



February 8, 2019

Re: House Bill 356 Adult Recreational Cannabis

House Health and Human Services Committee and House Bill 356 Sponsors:

I am writing on behalf of the members of the New Mexico Association of Commerce and Industry (ACI), a regarding House Bill 356. ACI is a statewide business advocacy organization that has been the voice for the New Mexico business community for the past 60 years.

ACI has not taken a position regarding the legalization of adult recreational cannabis, however we are very concerned that the current language proposed in HB 356 would threaten the ability of employers to maintain a safe and drug-free workplace. Specifically, our members are concerned about the employment protections Section 27 in the following areas:

Lack of clear statutory protections for employers. The current language does not provide clear protections for employers and this lack of clarity raises a host of questions related to drug-free workplace policies and employer rights. Because of this lack of clarity regarding employer rights, there would be an enhanced risk of liability and litigation for employers. For example, the current language allows for an employer to regulate “the possession of or use of intoxicating substances at work during work hours” but does not address consumption of cannabis offsite, prior to work and then an employee reporting to work in an impaired state. (see HB356, Section 27(B)(1)).

New Mexico employers must be able to:

- o Enforce drug-free workplace policies on or off the job;
- o Terminate an employee who tests positive for marijuana;
- o Define impairment without risk of litigation;
- o Terminate employees for cause due to a positive drug test without eligibility for unemployment benefits; and/or
- o Deny workers’ compensation benefits if a workplace injury was caused by the injured employee’s use of marijuana.

Open-ended liability. Employers have a responsibility to protect all employees. Under the federal Occupational Safety and Health Administration, employers are required to provide their employees with a place of employment that “is free from recognizable hazards that are causing or likely to cause death or serious harm to employees.” Failure to do so opens employers to liability and lawsuits. Yet, there is no way to regulate marijuana in the workplace outside of current drug testing protocols.

No impairment test. Given the lack of an on-demand test to determine impairment, employers are forced to rely solely on blood and urine tests, neither of which can reliably provide information about present impairment or whether an employee is “under the influence.” The lack of an impairment test will create significant human resources



dilemmas for employers if recreational marijuana becomes legal in New Mexico, and employers are not allowed to maintain a drug free workplace.

Marijuana is still an illegal drug under federal law. As such, employers cannot be forced, through state legislation, to ignore federal law. The current language protecting employers against violations of federal law or federal contract requirements also lack clarity and would subject employers and federal contractors to potential liability.

ACI requests that the following employer and work-place safety principles be included in HB 356:

- (1) Nothing in this act:
 - (a) requires an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of cannabis in the workplace;
 - (b) affects the ability of an employer to implement policies [promoting workplace health and safety by] restricting the use of cannabis by employees; or
 - (c) requires a government medical assistance program, a private health insurer or a workers' compensation carrier or self-insured employer providing workers' compensation benefits to reimburse a person for costs associated with the medical use of cannabis.

- (2) Nothing in this act may be construed to:
 - (a) prohibit an employer from including in any contract a provision prohibiting the use of marijuana;
 - (b) permit a cause of action against an employer for wrongful discharge or discrimination; or
 - (c) prohibit a person, employer, corporation, or any other entity who occupies, owns, or controls a property from prohibiting or otherwise regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property;
 - (d) prohibit an employer from establishing and enforcing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy.

- (3) A patient who is discharged from employment for ingesting cannabis in the workplace, working while under the influence of cannabis or testing positive for a controlled substance shall not be eligible to receive benefits under [state Unemployment Insurance law].

ACI stands ready to work with you to ensure that the measure is designed in a way that supports employee and workplace safety.

Sincerely,

Rob Black
President and CEO
New Mexico Association of Commerce and Industry