

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1171 (Blanca Rubio)
Version: July 5, 2023
Hearing Date: July 11, 2023
Fiscal: No
Urgency: No
AWM

SUBJECT

Cannabis: private right of action

DIGEST

This bill creates a private right of action allowing a licensed commercial cannabis operator who has been harmed by an unlicensed cannabis operator to seek actual damages, statutory damages, and an injunction against the unlicensed cannabis operator.

EXECUTIVE SUMMARY

Although cannabis has been legal in California for medical use since the mid-1990s and for adult recreational use since 2016, an illicit market for cannabis products continues to flourish in the state. Operators engaging in unlicensed cannabis activity have significant economic advantages over their licensed counterparts, as unlicensed operators can avoid the costs of complying with state regulations, paying taxes, and properly testing products. In recent years, the Legislature has approved several measures aimed at strengthening civil enforcement of cannabis laws to prevent the illicit market from overtaking licensed cannabis businesses. However, due to a lack of state-level enforcement resources, these tools have been underutilized, and the legal cannabis industry continues to struggle in the face of unlawful competition.

The author and sponsor of the bill, recognizing that the state's current budget situation is unlikely to produce significant new investment in enforcement resources, seek to empower licensed cannabis operations to enforce the law on their own. This bill thus creates a cause of action for a licensed cannabis business that is harmed by an unlicensed operator to file a civil suit against the unlicensed operator; if the licensed business prevails, it can recover actual damages or statutory damages, along with reasonable attorney fees and costs. Additionally, the court can enjoin the unlicensed operator from continuing to engage in unlicensed cannabis activities. The bill also

clarifies that this private right of action does not extend to unlicensed cannabis businesses engaging in certain Labor Code violations.

This bill is sponsored by the San Diego/Imperial Counties Joint Labor Management Committee and is supported by the California Cannabis Industry Association and UFCW Western States Council. There is no known opposition. The Senate Business, Professions and Economic Development Committee passed this bill with a vote of 11-0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), which establishes a comprehensive system to control and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale of medical cannabis and recreational cannabis for adults aged 21 years and older. (Bus. & Prof. Code, div. 10, §§ 26000 et seq.)
- 2) Establishes the Department of Cannabis Control (DCC), which has licensing and regulation authority under MAUCRSA, except where the authority is expressly delegated to another agency or department. (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) Prohibits a person from engaging in commercial cannabis license without a valid license issued by the DCC. (Bus. & Prof. Code, § 26037.5.)
- 5) Authorizes the DCC to issue a citation to a person engaging in unlicensed commercial cannabis activity
- 6) Provides civil penalties for persons engaging in unlicensed commercial cannabis activity, for persons aiding and abetting unlicensed commercial cannabis activity, and persons who knowingly rent or make available property for unlicensed commercial activity, as follows:
 - a) For unlicensed commercial cannabis activity, the penalty is up to three times the license fee for each day of the violation; for aiding and abetting, the penalty is up to \$30,000 for each violation, per day of the violation; for knowingly renting or making property available, the penalty is up to \$10,000 per day of the violation.
 - b) The statute of limitations is three years.

- c) Actions for aiding and abetting may be brought only by the Attorney General on behalf of the DCC, or by a city or county counsel or city prosecutor in a city or county having a population in excess of 750,000; actions for renting or making available property may be brought only by the Attorney General on behalf of the DCC or by a city or county counsel or city prosecutor.
 - d) For aiding and abetting and renting/making available property, the prosecuting entity must establish additional factors regarding the defendant's knowledge and significant role in the unlicensed cannabis operation. (Bus. & Prof. Code, § 26038.)
- 7) Provides that MAUCRSA, except where specified, does not supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate licensed cannabis businesses, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, or to completely prohibit the establishment or operation of one or more types of licensed commercial cannabis businesses. (Bus. & Prof. Code, § 26200.)

