

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

AB 2728 (Smith)  
Version: April 20, 2022  
Hearing Date: June 28, 2022  
Fiscal: Yes  
Urgency: No  
AWM

**SUBJECT**

Unlawful cannabis activity: penalties

**DIGEST**

This bill increases the maximum civil penalty for engaging in commercial cannabis activity without a license as required to up to four times the amount of the license fee for the violation, with each day of operations constituting a separate violation; and provides that unpaid penalties can be waived if, within 10 days of the issuance of the penalty, the person submits a payment equal to the original license fee and accompanying application information to Department of Cannabis Control (DCC).

**EXECUTIVE SUMMARY**

Californians voted to legalize the adult use and sale of recreational cannabis in 2016, and the Legislature subsequently implemented a licensing regime for the cultivation, manufacture, testing, and sale of cannabis products. Despite the state's efforts to permit and regulate cannabis activities, illicit cannabis activities still remain as a substantial portion of the cannabis industry. The author has provided information about large-scale operations to crack down on unlicensed cannabis operations, which resulted in hundreds of arrests, thousands of greenhouses eradicated, and millions in cash seized. Neither the DCC nor the author has provided this Committee with information about how many, if any, individuals charged and penalized in connection with these operations were assessed with a civil penalty for unlicensed commercial cannabis activity.

This bill increases the maximum civil penalty for conducting unlicensed commercial activity in the state, from a maximum of three times the relevant licensing fee per violation per day to four times the licensing fee per violation per day.

This bill is sponsored by the County of San Bernardino and is supported by the California Narcotic Officers Association. This bill is opposed by California Cannabis

Equity Alliance, California NORML, and the Cannabis Consumers Campaign. This bill passed out of the Senate Business, Professions and Economic Development Committee with a 13-0 vote.

### **PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Establishes the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) to regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale of both medicinal cannabis and adult-use cannabis. (Bus. & Prof. Code. §§ 26000 et seq.)
- 2) Grants DCC the authority to regulate cannabis, including the sole authority to create, issue, deny, renew, discipline, condition, suspend, or revoke licenses for commercial cannabis activity. (Bus. & Prof. Code, §§ 26010, 26012.)
- 3) Establishes 20 types of licenses for various commercial cannabis activities, including cultivation, manufacturing, testing, retail, distribution, and microbusiness; a licensee must designate whether the license is for adult-use or medicinal cannabis, except for the testing laboratory license. (Bus. & Prof. Code, § 26050.)
- 4) Provides that a person engaging in commercial cannabis activity without the required license shall be subject to a civil penalty of at least three times the amount of the license fee for each violation, and the court may order the destruction of the cannabis associated with the violation. (Bus. & Prof. Code, § 26038(a)(1).)
- 5) Provides that a person aiding and abetting unlicensed commercial cannabis activity shall be subject to civil penalties of up to three times the amount of the license fee for each violation, not to exceed thirty thousand dollars \$30,000 for each violation, provided that the court makes certain findings related to the person's control over the cannabis operation. This action may be brought only by the Attorney General on behalf of the people, on behalf of the department, or on behalf of the participating agency, or by a city or county counsel or city prosecutor in a city or county having a population in excess of 750,000. (Bus. & Prof. Code, § 26038(a)(2), (d), (e)(4).)
- 6) Provides that, for purposes of calculating the number of violations in 4) or 5), each day of unlicensed operation constitutes a separate violation. (Bus. & Prof. Code, § 26038(a).)
- 7) Requires a court, when assessing a penalty under 4) or 5), to give due consideration to the appropriate amount of the civil penalty with respect to relevant factors, including:
  - a) The gravity of the violation of the person.

