

Statement in Support of HB 2655

Beth Creighton - OR Affiliate - National Employment Lawyers Association (OR-ELA)

My name is Beth Creighton. I am the founder and president of the Oregon Affiliate of the National Employment Lawyers Association (OR-ELA). NELA is a national organization of attorneys committed to advancing equality and justice in the workplace.

For the past 20 years, I have represented employees across the State of Oregon. Since the legalization of marijuana in Oregon, my office receives at least one phone call a month from an Oregonian who was fired for legally consuming cannabis on their off duty hours. 98% of the time I have to tell clients that I am unable to help them because under the current law, an employer can fire an employee for using any substance while off duty, even if it is legal to do so. The only exception is tobacco, which is protected by ORS 659A.315.

ORS 659A.315 states "It is an unlawful employment practice for any employer to require, as a condition of employment, that any employee or prospective employee refrain from using lawful tobacco products during nonworking hours..." HB 2655 would change the words "lawful tobacco products" to "a substance that is lawful to use under the laws of this state." Other legal substances such as alcohol, cannabis or medication used under a doctor's supervision should enjoy the same protections as tobacco products currently do.

At present, if an employee is forced to take a drug test at work, he or she can be fired for having cannabis in their system, even if they ingested it weeks ago and are stone cold sober at work. Additionally, those who use medical marijuana are not protected under either State or Federal law from being terminated for using a substance that has been determined to help alleviate their pain, seizures, debilitating nausea, or other symptom related to their medical condition. Those that use topical cannabis for its pain relieving properties are also not protected from termination by an employer with a zero-tolerance policy for any drug detected in a drug screen.

There is absolutely no business-related reason that an employee who has a beer on Friday night after work should be terminated Monday morning for doing so. Also, it makes little sense to fire employees who take pain medication at night that wears off by morning, but is still in their system. There is no current law preventing employers from doing just that. Allowing employers to terminate employees for something that the voters in this state have decided is perfectly legal infringes upon Oregonians' fundamental rights to freedom.

HB 2655 does contain some exceptions to safeguard employers' concerns. Employers do not have to allow the use of the lawful substance off duty when it relates to a bona fide occupational qualification - such as certain federal laws about commercial driver's licenses or certain federal contracts. Employers can prohibit an employee from coming to work impaired by the substance. And finally, an employer can have a policy prohibiting the off-duty use of the substance, if it is pursuant to a collective bargaining agreement. These exceptions create a balance between the rights of Oregonians as individuals to engage in legal activities and the rights of employers to provide a safe workplace.

With the changing landscape in Oregon since cannabis has been legalized, workers in Oregon need the legislature to act now more than ever to protect their right to work while also protecting the rights afforded to them by the laws of this state.

FACT SHEET

Questions/Concerns

1) Doesn't Measure 91 section 4 state that the Control Regulation and Taxation of Marijuana and Industrial Hemp Act may not be construed as amending or affecting in any way any state or federal law pertaining to employment matters?

Answer: Yes, while Measure 91 does in fact state that, there is no prohibition in Measure 91 against creating new employment laws protecting employment rights of those who use substances made legal by Measure 91. HB 2655 is completely separate from Measure 91 and protects all employees from being terminated due to off duty use of any legal substance. It would prohibit employers from terminating employees who take pain medication on the weekends or use alcohol on the weekends in their off duty hours, as well as those who imbibe cannabis. It would also protect employees who attend parties and accidentally find themselves ingesting edibles without their knowledge.

2) Wasn't there a case involving medical marijuana that held that federal law pre-empts state law on the issue of marijuana use in the workplace?

Answer: No. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 OR 159 (2010) addressed the issue of medical marijuana in the workplace. The theory BOLI advanced on behalf of the employee was that the employee had a disability and that medical marijuana was his medication for the disability and should be accommodated in the workplace. Because Oregon's disability discrimination laws are modeled upon the Americans with Disabilities Act (the "ADA") and the ADA (and analogous provisions of Oregon law) provides that the protections of the ADA (including the right to accommodation for a disability) do not apply to employees involved in illegal drug use and because marijuana use is still illegal under federal law, the employee was not entitled to protections of the ADA or the analogous Oregon law. The case was limited to the interpretation of medical marijuana as an accommodation for a disability and the theory that the employee was indirectly terminated for his disability (which he treated with medical marijuana). Under the disability laws, there was no protection for the employee.

The Oregon Supreme Court in its opinion stated "We express no opinion on the question whether the legislature, if it chose to do so and worded Oregon's disability law differently, could require employers to reasonable accommodate disabled employees who use medical marijuana to treat their disability. Rather, our opinion arises from and is limited to the laws that the Oregon legislature has enacted." This was an invitation to the legislature to revisit the employment laws to prevent future injustices like the one that occurred in Emerald Steel. HB 2655 will do just that, for medical marijuana users and for those who legally and responsibly use marijuana for recreational purposes.