This bill:

- 1) Provides that, in addition to other remedies permitted by law, a cannabis licensee may bring a private right of action against a person engaging in unlicensed commercial cannabis activity.
 - a) In order to prevail in the action, the licensee must demonstrate that they have suffered actual harm as a result of the unlicensed commercial cannabis activity.
- 2) Authorizes a court, in an action brought under 1), to enter an order enjoining a defendant from engaging in unlicensed cannabis activity.
- 3) Provides that a cannabis licensee who prevails in an action brought under 1) shall be entitled to the following:
 - a) Either actual damages caused by the unlicensed commercial cannabis activity or statutory damages of up to \$500,000.
 - b) Reasonable attorney fees and costs.
- 4) Requires a court, in determining the amount of statutory damages to assess under 3)(b), to consider all of the following:
 - a) The amount of money derived by the person engaging in commercial cannabis activity without a license.
 - b) The number of licensed operations impacted by the unlawful conduct.
 - c) The number of prior violations of state or local cannabis laws committed by the defendant.
 - d) Any other factors the court deems to be within the interest of justice.

- 5) States that the above shall not apply to any Labor Code violations committed by a person engaging in unlicensed cannabis activity and shall not form the basis for a cause of action arising under the Private Attorneys General Act of 2004) (Lab. Code, §§ 2698-2699.8.)
- 6) States that the Legislature finds and declares that this bill furthers the purposes and intent of the Control, Regulate and Tax Adult Use of Marijuana Act (Proposition 64).

COMMENTS

1. Author's comment

According to the author:

AB 1171 seeks to empower legal and fully licensed cannabis operators to petition the court to issue an injunction against non-licensed operators. This additional enforcement tool is essential given that the local and state agencies responsible for cannabis enforcement are insufficiently equipped to meet the challenge of California's enormous and rapidly growing illegal cannabis industry.

2. Despite legalization, unlicensed cannabis activity in California remains prevalent

While cannabis remains a Schedule I narcotic under federal law,¹ California has permitted medical cannabis use since 1996.² Adult recreational cannabis use was approved by the voters in 2016,³ and the Legislature subsequently enacted MAUCRSA to streamline and synthesize the licensing and regulatory regimes for medical and recreational cannabis.⁴

Although many cannabis operators opted to embrace the newly state-legal framework and obtain licenses, the illicit market for unlicensed products continues to flourish.⁵ The persistence of unlicensed cannabis operations harms licensed operators – unlicensed operators are able to offer lower prices than licensed operators because they do not

¹ 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).) Fentanyl and other opioids, by contrast, are designated as Schedule II. (*Id.*, § 812, Schedule II.)

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

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

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

⁵ See, e.g., Orsmeth, *Killings, robberies, extortion. California can't stop its booming illegal cannabis stores*, L.A. Times (Sept. 13, 2022), available at <https://www.latimes.com/california/story/2022-09-13/illegal-weed-dispensaries-police-raids-crime>. All links in this analysis are current as of July 6, 2023.

have to pay licensing fees⁶ – and can also harm the customers, given that unlicensed products do not go through quality testing and can be tainted.⁷

State and local enforcement agencies have taken steps to crack down on unlicensed cannabis, including through the creation of a Unified Cannabis Enforcement Taskforce.⁸ Stakeholders report, however, that these efforts are still insufficient to stem the tide of unlicensed cannabis, and that the prevalence of unlicensed businesses may cause licensed businesses to fail in large numbers. According to the California Cannabis Industry Association, writing in support:

The licensed cannabis industry continues to struggle with competition from an illicit market that is untaxed, unregulated, and untested. This entrenched unlicensed market accounts for approximately two-thirds of all cannabis sales in the state, according to a 2022 Reason Foundation report, and has resulted in numerous negative consequences, including an increase in cannabis-related violence, worker exploitation, and environmental damage. Competition from the illicit market also robs the state of about \$2 billion in taxes per year.

3. This bill creates a private right of action for a licensed cannabis operator to seek damages from an unlicensed cannabis operator

While the Legislature has previously expanded the authority of state actors to seek civil penalties from unlicensed cannabis operators, individuals who aid and abet unlicensed cannabis operators, and individuals who knowingly rent to unlicensed cannabis operators,⁹ this bill cuts out the middleman and allows licensed commercial cannabis operators to sue the unlicensed cannabis businesses causing them harm.