- b) The good faith of the person.
  - c) The person's history of previous violations.
  - d) Whether, and to what extent, the person profited from the unlicensed cannabis activity. (Bus. & Prof. Code, § 26038(a)(3).)
- 8) Provides that an action for a civil penalty under 4) or 5) must be brought within three years of the violation. (Bus. & Prof. Code, § 26038(b).)
- 9) Provides that the civil penalties imposed and collected for unlicensed cannabis activity may be used to reimburse an agency's or the Attorney General's costs of investigation, and the prosecuting agency or counsel's costs of bringing the action, with the remainder, if any, to be deposited into the General Fund. (Bus. & Prof. Code, § 26038(c), (e).)

This bill:

- 1) Increases the maximum civil penalty for engaging in unlicensed commercial cannabis activity to four times the amount of the license fee.
- 2) Requires DCC to waive the civil penalty accrued under 1) if, within 10 business days of issuance of the penalty, the person submits a payment equal to the original licensing fee required by the department pursuant to Section 26180 and all accompanying documentation.

### COMMENTS

#### 1. Author's comment

According to the author:

When voters supported Proposition 64, they did so on the promise that the industry created would balance consumer desire and public safety in a similar way to other industries such as liquor. Unfortunately, that balance wasn't executed in a sustainable or effective way. Penalties for noncompliance were designed to be minor. Directly as a result of public opinion and a fear of another war on drugs. As a result of this light-footed approach, an untested and unregulated market now exists in way not seen before. In San Bernardino County alone, there has been a 200% increase in the seizures of illegal marijuana plants since the passing of Prop 64.

Therefore, we need to alter the civil penalty structure for unlicensed cannabis activity. Allowing for a stronger maximum penalty for illicit cannabis operations while giving them an incentive to come into compliance.

2. This bill increases the maximum civil penalty for engaging in unlicensed commercial cannabis activity from three times the licensing fee per day to four times the licensing fee per day

While cannabis remains a Schedule I narcotic under federal law,<sup>1</sup> California has permitted medical cannabis use since 1996.<sup>2</sup> Adult recreational cannabis use was approved by the voters in 2016 via Proposition 64 (Prop. 64),<sup>3</sup> and the Legislature subsequently enacted MAUCRSA to streamline and synthesize the licensing and regulatory regimes for medical and recreational cannabis.<sup>4</sup>

Prop. 64, as approved by the voters, provided numerous enforcement mechanisms for engaging in unlicensed commercial cannabis activity. Prop. 64 included a civil penalty for engaging in unlicensed commercial cannabis activity of up to three times the licensing fee for the activity (the 3x penalty), with each day of unlicensed activity constituting a separate violation<sup>5</sup> MAUCRSA left this penalty intact.<sup>6</sup> The civil penalty can be assessed by the DCC or sought in an action brought by the Attorney General, a county counsel, a city attorney, or a city prosecutor.<sup>7</sup>

Prop. 64 also reflected the intent of the voters that local governments generally retain the ability to enforce cannabis laws using local laws or penalties not specific to cannabis activity.<sup>8</sup> Local governments thus retain the ability to take action against unlicensed commercial cannabis activity using punitive measures, such as criminal charges arising from the cannabis itself, conspiracy charges, weapons charges, and so on. Local governments also use laws of general applicability such as the Unfair Competition Law,<sup>9</sup> zoning laws, and nuisance laws to combat unlicensed cannabis activity.

Committee staff were not provided with, and were unable to locate, information on how frequently the Prop. 64 civil penalty has been assessed by DCC or through a lawsuit – or indeed, whether it is used at all. There do not appear to be any reported judicial decisions addressing a case where the civil penalty was imposed.

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<sup>1</sup> 21 U.S.C. § 812. Drugs designated as Schedule I ostensibly have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use of the drug or other substance under medical supervision. (*Id.*, § 812(b)(1).) Opium and fentanyl, by contrast, are designated as Schedule II. (*Id.*, § 812, Schedule II.)

<sup>2</sup> Compassionate Use Act (Prop. 215), as approved by voters, Gen. Elec. (Nov. 5, 1996).

