

Oppose SB 301

SB 301 protects employee use of marijuana in situations where employers would otherwise be allowed to discourage or prohibit it. The bill is preempted by the US Constitution, conflicts with federal and state laws, and would be almost impossible for employers to reconcile with their obligations to maintain safe workplaces that do not endanger other employees, the public or the customers they serve.

SB 301 is preempted by the United States Constitution: SB 301 would run squarely into the Supremacy Clause in Article VI of the United States Constitution, which requires not only state statutes, but even state constitutions, to yield where the United States Congress has spoken. In this case, Congress spoke through the Controlled Substances Act, which specifically makes the use of marijuana a federal crime and has, in the words of the Oregon Supreme Court in *Emerald Steel Fabricators v. BOLI*, “imposed a blanket federal prohibition on the use of marijuana without regard to state permission.”

SB 301 is preempted by the Drug-Free Workplace Act: The Drug-Free Workplace Act requires employers who receive grants or contracts from the federal government (construction companies, hospitals and long term care facilities, for example, but many others also) to ensure that their workplaces are drug-free. As a practical matter, drug testing will not reveal whether an employee with marijuana in his or her system used it during working hours or during “non-working hours” (a term in SB 301 that might be interpreted to include meal breaks), much less whether the marijuana was used on the employer’s premises or not. Thus, an employer who is prevented by SB 301 from prohibiting marijuana use during non-working hours would find it impossible to comply with the Drug-Free Workplaces Act.

SB 301 is preempted by federal laws related to railway workers: With limited exceptions, railroads are required by federal law to use due diligence to ensure that covered employees do not use controlled substances at any time, whether on duty or off duty. SB 301 could put railroad employers in Oregon in the position of being required by federal law to take steps to ensure no off-duty marijuana use by covered employees, while simultaneously being prevented by SB 301 from taking those very steps, on pain of legal sanctions.

SB 301 Supposes a Testing Technology That Does Not Exist: The exception in SB 301 for off-duty marijuana use that impairs employees’ performance on the job cannot be implemented, because currently, there is no recognized test for whether an employee is “impaired” by his or her use of marijuana (off duty or not).

Current testing protocols can do no more than confirm whether a testee has marijuana in his or her system and if so in what amount, not whether the amount results in impairment or being “under the influence.”

Because SB 301 makes it an **unlawful employment practice** to prohibit off-duty marijuana use except as expressly authorized, this conflict will play out in claims made with BOLI and in lawsuits filed in circuit courts.

SB 301 is not needed because an employee’s use of legal prescription drugs is already protected: Both the Americans With Disabilities Act (“ADA”) and Oregon disability law require an employer to reasonably accommodate an employee’s disability and the treatment of a disability with medication, including situations in which off-duty use of medication affects the employee’s performance at work.

SB 301 creates potential for conflict with those disability statutes. A well-developed body of federal and state case law tells an employer whether an accommodation is or is not “reasonable.” SB 301, on the other hand, imposes no such limitation: an employer may not limit employees’ off-duty use of any lawful substances except to the extent it causes an impairment at work or relates to a bona fide occupational qualification.

SB 301 puts Oregon employers in an impossible position: If the Legislative Assembly enacted SB 301, Oregon employers of all sizes would be in an impossible situation. SB 301 would force them either to employ people who are breaking federal law (regardless of the employer’s business judgment, ethics or morals about hiring lawbreakers) or to gamble that when a disciplined employee filed a lawsuit or BOLI claim, the employer could afford defense costs.

SB 301 also puts employers in the position of having potentially unsafe work environments. Since they would not be able to enforce drug policies regarding marijuana, employers would be stuck having to choose between safety of all their employees and breaking the law. Especially for employers in high risk industries, or where particular employees have high risk positions and others do not, this law would force them to make impossible choices.

SB 301 would unfairly trap employers in the no-man’s land of a policy disagreement between Congress and the Oregon Legislature, while undermining the safety of Oregon’s workplaces. We urge your opposition to the bill.

Associated Builders & Contractors	Oregon Concrete & Aggregate Producers Association
Associated General Contractors	Oregon Farm Bureau
Associated Oregon Industries	Oregon Forest Industries Council
Boise Cascade LLC	Oregon Health Care Association
Building Owners and Managers Association	Oregon Homebuilders Association
Columbia Gorge Fruit Growers	Oregon Metals Industry Council
Far West Agribusiness Association	Oregon Plumbing, Heating & Cooling Contractors
Independent Electrical Contractors of Oregon	Oregon Restaurant & Lodging Association
League of Oregon Cities	Oregon Rural Electric Cooperative Association
National Federation of Independent Business/Oregon	Oregon Seed Council
Northwest Food Processors Association	Oregon State Chamber of Commerce
Northwest Grocery Association	Oregon Trucking Association
Oregon Association for Home Care	Portland Business Alliance
Oregon Association of Nurseries	Special Districts Association of Oregon
Oregon Business Association	