

FISCAL IMPLICATIONS

In their analyses of the original bill, no agency reports any fiscal impact to the state.

SIGNIFICANT ISSUES

It is unclear whether HB292/cs allows adverse employment actions against an employee in safety-sensitive positions other than those who carry firearms or need a commercial driver's license. Although the definition of "safety-sensitive" in LECUA remains the same, the change in the language of Section 1(B)(2), which now exempts only those two categories of qualified medical cannabis patient employees from LECUA's protection against adverse employment actions raises the question whether such actions are still permitted against other qualified medical cannabis patient employees in safety-sensitive positions under the existing language contained in Section 1(B)(1). Given that lack of clarity, earlier agency analyses concerning the effect of a change in law that would prevent such adverse employment actions against those other qualified medical cannabis patient employees is set out below.

NMDOT's Transit Bureau reported in its analysis of the original bill that it has 1,071 designated safety-sensitive positions. All but six of those positions require a CDL. It advised the effect of legislation like HB292/cs on five of the remaining positions would be pre-empted by federal regulation, and the impact on the sixth position would be de minimus. Further, it noted in Section 6-2B-9A of the LECUSA, an exemption is granted to the employment protections granted individuals participating in the medical cannabis program if failure to take an adverse employment action would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulation.

However, based on its analysis of the original bill, CYFD apparently would not fall within that exception, and warned of the impact on its operations:

The staff in CYFD's secure and non-secure facilities are responsible for the care and rehabilitation of youths who have been exposed to misuse or abuse of drugs and alcohol or misused or abused drugs and alcohol themselves. Staff are frequently required to respond to emergencies in the facilities requiring quick, decisive actions to preserve the safety of staff and clients, including clients being aggressive to staff or other youths, or engaging in self-harm.

An individual under the influence of medical marijuana may not have the cognitive capacity while under the influence to initiate Handle with Care Protocols when trying to contain a youth that is violently out of control. In these situations, being under the influence of medical marijuana may impair their response time as well as their ability to reasonably detain (i.e., no use of excessive force or too little force) which may cause undue harm or death to a youth in their charge or a coworker.

RLD in its analysis of the original bill noted its impact:

RLD directly licenses and regulates a variety of industries and professions whose licensees, when in the performance of the job duties/services they are licensed to perform, could reasonably be viewed as posing a risk to public safety if those

duties/services were performed by an individual while that individual was under the influence of drugs or alcohol. Crane operators and electricians are licensed professions that might immediately come to mind. If the over thirty (30) other industries licensed and regulated by boards and commissions administratively attached to the RLD are considered (dentists, architects, chiropractors, and many others) the potential impact of HB292 expands.

Similarly, based on DOH comments in its analysis of the original bill it appears that HB292/cs would require the Department to hire and employ persons who are enrolled as qualified medical cannabis patients as direct care staff and would require that they continue to be hired and employed in other positions that are currently deemed “safety-sensitive” in accordance with State Personnel Office position designations.

As DOH’s comments suggested, HB292/cs appears to conflict with the existing State Personnel Board regulations that define a safety-sensitive position to be:

A position approved as such by the board, including a supervisory or managerial position in which impairment by drug or alcohol use would constitute an immediate and direct threat to public health or safety and includes, but is not limited to, health care providers, peace officers, pilots, correctional officers, employees who are required to regularly carry a firearm, employees who regularly transport other people as their principal job; and positions involving use of equipment that could pose a risk to public health or safety.

(See 1.7.8.7(M), New Mexico Administrative Code.)

SPO in its earlier analysis of the original bill, noted this definition is broader: Not only does it encompass positions that pose a risk of injury or death, the rule includes positions that threaten public health and safety, beyond those that involve carrying a firearm or operating a commercial vehicle. It also commented that the original bill as well as this Substitute is not clear whether its exemption in Section 1(B)(2) includes positions that have access to but are not required to carry a firearm, such as, in the state classified system, correctional officers and juvenile corrections officers.

SPO advised:

The State Personnel Board has currently designated a total of 4,347 Safety Sensitive positions, 272 of those are required to carry a firearm, while another 1,526 have access to firearms. We do not have an indicator for commercial vehicle licensure. State classified safety sensitive positions that would not be covered under the proposed definition include, but are not limited to, bus mechanics, medication aides, physicians, nurses, forensic scientists, highway maintenance workers, corrections officers and juvenile corrections officers.

In addition, as NMDOT, CYFD, and DOH and the regulation suggested, there are numerous positions in which drug impairment could raise public health and safety concerns that do not require the carrying of a firearm or a commercial driver’s license.

DOH advised:

The existing “safety-sensitive position” text was included in the LECUA in 2019 partly in recognition of the difficulty of proving impairment on the job from cannabis use. THC metabolites can remain in the human body for weeks after cannabis is consumed, and it is

generally considered impossible, using existing testing methods, to determine from a urine or blood test whether an individual is actively impaired from cannabis.

SPO also called attention to the language in LECUA that exempts an employee “whose employer deems that the employee works in a safety-sensitive position.” As SPO noted, in cases of conflict between an employer’s and the statutory definition of safety-sensitive, this language is unclear which definition should prevail. HB292/cs does not resolve this question. SPO warned:

If enacted, HB292 will limit the ability of employers to take action against employees that test positive for Cannabis in a wide range of positions that impact safety and could lead to injury or death. HB292 could increase confusion for employers and employees as to who is protected against adverse employment action for medical marijuana use under 26-2B-9 of the Act.

ADMINISTRATIVE IMPLICATIONS

NMDOT cautioned that despite federal preemption, there is potential for confusion over the difference between a federal-defined safety-sensitive position, which requires drug and alcohol testing, versus a state-defined safety-sensitive position for medical marijuana users, which can conflict with federal regulation. Employees may therefore inadvertently be excluded from federal drug and alcohol testing requirements or face challenge of testing requirements and results in contrast to federal regulation. This could put federal funding at risk.

OTHER SUBSTANTIVE ISSUES

DOH reported that many of the approximately 23 states that apply employment protections to medical cannabis usage apply an exception for “safety sensitive” positions. However, there is no uniform standard for what constitutes a safety-sensitive position.

AMENDMENTS

NMDOT proposed this amendment to subsection B(2) of Section 26-2B-9:

(2) apply to an employee whose employer deems that the employee works in a safety-sensitive position, provided that a legitimate medical explanation for a positive test of marijuana metabolites shall include possession of a valid State of New Mexico registry identification card denoting certified medical use of cannabis for that person, except in response to reasonable suspicion testing or otherwise contrary to applicable federal law or regulation.

MD/al/ne