TO: Judiciary Committee Members

RE: Opposition to Senate Bill 379

I write on behalf of the Oregon-Columbia Chapter of the National Electrical Contractors Association (NECA) to express the opposition of NECA and its membership to proposed SB 379. NECA was founded in 1901 as a national trade association to represent, promote and advance the interests of all branches of the electrical contracting industry and the public it serves. Its members are companies (or, in some cases, divisions or branches of companies) that are primarily engage in power distribution and/or integrated systems work. We are a trade association of businesses with unionized workers with almost 99 percent of our U.S. members having an agreement with the International Brotherhood of Electrical Workers (IBEW) to hire trained electricians. Through close partnering and through the collective bargaining process, NECA-IBEW reached a joint drug free workplace agreement that has been in place since 1990 and which has played a major role in improving the health and safety of our industry's workers and enhancing the productivity of the industry. Our workers perform safety sensitive work, the performance of which is essential to the completion of the safety of the construction in which they work. In this industry, nearly half the industrial accidents are related to alcohol or drug use. Abusers are four times more likely to have accidents.

The joint NECA-IBEW program places great importance on treatment over punishment and helps our members regain control of their lives. We have become a model for joint business-labor participation and have inspired other industries throughout the country. Our program has promoted a stable and safe workforce. We have been able to do so at a time when drug problems have plagued Oregon as never before.

Proposed SB 379 represents a risk to our program and to the construction contractors in this state. The bill as proposed prohibits an employer from requiring an employee or prospective employee to refrain from use of any substance that is lawful to use in state law. The language does not expressly call out marijuana, but it is plain that is the bill's intent.

You will no doubt recall that the Oregon Supreme Court has already ruled that such proposals are entirely preempted by federal law. That is, so long as marijuana remains illegal under federal law, the state may not affirmatively authorize a use that is prohibited by federal law. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159, 178, 230 P.3d 518, 529 (2010).

Our drug free workplace program prohibits workers from being at work having used marijuana precisely because it is not a safe substance to use in this industry AND because there is no agreed upon safe level of marijuana. It is important to emphasize that there are now medical forms of marijuana that are not impairing, so that workers who wish to use the drug therapeutically may do

so without the safety risks. What is at issue in this bill is the restriction on employers from prohibiting the form of substance that IS impairing, and that would be used recreationally. Aside from building in an unacceptable level of safety risk in the workplace, this legislation directly threatens our membership who would face challenges in their bidding on federally funded construction contracts of $100,000 or more. Oregon needs this work. Oregon needs these good high-paying jobs.

SB 379 directly conflicts with federal obligations to maintain a drug-free workplace, making it impossible for federal contractors in Oregon to comply with both state and federal laws. The Drug-Free Workplace Act requires contractors to establish and maintain a drug-free workplace to be awarded any federal contract of $100,000 or more or to receive any federal grants. 41 U.S.C. §§ 8102 and 8103. Further, the Act requires that as a condition of employment with the contractor, employees must comply with the drug-free workplace policies. A "drug-free workplace" prohibits employees from engaging in any possession or use of any federally controlled substance in the contractor's workplace. Under this federal law, any employer working under or bidding for federal contracts must maintain a policy that specifically prohibits employees from using or possessing controlled substances in the workplace, including marijuana. Failure to do so risks immediate termination of the federal contract and more sanctions.

This requirement of federal law directly conflicts with the provisions of SB 379 which would make it unlawful for an employer to prohibit employees from using "a substance that is lawful to use under the laws of this state," including marijuana, during nonworking hours. Particularly in the construction industry, where the contractor's workplace location is constantly changing based on the job or project, there are many instances where employees may be considered "in the contractor's workplace" but nevertheless are on nonworking time, such as meal and rest breaks. This would create a completely impossible position for employers during these times where federal law requires they maintain a policy completely prohibiting the use or possession of controlled substances, but where Oregon law would make it unlawful for the employer to maintain that same policy.

The "bona fide occupational qualification" exception of Section 1(1)(b) of the bill leaves vague and undefined what employers might be exempt from this law. It does not clearly reference employers covered by the federal contracting requirement under the Drug-Free Workplace Act. It does not clearly address safety sensitive jobs. There is no definition of the term in the bill, although other provisions of the Oregon Revised Statutes provide some definition of what a BFOQ is. The proposal does not sufficiently protect employers who have a drug free workplace for safety reasons or to permit federal contracting.

Additionally, the exception in Section 1(1)(b) (impaired performance) does not adequately address the concern of our members about employees who use substances such as marijuana because it offers no guidance of what constitutes "impaired" and no objective standard for employers to determine whether an employee is performing work "while impaired." there is no reliable and consistently accepted standard for measuring impairment and this proposal does not even attempt to provide one.

Oregon workers will be the real losers in this legislation if it is passed. Contractors will lose bidding opportunities, which will cost them jobs, and workers will be free to test the limits of impairment, placing all of their coworkers at risk of accident or on-the-job injury.

Sincerely,

Timothy J. Gauthier
Executive Manager