DAVID Y. IGE
GOVERNOR

NOLAN P. ESPINDA
DIRECTOR

Cathy Ross
Deputy Director
Administration

Jodie F. Maesaka-Hirata
Deputy Director
Corrections

Renee R. Sonobe Hong
Deputy Director
Law Enforcement

STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

No. _____

TESTIMONY ON SENATE BILL 2220
RELATING TO EMPLOYMENT PRACTICES
by
Nolan P. Espinda, Director
Department of Public Safety

Senate Committee on Labor
Senator Jill N. Tokuda, Chair
Senator J. Kalani English, Vice Chair

Thursday, February 8, 2018; 3:30 p.m.
State Capitol, Conference Room 229

Chair Tokuda, Vice Chair English, and Members of the Committee:

The Department of Public Safety (PSD) offers comments to Senate Bill (SB) 2220. PSD believes that the language in this measure would conflict with requirements in federal law for the shipping, transporting, receiving, or possessing firearms or ammunition as referenced by the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives' Open Letter dated September 21, 2011 (attached) and prohibitions in negotiated Collective Bargaining Agreements.

In light of the factors cited above, the Department respectfully requests that the Committee consider amending SB 2220 to ensure that the measure is not applicable to law enforcement officers throughout the State and employees who work in any State Correctional Facility. PSD suggests that the following language be added to page 2, Section 1(a)(5):

"(C) An employee who is a law enforcement officer with the State and employees who work in any State Correctional Facility."

Thank you for the opportunity to present this testimony.

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Washington DC 20226

September 21, 2011

www.atf.gov

OPEN LETTER TO ALL FEDERAL FIREARMS LICENSEES

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has received a number of inquiries regarding the use of marijuana for medicinal purposes[1] and its applicability to Federal firearms laws. The purpose of this open letter is to provide guidance on the issue and to assist you, a Federal firearms licensee, in complying with Federal firearms laws and regulations.

A number of States have passed legislation allowing under State law the use or possession of marijuana for medicinal purposes, and some of these States issue a card authorizing the holder to use or possess marijuana under State law. During a firearms transaction, a potential transferee may advise you that he or she is a user of medical marijuana, or present a medical marijuana card as identification or proof of residency.

As you know, Federal law, 18 U.S.C. § 922(g)(3), prohibits any person who is an "unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" from shipping, transporting, receiving or possessing firearms or ammunition. Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, and there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law. Further, Federal law, 18 U.S.C. § 922(d)(3), makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or **having reasonable cause to believe** that such person is an unlawful user of or addicted to a controlled substance. As provided by 27 C.F.R. § 478.11, "an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."

Therefore, any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition. Such persons should answer "yes" to question 11.e. on ATF Form 4473 (August 2008), Firearms Transaction Record, and you may not transfer firearms or ammunition to them. Further, if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have "reasonable cause to believe" that the person is an unlawful user of a controlled substance. As such, you may not transfer firearms or ammunition to the person, even if the person answered "no" to question 11.e. on ATF Form 4473.

ATF is committed to assisting you in complying with Federal firearms laws. If you have any questions, please contact ATF's Firearms Industry Programs Branch at (202) 648-7190.

Arthur Herbert
Assistant Director
Enforcement Programs and Services

[1] The Federal government does not recognize marijuana as a medicine. The FDA has determined that marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and lacks an accepted level of safety for use under medical supervision. See 66 Fed. Reg. 20052 (2001). This Open Letter will use the terms "medical use" or "for medical purposes" with the understanding that such use is not sanctioned by the federal agency charged with determining what substances are safe and effective as medicines.

the Drug Policy Forum of hawai'i

Dedicated to safe, responsible, humane and effective drug policies since 1993

TO: Senate Committee on Labor
FROM: Carl Bergquist, Executive Director
HEARING DATE: 8 February 2018, 3:30PM
RE: SB2220, RELATING TO EMPLOYMENT PRACTICES, **SUPPORT**

Dear Chair Tokuda, Vice Chair English, Committee Members:

The Drug Policy Forum of Hawai'i (DPFHI) **supports** this measure to protect medical cannabis patients who are in full compliance with state law from discriminatory termination by their employer. As a member of the Legislature's Act 230 Oversight Working Group, I chaired a patients rights subcommittee and we proposed a recommendation to this effect. It was supported by a majority of that Working Group, and the specific language can be found in one of the larger medical cannabis omnibus bills, SB2248. The one amendment we would propose to this bill is that it add protections from being fired solely based on the *status* of being a patient. Such *status* protections in the housing, hospital, education and child custody spheres were passed by the legislature and enacted in 2015 as Act 242.

