



**Written Testimony of Rob Bovett, AOC Legal Counsel,
before the Senate Judiciary Committee
in opposition to Senate Bill 301**

Tuesday, February 21, 2017

Chair Prozanski, Vice-Chair Thatcher, and Senators Dembrow, Linthicum, and Manning,

Thank you for the opportunity to share a few thoughts with you regarding [Senate Bill 301](#). While I can certainly understand the impetus for SB 301, for a number of very real legal, practical, and fiscal reasons, the Association of Oregon Counties (AOC) is opposed to the bill.

SB 301 would make it unlawful for an employer to prohibit an employee from using, during nonworking hours, any substance that is lawful to use in this state, except in three circumstances: (1) When the prohibition relates to a “bona fide occupational qualification;” (2) when the employee is performing work while impaired; or (3) when an applicable collective bargaining agreement prohibits off-duty use of the substance. The bill is obviously targeted to the use of marijuana, which is lawful under state law, but prohibited under federal law.

Ballot Measure 91, which legalized recreational marijuana under state law, promised Oregonians that it would not be construed to “amend or affect state or federal law pertaining to employment matters.” See 2015 Oregon Laws, Chapter 1 ([2014 Ballot Measure 91](#)) §4(1), now codified as [ORS 475B.020\(1\)](#). There were, and are, good reasons for that promise. If enacted, the bill would immediately present direct conflicts of law, including, but not limited to:

1. Global preemption under the federal Controlled Substances Act (CSA), [21 USC § 801 et seq.](#), per the Oregon Supreme Court decision in [Emerald Steel v BOLI](#), 348 Or 159 (2010). The *Emerald Steel* decision is squarely on point. Although many counties, and many Oregon employers, treat marijuana like alcohol, and have personnel rules in place that might comply with SB 301, some counties, and many Oregon employers, do not. This would unavoidably lead to litigation that, in my legal opinion, would result in the nullification of SB 301 under the *Emerald Steel* precedent.

2. Specific preemption under federal law that mandates random drug testing of persons performing certain safety sensitive functions, such as holders of Commercial Driver Licenses (CDLs), and mandates policies that sanction employees that test positive. See Omnibus Transportation Employee Testing Act of 1991, PL 102-143, 105 Stat 917, [49 USC § 31306](#), [49 CFR Part 40](#), [49 CFR Part 382](#). Counties have many employees that fall within the mandates of those federal laws and rules, such as heavy equipment operators that work for county road departments. This would unavoidably lead to litigation that, in my legal opinion, would result in the nullification of SB 301 to the extent the “bona fide occupational qualification” or “collective bargaining agreement” exceptions in SB 301 do not cover those employees.

The fiscal impacts of SB 301 on counties and cities would not be trivial. City/County Insurance Services (CIS), which insures many counties and cities, estimates that it would spend between \$1.15 million and \$1.6 million in one-time litigation costs, plus additional litigation and other costs of \$925,000 to \$1.2 million each year thereafter. Those costs would directly impact and increase liability and other insurance rates charged to CIS members. These estimates by CIS are detailed in the SB 301 Fiscal Impact Statement (FIS) provided to the Legislative Fiscal Office (LFO). It would be fair to double those fiscal impact estimates when considering self-insured counties and cities.

Again, while I can certainly understand the impetus for SB 301, for the legal, practical, and fiscal reasons set forth above, the Association of Oregon Counties (AOC) is opposed to SB 301, and urges the Committee to not move it forward. Thank you again for the opportunity to share a few thoughts with you regarding Senate Bill 301.