

HOUSE BILL REPORT

ESSB 5123

As Passed House - Amended:

March 29, 2023

Title: An act relating to the employment of individuals who lawfully consume cannabis.

Brief Description: Concerning the employment of individuals who lawfully consume cannabis.

Sponsors: Senate Committee on Labor & Commerce (originally sponsored by Senators Keiser, Frame, Hunt, Kuderer, Mullet, Nguyen, Randall, Stanford, Van De Wege and Wellman).

Brief History:

Committee Activity:

Labor & Workplace Standards: 3/14/23, 3/21/23 [DP].

Floor Activity:

Passed House: 3/29/23, 57-41.

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

- Prohibits employers from discriminating against a person in an initial hiring decision based on the person's use of cannabis outside of work or based on a finding of nonpsychoactive cannabis metabolites in an employer-required drug screening test, with some exceptions.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: Do pass. Signed by 6 members: Representatives Berry, Chair; Fosse, Vice Chair; Bronoske, Doglio, Ormsby and Ortiz-Self.

Minority Report: Do not pass. Signed by 3 members: Representatives Robertson, Ranking Minority Member; Schmidt, Assistant Ranking Minority Member; Connors.

Staff: Kelly Leonard (786-7147).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Background:

Employment Restrictions on the Use of Cannabis.

Cannabis, also referred to as marijuana in some contexts, is a Schedule I hallucinogenic substance under the Washington Uniform Controlled Substances Act and the federal Controlled Substances Act. It is generally unlawful to knowingly possess a controlled substance without a valid prescription. However, state law has established exceptions for medical and recreational possession of cannabis. In 1998 the voters approved Initiative Measure No. 692, legalizing possession of cannabis for medical purposes. Then, in 2012, the voters approved Initiative Measure No. 502, legalizing possession of small amounts of cannabis for persons age 21 and older without requiring a medical purpose. The state has since adopted a comprehensive regulatory approach on cannabis, with state-licensed producers, processors, and retailers. Cannabis remains illegal under federal law.

State law prohibits consumption of cannabis in view of the general public or in a public place. However, it does not directly address employer policies regarding cannabis, except for limited instances involving commercial driver's licenses. Therefore, while employers must comply with the Fair Chance Act and other anti-discrimination laws, they may reject applicants based on prior or current use of cannabis. Employers may adopt and enforce policies on the use of cannabis or the impacts of its use in the workplace. This may include requiring applicants or employees to submit to drug testing. Employers operating with federal funds are required to comply with the Drug-Free Workplace Act.

Fair Chance Act.

Under the Fair Chance Act, employers are restricted from using categorical exclusions or screening job applicants based on criminal history until after the employer determines whether those applicants are qualified for the applicable positions. The Office of the Attorney General oversees the administration and enforcement of these restrictions by: (1) investigating violations on its own initiative or in response to a complaint; (2) pursuing administrative sanctions or filing a lawsuit for penalties, costs, and attorneys' fees; and (3) adopting rules to implement the provisions. In exercising its enforcement powers, the Office of the Attorney General must use a stepped enforcement approach as follows:

- first violation—notice of violation and offer of agency assistance;
- second violation—monetary penalty up to \$750; and
- subsequent violations—monetary penalty of up to \$1,000 for each subsequent violation.

Summary of Amended Bill:

Restrictions on Hiring Practices.

The Fair Chance Act is expanded by making it unlawful for an employer to discriminate against a person in the initial hiring for employment based upon:

- the person's use of cannabis off the job and away from the workplace; or
- an employer-required drug screening test that has found the person to have

nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

The restriction does not prohibit an employer from basing initial hiring decisions on scientifically valid drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites. Employers may require an applicant to be tested for a spectrum of controlled substances, which may include cannabis, as long as the cannabis results are not provided to the employer.

The Office of the Attorney General must administer and oversee enforcement of these restrictions in the same manner as provided for the restrictions against categorical exclusions based on criminal history, including for conducting investigations, imposing sanctions, rulemaking, and implementing a stepped enforcement approach.

Exceptions.

The bill does not apply to an applicant seeking:

- a position that requires a federal government background investigation or security clearance;
- a position with a general authority Washington law enforcement agency;
- a position with a fire department, fire protection district, or regional fire protection service authority;
- a position as a first responder, including a dispatcher position with a public or private 911 emergency communications system or a position responsible for the provision of emergency medical services;
- a position as a corrections officer with a jail, detention facility, or the Department of Corrections, including any position directly responsible for the custody, safety, and security of persons confined in those facilities;
- a position in the airline or aerospace industries; or
- any other safety-sensitive position for which impairment while working presents a substantial risk of death.

Safety-sensitive positions must be identified by the employer prior to the applicant's application for employment.

The bill also does not preempt state or federal law requiring an applicant to be tested for controlled substances as a condition of receiving employment, receiving federal funding or licensing-related benefits, or as required by federal contract. This includes laws requiring applicants to be tested or specifying the way they are tested.

Drug and Alcohol-Free Workplace.

The bill does not affect the rights or obligations of an employer to maintain a drug and alcohol-free workplace, or any other rights or obligations of an employer required by federal law or regulation.

An employer may still conduct testing for controlled substances other than preemployment, such as post-accident testing or testing because of a suspicion of impairment or being under the influence of alcohol, controlled substances, medications, or other substances.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on January 1, 2024.

Staff Summary of Public Testimony:

(In support) Cannabis is a legal substance in Washington, similar to alcohol. There is no connection between the appearance of cannabis metabolites in drug screening tests and actual impairment. Drug screening has harmed workers. For these reasons, it is important for the state to prevent people from being sidelined based on past use of cannabis or drug screening tests. The bill has an equity lens and removes unnecessary barriers to employment. The bill also has important exemptions, and also allows employers to maintain drug-free workplace policies.

(Opposed) If the Legislature passes Substitute Senate Bill (SSB) 5110, then the provisions in this bill will be subject to a private cause of action. This will have unintended consequences, and it will generate frivolous lawsuits. To prevent this, the bill should be amended to include a specific enforcement mechanism. By adding specific enforcement, SSB 5110 will not apply to this bill.

Drug screening and other restrictions are necessary in some instances for workplace safety. The exemption in the bill is insufficient. It is currently limited to safety sensitive positions for which impairment while working presents "a substantial risk of death." This should be expanded to also include situations where impairment while working presents a substantial risk of a disabling injury.

(Other) The bill should be amended to explicitly exempt law enforcement and other public safety personnel from the restrictions. As written, it is not clear whether the bill intends to cover these positions. By carving them out with an amendment, law enforcement agencies would be given appropriate discretion to use prescreening; it would not be required in every instance.

Persons Testifying: (In support) Senator Karen Keiser, prime sponsor; Matthew Hepner, International Brotherhood of Electrical Workers, Certified Electrical Workers of Washington; and Sybill Hyppolite, Washington State Labor Council, American Federation of Labor and Congress of Industrial Organizations.

(Opposed) Esther Miller; Sophia Steele, Associated Builders and Contractors; and Jerry

VanderWood, Washington Construction Industry Council and Associated General Contractors.

(Other) Taylor Gardner, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying: None.