At least 11 other states (AR, AZ, CT, IL, ME, MN, NV, NY, PA, RI) have laws with explicit protections (anti-discrimination or "reasonable accommodation") against discrimination while have had courts step in to add them.(MA). A few of these expressly deal with drug testing while others deal with the status of being a medical cannabis patient. In the final report to the Working Group, we reviewed some of this case law. It is excerpted below. To be clear, we should *not* wait for the courts to compel action on this front. Medical cannabis patients who choose this form of medicine over e.g. prescription opioids to deal with chronic pain should be treated the same as those who do choose opioids. We recognize the need for exemptions in cases of federal contracts that require a "zero-tolerance" policy, but that fact should not stand in the way of introducing general and overdue protections for patients who are not breaking any state law. The creation of the dispensary system is helping to increase the number of patients and the quality of medicine. This development further highlights the need to address this right now.

(con.)

P.O. Box 83, Honolulu, HI 96810-0083 Phone: 808-518-3213 Email: info@dpfhi.org
Website: www.dpfhi.org

From the Patients Right Subcommittee Report to Act 230 Legislative Oversight Working Group:

> *SUMMARY - In 2015, Hawai'i was poised to join a handful of states that provide some measure of protection for medical cannabis patients from discrimination. Concerns regarding evolving judicial precedents in case law, consequences for federal contractors and the enforcement role of the Hawai'i Civil Rights Commission (HCRC) ultimately led to those provisions in SB1291 (Act 242 of 2015) being removed. (PLEASE NOTE: The SD2 HD2 version of the bill still contained them & had the qualified support of the HCRC.) Case law has since then become more favorable toward patients.*
>
> *Current Case Law*
>
> *On July 17, 2017, the Massachusetts Supreme Judicial Court issued a ruling in Barbuto v. Advantage Sales and Marketing that was almost unanimously declared as a landmark.[1] Reuters reported the following on the ruling:*
>
> > *Chief Justice Ralph Gants wrote that if a doctor concludes medical marijuana is the most effective treatment for an employee's debilitating condition, "an exception to an employer's drug policy to permit its use is a facially reasonable accommodation."*
> > *"The fact that the employee's possession of medical marijuana is in violation of federal law does not make it per se unreasonable as an accommodation," Gants wrote.*
> > *The unanimous six-judge panel's ruling noted that only the employee, not the company, could have been subject to prosecution under federal law for her drug use.[2]*
>
> *At once, the ruling dealt with patient rights while emphasizing that only a patient can be prosecuted under law, i.e. not the employer. The ruling further emphasizes that employers can still attempt to prove "undue hardship" to operations or "unacceptably significant" safety risks, and that they need not accommodate the use of medical cannabis at the work place itself. In May, a Rhode Island lower court issued a similar ruling.[3]*

Finally, another case in Connecticut ruled that a Connecticut state law similar to this proposed legislation is not in conflict with *any* federal law including the Controlled Substances Act.)[4]

Thank you for the opportunity to testify.