<sup>3</sup> The Control, Regulate, and Tax Adult Use of Marijuana Act (Prop. 64), as approved by voters, Gen. Elec. (Nov. 8, 2016).

<sup>4</sup> SB 94 (Senate Committee on Budget and Fiscal Review, Ch. 27, Stats. 2017).

<sup>5</sup> Prop. 64 at p. 17.

<sup>6</sup> Bus. & Prof. Code, § 26038(a); *see* Prop. 64 at p. 17.

<sup>7</sup> *Id.*, § 23068(e).

<sup>8</sup> Prop. 64 at p. 38; Bus. & Prof. Code, § 26200.

<sup>9</sup> Bus. & Prof. Code, div. 7, ch. 5, §§ 17200 et seq.

This bill increases the maximum civil penalty that may be assessed by DCC or awarded in a civil action under MAUCRSA for unlicensed commercial cannabis activity, to four times the licensing fee per violation per day. The bill also requires DCC to waive any unpaid penalties if, within 10 days of the issuance of the penalty, the violator submits an amount equal to the licensing fee and “accompanying documentation,” which is intended to require the violator to complete an application for the license they should have had. It is unclear whether this waiver provision will be useable in practice; completing an application for a cannabis license within 10 days appears to be virtually impossible due to the complexity and scope of required documentation. The author is continuing to work on improving this provision.

Because Committee staff have received no specific information illustrating why the 3x penalty put in place by Prop. 64 is insufficient, it is difficult to determine whether it is, in fact, insufficient to effectuate the intent of the voters. Committee staff have not received, for example, information about cases wherein an unlicensed business was assessed with a 3x civil penalty and yet continued to operate with impunity. Given that the penalty already triples the licensing fee per day of unlicensed cannabis activity, the potential penalty is already sizeable. Licensing fees currently cost from \$1,250 to \$300,000.<sup>10</sup> The maximum penalty under the existing statute for a month’s worth of unlicensed activity can thus range from \$112,500 to \$27,000,000. It is not clear how increasing the maximum penalty to four times the fee would significantly change the risk calculus for persons engaging in unlicensed activity.

It is also worth noting that, while the sponsor states the penalty increase is necessary so as to combat the large-scale criminal cannabis operations, the penalty increase is not limited to flagrant or willful violators. Virtually any violator, no matter how low-level, could be hit with four times the licensing fee per day, or could be pressured into admitting to other violations rather than risk the imposition of a crushing penalty.

There is already evidence that local governments are not limiting their enforcement efforts to high-level, violent operations. Consider Emily Wheeler. When Ms. Wheeler was 85 years old, the City of Los Angeles charged her and her son with misdemeanor zoning violations for renting a storefront to an unlicensed cannabis business.<sup>11</sup> The court dismissed the charges against Ms. Wheeler “in the interest of justice” because there was no evidence that she had any knowledge of the unlicensed cannabis activity on her property.<sup>12</sup> Rather than let it drop, the City of Los Angeles appealed the dismissal and ultimately the Second District Court of Appeal held that the trial court

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<sup>10</sup> See Department of Cannabis Control, Application and license fees (2022) <https://cannabis.ca.gov/applicants/application-license-fees/#fees-by-license-type> (last visited Jun. 22, 2022).

<sup>11</sup> *Wheeler v. Appellate Division of Superior Court of Los Angeles County* (2021) 72 Cal.App.5th 824, 828.

<sup>12</sup> *Id.* at pp. 828-829.

exceeded its authority by dismissing the charges because the zoning violations did not require actual knowledge.<sup>13</sup>

The Prop. 64 penalty is similar in that it does not require evidence of intent or harm; any person who engages in unlicensed cannabis activity can be liable for the penalty. Ms. Wheeler at least had a public defender because she was charged with misdemeanors; the penalty here is civil, so no counsel would be provided. As a result, while the increased penalty in this bill could be assessed against the large criminal operations – even though there is no evidence anyone tried to use the 3x penalty – it could equally be applied to persons operating relatively harmlessly and who likely could not afford representation to help keep the assessed penalty commensurate with the nature of the violation. Moreover, because the provision allowing most of the fee to be waived appears too difficult to use in practice, the bill does not provide meaningful protection for unintentional violations.

