Substitute Bill (As Amended by House)

- 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 when violations may result in license cancellation and when violations occurring more than two years prior may be considered.
- Requires the LCB to consider mitigating and aggravating circumstances and to deviate from penalties accordingly.
- Modifies the LCB's settlement conference and settlement agreement process.

*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.*

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## HOUSE COMMITTEE ON COMMERCE & GAMING

**Majority Report:** Do pass as amended. Signed by 9 members: Representatives Stanford, Chair; Reeves, Vice Chair; MacEwen, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Blake, Kirby, Kloba, Morgan and Vick.

**Minority Report:** Without recommendation. Signed by 1 member: Representative Jenkin.

**Staff:** Peter Clodfelter (786-7127).

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** Do pass as amended by Committee on Appropriations and without amendment by Committee on Commerce & Gaming. Signed by 32 members: Representatives Ormsby, Chair; Bergquist, 2nd Vice Chair; Robinson, 1st Vice Chair; Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Caldier, Chandler, Cody, Dolan, Dye, Fitzgibbon, Hansen, Hoff, Hudgins, Jinkins, Kraft, Macri, Mosbrucker, Pettigrew, Pollet, Ryu, Schmick, Senn, Springer, Stanford, Steele, Sullivan, Sutherland, Tarleton, Tharinger and Ybarra.

**Staff:** Linda Merelle (786-7092).

### **Background:**

Under a process established through 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 had 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 hearing examiner or LCB designee, accept the originally recommended penalty, or request an administrative hearing on the charges.

### **Summary of Amended 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. A notice of correction is not a formal enforcement action, is not subject to appeal, and is a public record.

The LCB may issue a civil penalty without first issuing a notice of correction in three circumstances. The first circumstance is when a licensee has previously been given notice of, or been subject to, an enforcement action for the same or a 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 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, cartels, or parties not qualified to hold a marijuana license based on criminal history requirements; (4) the commission of nonmarijuana-related crimes; or (5) knowingly making a misrepresentation of fact related to conduct or an action that is, or is alleged to be, any of the preceding four violations.

#### 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. 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. If any areas of concern are disclosed within the scope of any 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. 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.

Valuable formulae or financial or proprietary commercial information records received during a consultative visit, or while providing consultative services, are subject to inspection under the Public Records Act.

#### Enforcement Procedures and Civil Penalties.

The LCB must prescribe procedures for enforcement with specific components, such as a process for issuing written warnings or notices to correct instead of penalties, with respect to violations that have no direct or immediate relationship to public safety as defined by the LCB. The LCB must also adopt rules establishing penalties for violations of marijuana laws.

However, a single violation may not result in license cancellation unless the LCB can prove by a preponderance of the evidence that the violation evidences any of the following: (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, cartels, or parties not qualified to hold a marijuana license based on criminal history requirements; (4) the commission of nonmarijuana-related crimes; or (5) knowingly making a misrepresentation of fact related to conduct or an action that is, or is alleged to be, any of the preceding four violations.

Additionally, the cumulative effect of any escalating penalties must last two years or less. And 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 mitigating and aggravating circumstances and deviate from prescribed penalties accordingly, and must authorize enforcement officers to do the same.

The LCB must give substantial consideration to mitigating any penalty imposed on a licensee when there is employee misconduct that led to the violation and 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 occurring more than two years prior may be considered as grounds for denial, suspension, revocation, cancellation, or nonrenewal of a marijuana license, unless the LCB can prove by a preponderance of the 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, cartels, or parties not qualified to hold a marijuana license based on criminal history requirements; (4) the commission of nonmarijuana-related crimes; or (5) knowingly making a misrepresentation of fact related to conduct or an action that is, or is alleged to be, any of the preceding four violations.

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. If a settlement agreement is entered into between a marijuana licensee and a hearing officer or LCB designee at or after a settlement conference, the terms of the settlement agreement must be given substantial weight by the LCB.

#### 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 of Amended Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony (Commerce & Gaming):**

(In support) This bill results from three-and-a-half years of concerns raised by businesses in the marijuana industry. Enforcement models at the Department of Labor and Industries and at the Department of Health influenced this bill's approach. Compliance reform is critical to the industry. A common complaint of licensees is a lack of uniform enforcement. Many licensees invested their life savings in their businesses, and are in constant fear of losing their license over small, unintentional violations of complex and fast changing laws and rules. The level of anxiety for business owners is tremendous, not present in other industries, and employees' jobs are unnecessarily at risk. The creation of the notice of correction, which would be issued instead of a civil penalty, will help achieve compliance. Although there can be legitimate true party of interest violations involving hidden ownership, the current rules are unfairly and punitively applied to shut businesses down. Stakeholders support the changes to the settlement agreement process; the current process is unfair because the LCB can override an agreement entered between the licensee and the Office of the Attorney General. This bill will reset the relationship between licensees and the LCB.

Stakeholders are working closely with the LCB, and a forthcoming committee amendment ensures the LCB still has tools to address bad actors while making needed changes to the enforcement and compliance process. Other states with regulated marijuana programs do not take such punitive approaches to enforcement, and Washington can learn from other states' enforcement models. A current LCB enforcement officer supports the bill and reports that the officer has witnessed and been directed to engage in unfair and inconsistent applications of laws and rules against the public. The officer raised concerns within the LCB without much success, and now feels retaliated against. The officer has heard from licensees about unfair enforcement and licensing actions; many of these licensees are minorities or immigrants. The officer sees inconsistent training on laws and policies. This bill is a step in making the LCB more accountable and transparent, especially through the creation of the work group and potentially an ombuds position. The bill will reform the LCB to be more efficient and effective.

(Opposed) None.

(Other) Stakeholders and the LCB recently reached an agreement on the bill that is supported by all. The good-faith negotiations by all parties in finding agreement is appreciated. An important part of the new program is creating a process for licensees to consult with enforcement staff to correct deficiencies within a set period of time. There is good balance in the bill. The LCB is currently working on restructuring the penalty guidelines for marijuana violations and will continue discussions on how to improve policies and regulations.

**Staff Summary of Public Testimony (Appropriations):**

(In support) Under the provisions of this bill, administrative violations are treated differently from violations that result in threats to public safety, such as intentionally furnishing product to minors and the diversion of funds. The regulatory approach in this bill is similar to the model used by the Department of Labor and Industries and is appropriate for the less serious infractions.

(Opposed) The bill should be strengthened. The LCB needs to retain deterrents and should have the authority to impose serious penalties for major infractions, such as hidden ownership, hidden distribution of funds, hidden true parties of interest, and fraud.

**Persons Testifying** (Commerce & Gaming): (In support) Senator Rivers, prime sponsor; Brooke Davies, Washington CannaBusiness Association; Ty Camp, Sunshine Farms; Wendy Hull, Fairwinds Manufacturing; Chris Masse, Miller Nash Graham & Dunn, LLP; Bryan McConaughy, Washington Sungrowers Industry Association; Lara Kaminsky, The Cannabis Alliance; John Jung; and Laurent Bentitou.

(Other) Chris Thompson, Liquor and Cannabis Board; and Seth Dawson, Washington State Association for Substance Abuse Prevention.

**Persons Testifying** (Appropriations): (In support) Vicki Christophersen, Washington CannaBusiness Association.

(Opposed) Arne Nelson, Evergreen Market.

**Persons Signed In To Testify But Not Testifying** (Commerce & Gaming): None.

**Persons Signed In To Testify But Not Testifying** (Appropriations): None.