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ATTORNEYS AT LAW

January 28, 2020

To: Chairman Sheppard and Members of the House Committee on Government Operations

Re: Support for Senate Concurrent Resolution No. 18

Dear Chairman Sheppard and Members:

Thank you for the opportunity to provide this brief comment and analysis in support of Senate Concurrent Resolution No. 18, on behalf of Associated Builders & Contractors of Michigan ("ABC Michigan"). As you may know, ABC Michigan is a state-wide construction trade association committed to promoting the merit-shop philosophy, and a healthy business environment, throughout Michigan. It is for that reason that ABC Michigan supports Senate Concurrent Resolution No. 18, and opposes the Marijuana Regulatory Agency's proposed rules to regulate marijuana licenses (2019-67 LR), which would include, as currently drafted, a requirement that licensees agree to a labor peace agreement with a labor union before they can apply for or renew a license.

This comment will focus on our concerns over the legality of the proposed labor peace agreement requirement. This provision, if adopted, will almost certainly result in legal challenges which will delay and encumber the development of the legalized marijuana industry, and has broader potential impact on other regulated industries.

The proposed rules, in our view, are substantially likely to be invalidated on multiple grounds, including the following:

1. NLRA Preemption.

The National Labor Relations Act ("NLRA") protects the rights of individuals to join or assist, or not to join or assist, a labor organization.[1] The NLRA also comprehensively regulates activities of employers with respect to their interactions with labor organizations.[2] As a result, it is well settled that "the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom…or for NLRB jurisdiction."[3] In other words, States are not permitted to regulate activities that are either permitted or forbidden by the NLRA.

[1] 29 U.S.C. § 157.
[2] 29 U.S.C. § 158.
[3] *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226–27 (1993).

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Here, the proposed rules do exactly that. The rules require an employer to enter into an agreement with a labor organization in order to obtain a license to do business. These agreements must include, "at a minimum," provisions governing various activities protected under the NLRA. But there are no limits on what may be included. A business owner required to reach an agreement may feel compelled to accept numerous provisions often found in collective bargaining agreements, which he or she might otherwise reject absent the rule. In that sense, the proposed rules create an unequal negotiating environment which is directly in conflict with the NLRA. We therefore believe there is a substantial risk of federal preemption or invalidation if the proposed rules are adopted in Michigan.

2. Labor Peace Agreements Are Not Authorized By the Statute

Terms such as labor peace agreement, labor organization, or union, are not included in the Michigan Regulation and Taxation of Marijuana Act (the "Act"). In fact, the Act does not address labor regulation at all. A labor peace agreement requirement is, therefore, unauthorized under the Act. Section 8.1 provides specific authorization for the types of rules that may be promulgated. These include such things as rules that relate to procedures, fees, and health standards. Subsection 8.1(c) specifically authorizes rules governing "qualifications for licensure that are directly and demonstrably related to the operation of a marijuana establishment . . . ." Nowhere in the list of authorized rules is agreement with a labor organization on a labor peace agreement. Regulation of labor issues is not authorized at all. The proposed rules, therefore, are not supported by the language of the Act.

The Act further contains a list of prohibited rules, which include any rule that is "unreasonably impracticable." Act, Section 8.3(d). The proposed rules here appear to fall squarely within that prohibition. An "unreasonably impracticable" rule is one which subjects a licensee to (i) unreasonable risk, or (ii) requires such an investment of money, time or resources that a reasonable businessperson would not operate the business. Act, Section 3(u). Here, the proposed rules provide no guidance as to what labor organizations may be considered *bona fide*, nor is there any limitation on what additional concessions such a labor organization may demand in order to extract an agreement. The undefined requirements of the proposed rules likely renders them unconstitutionally vague. The licensee must assume the risk that they are bargaining with a qualified labor organization, and that the terms negotiated are sufficient for approval by a licensing authority that was not involved in the negotiations. These are unreasonable risks that will be a barrier to qualified businessowners from entering the industry.

We believe that federal law, and the Michigan Regulation and Taxation of Marijuana Act itself, may prohibit the rules currently under consideration. The strong possibility of legal challenges on multiple grounds, and the unreasonable risk of imposing vague elements of labor policy on the licensing process, advises against adoption of the proposed rules.

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