### 3. Arguments in support

According to the County of San Bernardino, the sponsor of the bill:

When voters enacted Proposition 64 to legalize recreational cannabis, they did so with the assumption that the state would balance consumer desire with public safety. Unfortunately, penalties for illegal cannabis activity were reduced before the legal market was firmly established. As a result, California has had a massive increase in illegal cannabis farms across the wilderness areas of the state. State law already permits civil penalties against unlicensed cannabis dealers, however, the current civil fine structure does little to discourage illegal activity which directly competes with legal, law-abiding cannabis businesses, production, and retail sales. State law should set heavier fines to deter illegal cannabis production that undermines the legal market and law-abiding entrepreneurs. AB 2778 increases fines for unlicensed, illegal cannabis activity. Heavier fines will encourage illegal cannabis operators to comply with state law, and thereby decrease the amount of illegal product that competes with the legal cannabis market.

### 4. Arguments in opposition

While it is essential that the state take more decisive action to curb the illicit market for cannabis, we do not believe that the continued perpetuation of 80 years of failed enforcement policies is the answer. The market for cannabis in California is too strong, and the potential profits to be made are too great, for the proposed fines in this legislation to make a significant dent in the illicit trade.

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<sup>13</sup> *Id.* at pp. 842-843.

This measure therefore represents little more than a symbolic deterrent that will be good for a press release and little else....[T]he approach of AB 2728 represents a significant step backward. Curbing the illicit market requires more than window dressing.

### **SUPPORT**

County of San Bernardino (sponsor)  
California Narcotic Officers' Association

### **OPPOSITION**

California Cannabis Equity Alliance  
California NORML  
Cannabis Consumers Campaign

### **RELATED LEGISLATION**

#### **Pending Legislation:**

AB 2421 (Blanca Rubio, 2022) increase the ability for local agencies to take enforcement actions against unlicensed cannabis cultivation operations that illegally divert water and pollute the environment. AB 2421 is pending before the Senate Natural Resources and Water Committee.

AB 2102 (Jones-Sawyer, 2022) establishes a civil penalty of up to \$30,000 for landlords who knowingly rent to persons engaged in unlicensed cannabis activity. AB 2022 is pending before the Senate Judiciary Committee.

#### **Prior Legislation:**

AB 1138 (Blanca Rubio, Ch. 530, Stats. 2021) creates a civil enforcement action for aiding and abetting unlicensed cannabis activity by certain high-level control persons, with a civil penalty of up to \$30,000 per violation

AB 2122 (Blanca Rubio, 2020) would have established a civil penalty for aiding and abetting unlicensed cannabis activity. AB 2122 died in the Senate Judiciary Committee.

AB 1530 (Cooley, 2019) would have established grants for local governments to establish or expand an enforcement program against unauthorized cannabis activity, as defined, and provide consumer education about the difference between licensed or legal cannabis activity and unlicensed or illegal cannabis activity. AB 1530 died in the Assembly Business and Professions Committee.

AB 1417 (Blanca Rubio, 2019) would have, among other things, extended the penalty for unlicensed cannabis activity to aiders and abettors. AB 1417 died in the Senate Appropriations Committee.

**PRIOR VOTES:**

Senate Business, Professions and Economic Development Committee (Ayes 13, Noes 0)

Assembly Floor (Ayes 66, Noes 0)

Assembly Appropriations Committee (Ayes 13, Noes 0)

Assembly Judiciary Committee (Ayes 9, Noes 0)

Assembly Business and Professions Committee (Ayes 15, Noes 0)

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