



Tuesday, January 28, 2020

Chairman Jason Sheppard
House Government Operations Committee
Lansing, MI

Senate Concurrent Resolution 18 Correctly Identifies Major Flaws with Proposed Regulation by Marijuana Regulatory Agency

Dear Chairman Sheppard and Members of the Committee:

On behalf of the Reason Foundation, I thank you for accepting these comments and making them part of the public record. Among other things, the Reason Foundation is committed to ensuring that state-regulated marijuana markets are designed in such a way that they remain dynamic and offer genuine economic opportunity to individuals from a range of backgrounds. As such, we are deeply concerned with a new proposed rule that would require entrepreneurs to enter into a labor peace agreement as a condition of licensure. We anticipate this will cause delays in the market's development, render it less dynamic, give undue influence to unrelated third parties, and would violate federal labor laws.

Proposal 1, the initiative that made marijuana legal for adult use in Michigan, made no mention of a requirement for labor peace agreements. To the contrary, Proposal 1 states the administration may only require "qualifications for licensure that are directly and demonstrably related to the operation of a marijuana establishment." We don't see how the requirement to enter a labor peace agreement falls within this statutory scope of permissible administrative action.

Moreover, there is a long series of legal precedents that make clear the proposed rule is federally unconstitutional. The Supremacy Clause to the U.S. Constitution elevates federal law above state and local laws that may be in conflict, and federal law reserves to the National Labor Relations Board the sole authority to regulate private-sector labor relations. A federal Court of Appeals ruled in 2005 that a provision in Wisconsin that would have required contractors with local governments to enter a labor peace agreement ran afoul of the National Labor Relations Act.¹

For its part, the National Labor Relations Act only requires employers to negotiate "in good faith" with a federally recognized union that has achieved majority support of workers in an NLRB-supervised election. It never requires an employer to enter into any form contract with a union as a condition of opening its doors.

Proponents will likely point to a similar provision within California's marijuana licensing scheme as support for the new proposed rule. California's rules require a marijuana licensee with more than 20 employees to enter a labor peace agreement. This provision, however, was expressly included within the language of Proposition 64, the voter initiative that legalized adult-use marijuana. Still, many legal scholars expect the California rule to eventually be struck down as violative of the National Labor

¹ *Metro Milwaukee Commerce vs. Milwaukee County*. United States Court of Appeals, Seventh Circuit, 431 F 3d 277. Dec. 5, 2005.

Relations Act.² Meantime, many licensed marijuana growers in California have avoided the requirement altogether by contracting with farm labor services for their labor needs to avoid the threshold of 20 employees.

Proponents may also argue the state has special powers to require a labor peace agreement by nature of the fact that a marijuana license is a privileged license required to operate a business type that would otherwise be illegal and this entitles the state to attach special conditions to its issue. However, the U.S. Supreme Court ruled in 1987 that the City of Los Angeles could not withhold the license of a taxicab company based solely on the condition that the company resolve a labor dispute.³ Regulation of private-sector labor disputes, noted the Court, was preempted solely to the National Labor Relations Board and therefore no privileged license can be conditioned on a labor peace agreement.

We believe federal law is clear on these issues and excludes states from enacting a requirement such as that propose for Michigan. Even where states enact marijuana laws that may conflict with federal interpretation of the Controlled Substances Act, those states still have no leeway within such laws to simultaneously violate federal labor law. We therefore urge strong caution before Michigan imposes any requirement on marijuana licensing that is likely to be struck down upon a challenge in federal court.

We believe the admonishment contained in SCR 18 correctly identifies these legal issues and that it's appropriate for Michigan lawmakers to express concern over the promulgation of rules that are not clearly authorized by statute and that likely violate federal law. The legislature is the appropriate venue to propose and debate new matters of public policy and our reading of Proposal 1 indicates the requirement for labor peace agreements would be a new matter of public policy with no existing statutory authorization. Although state autonomy from federal overreach should be safeguarded jealously, we also believe judicial precedence is clear on this issue. If Michigan does indeed attempt to usurp the powers of the National Labor Relations Board by directly regulating private-sector labor relations, it could invite additional, unwanted scrutiny over states' efforts to end the failed War on Drugs within their own borders. We urge Michigan and all other states attempting to legalize and regulate the purely intrastate commerce of adult-use marijuana to tread carefully with these programs and not provoke federal retaliation by including within their regulatory apparatus tangential requirements that clearly violate legitimate tenets of federal jurisdiction.

Sincerely,
Geoffrey Lawrence
Senior Policy Fellow
Reason Foundation

² See, e.g., Morris, Keahn N. "AB 1291 Forces California Cannabis Companies to Sign 'Labor Peace Agreements' with Unions, but Statute May Be Unconstitutional." *The National Law Review*. October 23, 2019, <https://www.natlawreview.com/article/ab-1291-forces-california-cannabis-companies-to-sign-labor-peace-agreements-unions>; Armistead, Chandler et al. "California Attempts to Weed Out Unfair Labor Practices at the State Level by Enacting Union-Friendly Regulation on Employers in the Cannabis Industry." *JD Supra*. November 18, 2019, <https://www.jdsupra.com/legalnews/california-attempts-to-weed-out-unfair-48662/>.

³ *Golden State Transit Corp. vs. City of Los Angeles*, 660 F Supp. 571 (1987).