



Senate Bill 375: Analysis and Recommended Changes

Prepared for:

Chairwoman Joy A. San Buenaventura
Hawaii Senate Committee on Health and Human Services

Chairman Jarrett Keohokalole
Hawaii Senate Committee on Commerce and Consumer Protection

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Senate Bill 375 Does Some Things Well, But Has Shortcomings

Dear Chairpersons and Members of the Committees:

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 cannabis markets are designed in such a way that they remain dynamic and offer genuine economic opportunity to individuals from a range of backgrounds. We have reviewed Senate Bill 375 and believe it does some things well but has key shortcomings and absent provisions that should be included.

Strengths

1. **Workplace protections.** Section A-4 includes workplace protections that allow employers to enforce a drug-free workplace or enforce uniform standards regarding employee drug use. This provision is vital for employers who may hold federal contracts or are engaged in physically dangerous activities.
2. **Automatic expungement.** Section 12 would automatically expunge convictions for activities that would no longer be considered crimes following the bill's passage, establishing intertemporal justice.
3. **Ordinary deductions.** Section 30 allows cannabis licensees to deduct ordinary and necessary expenses from gross income under the state corporate income tax, allowing these legal businesses to be treated as similarly situated legal businesses in other industries.
4. **Medical marijuana reciprocity.** Sections 32 and 33 would establish universal recognition of medical marijuana cards issued by other states so that patients can gain access to medically needed cannabis products while they are away from home.

Shortcomings

1. **Cannabis Authority would be slower than agency.** Sections A-12 and A-13 charge the proposed Hawaii Cannabis Authority with adopting rules, establishing fees and making decisions regarding the

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award of cannabis licenses to applicants. Section A-14 clarifies that these functions cannot be delegated. However, the Hawaii Cannabis Authority may meet as infrequently as once per quarter. This means that license applications may linger for extended periods while applicants are forced to consume working capital that may deplete their resources. If an applicant is instructed to cure a small deficiency within its application, then that application may not be considered again for three months. This structure could substantially slow licensing and cause disharmony in the market. Michigan began its adult use market with a similar board in charge of licensing decisions, but quickly scrapped it in response to frequent complaints about how slowly the board moved and the arbitrary nature of its decisions. Instead, Gov. Gretchen Whitmer created the Marijuana Regulatory Agency as a permanent state agency using a rules-based framework to evaluate license applications. Almost immediately, the state became more responsive to the needs of market participants.¹

2. **License types.** Section A-21 specifies the types of cannabis licenses to be issued by the Hawaii Cannabis Authority. It does not list license types available in many other states with adult use cannabis markets, including those for hosting cannabis events, consumption lounges, or retail delivery. In fact, Sections A-91 and A-92, respectively, expressly prohibit retail delivery and on-site consumption. Retail delivery and on-site consumption offer options that may allow consumers to more easily avoid driving while under the influence of cannabis.² Lawmakers should consider the public safety implications of these provisions.
3. **Labor peace agreement requirement is unconstitutional.** Section A-53 would require license applicants to enter into a labor peace agreement as a condition of receiving a license. Maintenance of the labor peace agreement would also be an “ongoing material condition of the license.” This provision would intrude on the exclusive jurisdiction of the National Labor Relations Board to regulate private-sector labor relations. U.S. Supreme Court precedent has made clear that state and local governments cannot condition the issuance of any privileged business license on entrance into a labor peace agreement.³ Through the Supremacy Clause of the U.S. Constitution, this provision is unconstitutional.⁴ Lawmakers should strongly consider removing it because it would imperil the entire state-regulated cannabis market.
4. **Providing capital to licensees could involve the state in federal racketeering.** Section A-32 provides for a series of loans or grants that could be offered to qualified social equity applicants. However, these applicants will be engaged in the manufacture and distribution of a Schedule 1 controlled substance, as defined by the federal Drug Enforcement Agency. As organized entities, these businesses constitute federal criminal enterprises. If the state provides capital directly to these businesses, it will enlist itself as an affiliate of one or more federal criminal enterprises. In the event federal enforcement policies toward state-licensed marijuana businesses change, this could implicate the state itself in federal racketeering and subject the state’s assets to seizure and officers and employees to arrest. Hawaii should refrain from providing direct financial support to any cannabis licensee at least until federal law allows for the legal manufacture and distribution of cannabis products.

Absent Provisions

1. **Enforceable contracts.** Senate Bill 375 contains no express provisions to clarify that contracts entered into by cannabis licensees are enforceable under Hawaiian law. This provision is required to hold counterparties to their commitments with cannabis licensees.
2. **Occupational licensing protection.** There is no express provision to protect holders of professional licenses from censure by state licensing boards simply because they offer services to a cannabis business. Since cannabis businesses are federal criminal enterprises, lawyers, accountants and other credentialed professionals should enjoy this protection under Hawaiian law.
3. **Parent protections.** There is no express provision clarifying that individuals cannot be stripped of their parental rights solely on the basis of their lawful cannabis consumption. Lawmakers should consider

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adding a provision to this effect.

Reason Foundation is committed to ensuring that cannabis legalization is done correctly and that state-regulated markets function properly. We are ready and eager to provide additional feedback on this or similar proposals as necessary.

¹ Geoffrey Lawrence, "Michigan's Marijuana Regulators Are Running Ahead of Schedule," Reason Foundation commentary, July 2, 2019, <https://reason.org/commentary/michigans-marijuana-regulators-are-running-ahead-of-schedule/>.

² Spence Purnell, "Marijuana Delivery: Addressing Concerns and Public Policy Issues," Reason Foundation policy brief, June 2019, <https://reason.org/wp-content/uploads/public-policy-cannabis-delivery-services.pdf>.

³ *Golden State Transit Corp. v. City of Los Angeles*, 660 F. Supp. 571 (C.D. Cal., 1987).

⁴ Geoffrey Lawrence, "Michigan Tries to Force Marijuana Businesses to Reach Labor Peace Agreements," Reason Foundation commentary, January 3, 2020, <https://reason.org/commentary/michigan-tries-to-force-marijuana-businesses-to-reach-labor-peace-agreements/>.

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