---

[1] Barbuto v. Advantage Sales and Mktg., LLC, SJC-12226, 2017 WL 3015716, at *1 (Mass. July 17, 2017).
[2] Massachusetts court rules for woman fired for medical marijuana use; July 17, 2017; https://www.reuters.com/article/us-massachusetts-marijuana/massachusetts-court-rules-for-woman-fired-for-medical-marijuana-use-idUSKBN1A21WX
[3] Callaghan v. Darlington Fabrics; May 23, 2017; (Superior Court, Rhode Island). The case is currently on appeal to the state Supreme Court, see http://www.riaclu.org/court-cases/case-details/callaghan-v.-darlington-fabrics-corporation.
[4] Noffsinger v. SSC Niantic Operation Company (3:16-cv-01938; D. Conn. Aug. 8, 2017

HAWAII SUBSTANCE ABUSE COALITION

SB2220 Medical Marijuana Employment Practices

COMMITTEE ON LABOR:

- Senator Jill Tokuda, Chair; Senator Kalani English, Vice Chair
- Thursday, February 8th, 2018: 3:30 pm
- Conference Room 229

HAWAII SUBSTANCE ABUSE COALITION (HSAC) Opposes SB2220:

GOOD MORNING CHAIR, VICE CHAIR AND DISTINGUISHED COMMITTEE MEMBERS. My name is Alan Johnson. I am the current chair of the Hawaii Substance Abuse Coalition (HSAC), a statewide hui of almost 40 alcohol and drug treatment and prevention agencies.

While Hawaii may change its law, employers must still inform employees and candidates that despite state law, marijuana remains illegal at the federal level for purposes of employment.

According to local employment law attorneys, "Nothing in Hawaii's medical marijuana law can shield an employee from termination if they use marijuana in violation of an employer's standards consistent with federal law." https://www.altres.com/business/2017/10/hiring-best-practices-for-medical-marijuana-users/

Given the federal laws, a company with a zero tolerance drug-free workplace policy will not accommodate an employee's use of medical marijuana in the workplace and could lead to costly litigious situations.

Hopefully, employers will see the federal law regarding medical cannabis evolve in the foreseeable future, but until then most court decisions nation-wide upheld the rights of the employer to enforce zero tolerance policies. Court precedence may be shifting, but its still a quagmire given the recent federal position by U.S. Attorney General Jeff Sessions, hence not a conducive time for employers to change their policies.

We appreciate the opportunity to testify.

SB-2220
Submitted on: 2/6/2018 11:09:17 PM
Testimony for LBR on 2/8/2018 3:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Joseph A. Bobich		Support	No

Comments:

SB-2220
Submitted on: 2/6/2018 9:10:29 AM
Testimony for LBR on 2/8/2018 3:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Hannah Preston-Pita	Big Island Substance Abuse Council	Oppose	No

Comments:

SB-2220
Submitted on: 2/6/2018 9:37:03 AM
Testimony for LBR on 2/8/2018 3:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Cynthia Santiago	Ohana Makamae, Inc.	Oppose	No

Comments:

I am an employer in the Behavioral Health field. Please make note of the following:

While Hawaii may change its law, employers must still inform employees and candidates that despite state law, marijuana remains illegal at the federal level for purposes of employment.

According to local employment law attorneys, “Nothing in Hawaii’s medical marijuana law can shield an employee from termination if they use marijuana in violation of an employer’s standards consistent with federal law.” https://www.altres.com/business/2017/10/hiring-best-practices-for-medical-marijuana-users/

Given the federal laws, a company with a zero tolerance drug-free workplace policy will not accommodate an employee’s use of medical marijuana in the workplace and could lead to costly litigious situations.

Hopefully, employers will see the federal law regarding medical cannabis evolve in the foreseeable future, but until then most court decisions nation-wide upheld the rights of the employer to enforce zero tolerance policies. Court precedence may be shifting, but its still a quagmire given the recent federal position by U.S. Attorney General Jeff Sessions, hence not a conducive time for employers to change their policies.

Sincerely,

Cynthia Santiago

SB-2220
Submitted on: 2/7/2018 1:17:43 PM
Testimony for LBR on 2/8/2018 3:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	OCC Legislative Priorities	Support	No

Comments:

LBR Testimony

From: Lee Eisenstein <lionel@cruzio.com>
Sent: Wednesday, February 7, 2018 10:51 AM
To: LBR Testimony
Subject: SB2220

Aloha,

I support this bill, (SB2220).

Drug testing people for marijuana makes no sense, as the substance stays in the body for weeks and can be absorbed, even by inadvertently inhaling second hand smoke or vapor. It's really a fraud and like the marijuana prohibition laws themselves, one among many.

