



TESTIMONY OF THE CONNECTICUT MEDICAL CANNABIS COUNCIL ON H.B. No. 6377, AN ACT CONCERNING LABOR PEACE AGREEMENTS AND A MODERN AND EQUITABLE CANNABIS WORKFORCE

Senator Kushner, Representative Porter, Senator Sampson, Representative Arora, and members of the Labor and Public Employees Committee:

The Connecticut Medical Cannabis Council (“CMCC”) is the trade association representing the four entities currently licensed by the Connecticut Department of Consumer Protection to produce cannabis for Connecticut’s medical marijuana program (collectively, “producers”). CMCC submits this testimony on behalf of its members in opposition to Section 17 of Raised House Bill No. 6377, which would require any cannabis establishment to enter and abide by a labor peace agreement as a condition of obtaining or maintaining licensure in Connecticut’s cannabis program.

Connecticut’s cannabis producers greatly value their workforces, including by providing good paying jobs with favorable terms and conditions of employment. They are proud to have maintained positive and peaceful relationships with their employees without interruption since receiving their initial licenses in 2014. They oppose the current proposal as a solution in search of a problem – and one that risks creating legal uncertainty and serious potential disruption for Connecticut’s cannabis program and the public it serves.

A labor peace agreement is a contractual agreement between an employer and a labor organization. Typically, such an agreement provides that a labor organization agrees not to strike or otherwise disrupt a workplace in exchange for employer concessions that facilitate union organizing, such as neutrality pledges, card check, provision of workers’ private contact information or access to the workplace for organizing activities. Connecticut law does not currently require any private employer in any industry – whether they hold a state license or not – to enter into labor peace agreements.

Nothing in the eight-year operation of Connecticut’s medical marijuana program demonstrates any justification for singling out cannabis establishments for unprecedented state interference in their labor relations activity. They have not experienced a single occurrence of workplace disruptions of the kind that labor peace agreements are intended to avoid.

Under current law, nothing prevents any willing cannabis producer or other cannabis establishment from voluntarily choosing to negotiate a labor peace agreement as a means of avoiding business disruptions arising from union organizing drives. Any effort to coercively mandate such agreements as a condition of licensure would not only be unnecessary and unwelcomed by the employers whose workplaces such agreements would ostensibly protect. It would also be subject to serious constitutional uncertainty and challenge, creating the potential for court interference and disruption in the state’s licensure and operation of cannabis establishments.

Federal labor law generally prohibits states from regulating labor management matters that are protected or prohibited – or even arguably protected or prohibited – under the National Labor Relations Act, as well as those matters that federal law intended to be left subject to unregulated market forces. Federal labor law requires employers and unions to bargain in good faith, but it does not require them to reach agreement. Thus, a state regulation requiring private employers to agree to contracts with unions governing their conduct in connection with labor organizing would appear to fall squarely within the broad sweep of federal preemption and, as a result, be unconstitutional. This is particularly so

given that the consequence to employers who fail to accede to an agreement – loss of an essential state license – would place the government’s heavy thumb on the scale in favor of the union.

A narrow exception to federal preemption applies when the government is acting as a direct market participant – in effect, as a buyer or seller of goods or services, such as when it is selecting contractors for a state building or managing concessions at a state operated airport. There is no straight-faced argument that the State of Connecticut, in establishing licensure requirements for cannabis establishments, would be acting as a market participant in the sale or distribution of cannabis as opposed to a regulator of those activities. (This is true for the same reason that nobody would seriously suggest the state is a participant in the markets for medical care, liquor sales, hypnotism, interior design or the many other professional activities for which it issues licenses and registration.) In the absence of actual, direct and proprietary market participation – which does not exist here—simply reciting in statutory language the state has “an interest” in a labor peace agreement is meaningless and wholly insufficient to evade preemption.

One might argue that federal labor law protections – and thus federal preemption – do not apply to cannabis workers because cannabis remains unlawful under federal criminal law. In fact, while the application of federal labor law to cannabis businesses has not been definitively resolved, the National Labor Relations Board’s legal staff has previously rejected the categorical exclusion of cannabis workers from federal labor law protections. Moreover, if federal law is amended to recognize the legality of cannabis or state cannabis programs, as many believe is likely, arguments against preemption would largely dissolve.

Nor could one reasonably suggest that because agricultural workers are exempted from the protection of federal labor law, a labor peace agreement is permissible as it relates to cannabis agricultural workers. This argument, too, would be misguided. The current proposal would apply without distinction to all cannabis establishments and employees, whether or not they are arguably agricultural workers. Whether any individual employee would be considered an agricultural worker under federal law requires a fact-specific analysis of their job duties. Clearly, however, many employees of cannabis establishments would not be exempted agricultural employees.

This points to an additional legal flaw with the present proposal. Labor peace agreements serve to facilitate union organizing, but Connecticut is not among the small minority of states that guarantee agricultural workers the right to organize and collectively bargain. Like federal law, Connecticut’s state labor relations act excludes agricultural workers from the definition of employees covered by its protections. How can the state mandate that an employer enter into an agreement meant to facilitate a union’s organizing of certain employees when the state does not mandate that the employer collectively bargain with those same employees?

The legal infirmities of the Raised Bill should concern all who value the proper functioning of Connecticut’s marijuana program. Any existing cannabis establishment licensee or future license applicant would likely have standing to sue in federal or state court challenging the labor peace agreement mandate. Indeed, because this proposal would result in agreements restraining employees’ activities in connection with union organizing, any individual employee of a licensee might challenge the requirement. In connection with such a suit, a litigant could request court orders substantially interfering with the state’s administration of the program or its issuance of licenses. Cannabis

establishments reasonably fear that their operations – and the well-being of those they serve – could be disrupted by litigation questioning the process under which they were licensed.

Moreover, the validity and enforceability of any individual labor peace agreement would remain uncertain to the extent such an agreement was the product of legally dubious regulatory coercion. No such uncertainty would impair voluntarily negotiated labor peace agreements. In addition, because the current proposal would require employers not just to have, but to abide by, labor peace agreements, the Department of Consumer Protection as the licensing agency would be thrust into the role of adjudicating labor/management disputes arising out of such agreements.

No comfort or lesson can be taken from existence of labor peace agreement requirements in the cannabis programs of others states. Because those requirements have not yet been challenged in litigation, their legality has not been affirmed and remains in serious question for the reasons set forth above.

Thank you for the opportunity to submit testimony to the committee.