Under this bill, a party with a valid cannabis license from the DCC can bring an action in superior court against a person engaging in unlicensed commercial cannabis activity, provided that the licensee can demonstrate that the unlicensed commercial cannabis activity caused them harm. The cause of action is available to all categories of licensees, from growers to retail shops. If the licensee prevails in the action, they are entitled to recover either the actual damages caused by the unlicensed activity or statutory damages of up to \$500,000, as well as their attorney fees and costs. Additionally, the

⁶ *Ibid.*

⁷ E.g., Kenny, *Monterey County reveals contamination in illicit marijuana samples*, The Mercury News (Dec. 15, 2021).

⁸ E.g., DCC, Press Release, *California's statewide cannabis enforcement taskforce continues to aggressively combat illegal marijuana by seizing over \$52 million worth of unlicensed cannabis products* (May 22, 2023), <https://cannabis.ca.gov/2023/05/californias-statewide-cannabis-enforcement-taskforce-continues-to-aggressively-combat-illegal-market-by-seizing-over-52m-worth-of-unlicensed-cannabis-products-in-q1-2023/>.

⁹ See AB 195 (Assembly Committee on Budget, Ch. 56, Stats. 2022); SB 1138 (Blanca Rubio, Ch. 530, Stats. 2021); AB 141 (Assembly Committee on Budget, Ch. 70, Stats. 2021).

court may issue an injunction to prohibit the defendant from engaging in further unlicensed commercial cannabis activity.

As always, there is a concern that increased penalties for unlicensed commercial cannabis activity could lead to the same type of unequal enforcement that characterized the pre-legalization era, with Black people and other people of color being disproportionately targeted. There is also a concern that penalties that can be levied against low-level participants in the unlicensed market will do little to deter high-level unlicensed cannabis operators while leaving small-time players with crushing debt. This bill, however, is structured to incentivize suits against the more powerful owners and executives, because they are the ones who will actually be able to pay the damages. An unenforceable judgment against a low-level actor is unlikely to make financial sense to a licensee, especially because they would remain on the hook for their attorney fees and costs.

SUPPORT

San Diego/Imperial Counties Joint Labor Management Committee (sponsor)
California Cannabis Industry Association
UFCW Western States Council

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 820 (Alvarado-Gil, 2023) allows the DCC or a local jurisdiction to seize specified property where unlicensed commercial cannabis activity is being conducted and vehicles used to conduct unlicensed cannabis activity, as specified. SB 820 is pending before the Senate Appropriations Committee.

AB 1684 (Maienschein, 2023) expands the authorization for local agencies to adopt ordinances providing for the imposition of administrative fines or penalties to include all unlicensed commercial cannabis activity, as specified. AB 1684 is pending before this Committee and is set to be heard on the same day as this bill.

AB 1601 (Alvarez, 2023) authorizes a local jurisdiction to take disciplinary action against a cannabis licensee for illegal business activities by the licensee, or for concealment of illegal business activities, by a licensee, or by an officer, director, owner, or authorized agent acting on behalf of the licensee. AB 1601 is pending before the Assembly Business & Professions Committee.

AB 1448 (Wallis, 2023) nonsubstantively recasts the requirements for civil penalties for unlicensed cannabis activity and requires, in an action brought by a county counsel, city attorney, or city prosecutor, the penalty first be used to reimburse the prosecuting agency for specified costs in bringing the action, with 50% of the remainder, if any, paid to the county or city, as applicable, and the other 50% to be deposited into the General Fund. AB 1448 is pending before the Senate Business, Professions and Economic Development Committee and is set to be heard on July 10; if it passes out of that Committee, it will be heard by this Committee on the same date as this bill.

Prior Legislation:

AB 2728 (Smith, 2022) would have increased the civil penalty for engaging in unlicensed cannabis activity to four times the amount of the license fee, with a specified safe harbor. AB 2728 failed passage in this Committee.

AB 1138 (Blanca Rubio, Ch. 530, Stats. 2021) created a civil enforcement action for aiding and abetting unlicensed cannabis activity, with a civil penalty of up to \$30,000 per violation.

AB 287 (Quirk, Ch. 264, Stats. 2021) extended the statute of limitations for an action to recover civil penalties for engaging in unlicensed commercial cannabis activity without a license to three years.

PRIOR VOTES:

Senate Business, Professions and Economic Development Committee (Ayes 11, Noes 0)

Assembly Floor (Ayes 69, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 0)

Assembly Business and Professions Committee (Ayes 15, Noes 2)