Aloha,
Lee Eisenstein
Hawaii

Aloha,
Lee Eisenstein
Hawaii

LBR Testimony

From: Al Yos <gr8tr8@gmail.com>
Sent: Wednesday, February 7, 2018 6:34 AM
To: LBR Testimony
Subject: SB2220 - Support

Hearing Time: Thursday 6 February 2018, 3:30PM, Room 229 Dear Chair Tokuda and Vice Chair English: I support SB2220. The measure will provide a vital layer of protection to Hawaii's tax payers who are patients under the care of Hawaii's medical cannabis laws and licensed healthcare professionals. Mahalo.

Sent from my iPhone

LATE

HAWAIʻI CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 · PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

February 8, 2018
Rm. 229, 3:30 p.m.

To: The Honorable Jill N. Tokuda , Chair
Members of the Senate Committee on Labor

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawaiʻi Civil Rights Commission

Re: S.B. No. 2220

The Hawaiʻi Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawaiʻi's laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services (on the basis of disability). The HCRC carries out the Hawaiʻi constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

S.B. No. 2220 amends H.R.S. chapter 378, part III, prohibiting unlawful suspension and discharge, amending H.R.S. § 378-32(a) to prohibit the suspension, bar, discharge, withholding of pay, demotion, or discriminatory treatment of an employee who is a registered qualifying patient authorized for the medical use of cannabis pursuant to H.R.S. §§ 329-122 and 329-123.

The HCRC supports the intent of S.B. No. 2220, with three points of clarification:

1. The new protection for registered medical cannabis users is placed in H.R.S. chapter 378, part III, enforced by the Department of Labor and Industrial Relations (DLIR). It is not under the jurisdiction of the HCRC, which limited to chapter 378, part I. This is consistent with the statutory recognition that the HCRC does not enforce the rights of registered medical cannabis users generally. The HCRC's interest is focused on the rights of persons with a disability. The H.R.S. § 329-122 definition of "debilitating medical condition" is not identical to the H.R.S. § 378-1 and H.A.R. § 12-46-182 definition of "disability," so not every registered qualifying medical cannabis patient will necessarily be a person with a disability entitled to a reasonable accommodation.
2. The HCRC has a civil rights interest in protecting the rights of persons with disabilities against discrimination in employment, including the right to a reasonable accommodation required to

enable a person with a disability to be considered for a job, to perform the essential functions of a job, or to enjoy the same or equal benefits of employment as are enjoyed by similarly situated employees without disabilities. A person with a disability who is a registered qualified medical cannabis patient can request a reasonable accommodation in employment if they test positive for the use of (medical) cannabis; such reasonable accommodation does not include cannabis use or intoxication at work.

3. In the past, HCRC testimonies have stated that we were unable to find any jurisdiction that had enacted a medical cannabis law that had recognized the right of a person with a disability to a reasonable accommodation for the use of medical cannabis, except where there was an express provision for employment-related protections in their medical cannabis laws. That has changed, with the Supreme Court of Massachusetts ruling in *Barbuto v. Advantage Sales and Marketing LLC*, 477 Mass. 456 (2017). In *Barbuto*, the Massachusetts Court held that the use of medical marijuana could be a required reasonable accommodation under the state's handicap discrimination law, even without an express provision of employment-related protections in the Massachusetts medical marijuana law. In the wake of *Barbuto*, we anticipate a trend of developing jurisprudence recognizing the use of medical cannabis as a reasonable accommodation under state fair employment laws.

The HCRC supports the intent of S.B. No. 2220, but notes that it does not specifically address or affect the rights of persons with disabilities to a reasonable accommodation under H.R.S. § 378-2 and H.A.R. § 12-46-187. Whether H.B. No. 2220 is enacted or not, it will not affect the jurisdiction and authority of the HCRC to make determinations or issue decisions on complaints raising reasonable accommodation claims, or engage in rulemaking on the use of medical cannabis as a reasonable accommodation, and will not affect the authority and jurisdiction of the state courts to review and decide cases raising these issues. We anticipate that the Commission and the courts will consider and address the issue in the near future.