

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

SB 1498 (Ashby)  
Version: March 20, 2024  
Hearing Date: April 23, 2024  
Fiscal: Yes  
Urgency: No  
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**SUBJECT**

Cannabis: advertising: private right of action

**DIGEST**

This bill provides a private right of action for parents or guardians of children to enforce cannabis laws that restrict advertising, namely those that are attractive to children.

**EXECUTIVE SUMMARY**

In recent years, the Legislature has approved several measures aimed at strengthening civil enforcement of cannabis laws to prevent unlawful practices in the industry. 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 seeks to complement existing enforcement by empowering parents and guardians of minors to bring actions to redress violations of specific portions of California's cannabis laws that restrict certain advertising.

The enforcement scheme requires a right to cure as well as an assessment of whether a failure to cure is reasonable. Civil penalties are discretionary and if awarded are split between the plaintiff and the state's General Fund.

This bill is author-sponsored. It is supported by Youth Forward. No timely opposition was received by the Committee. The bill passed out of the Senate Business, Professions and Economic Development Committee on a 7 to 0 vote.

**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 § 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) Prohibits a person from engaging in commercial cannabis without a valid license issued by the DCC. (Bus. & Prof. Code § 26037.5.)
- 4) Requires the DCC to make and prescribe reasonable rules and regulations as may be necessary to implement, administer, and enforce its duties, which must be consistent with the purpose and intent of the Control, Regulate and Tax Adult Use of Marijuana Act. (Bus. & Prof. Code § 26013.)
- 5) Prohibits a licensee from engaging in specified conduct, including the following:
  - a) Advertise or market on a billboard or similar advertising device located on an Interstate Highway or on a State Highway which crosses the California border.
  - b) Advertise or market cannabis or cannabis products in a manner intended to encourage persons under 21 years of age to consume cannabis or cannabis products.
  - c) Publish or disseminate advertising or marketing that is attractive to children.
  - d) Advertise or market cannabis or cannabis products on an advertising sign within 1,000 feet of a day care center, school providing instruction in kindergarten or any grades 1 to 12, inclusive, playground, or youth center. (Bus. & Prof. Code § 26152(d)-(g).)
- 6) Subjects those violating state licensing requirements and local laws and ordinances to disciplinary action. (Bus. & Prof. Code § 26030.)
- 7) Defines “market” and “marketing” to mean any act or process of promoting or selling cannabis or cannabis products including, but not limited to, sponsorship of sporting events, point of sale, advertising, and development of products

specifically designed to appeal to certain demographics. (Bus. & Prof. Code § 26150(e).)

- 8) Requires all advertisements and marketing to accurately reflect and legibly identify the licensee responsible for its content by adding, at a minimum, the licensee's number. (Bus. & Prof. Code § 21651(a)(1).)

This bill:

- 1) Authorizes a parent or guardian of a minor child to bring and maintain an action to redress a violation of subdivisions (d), (e), (f), and (g) of Section 26152.
- 2) Provides that a plaintiff who prevails in such an action shall be awarded injunctive relief.
- 3) Provides that a prevailing plaintiff may also be awarded reasonable attorney's fees and costs and/or civil penalties of not more than \$5,000 per violation. However, to award either reasonable attorney's fees and costs or civil penalties, or both, the court shall first find all of the following:
  - a) It was clearly established, under the law existing at the time of the defendant's conduct, that the defendant's conduct violated the relevant subdivision or subdivisions of Section 26152.
  - b) The plaintiff provided the defendant with written notice that the defendant's conduct violated the relevant subdivision or subdivisions of Section 26152, and gave the defendant a reasonable opportunity to cure the violation, prior to bringing an action pursuant to this section.
  - c) The defendant refused to cure the violation.
  - d) The defendant lacked a reasonable, good faith basis for refusing to cure the violation.
- 4) Requires the court, in determining whether to award reasonable attorney's fees and costs and civil penalties, and in assessing the amount of any civil penalty, to consider factors the court determines to be relevant, including:
  - a) The gravity of the violation.
  - b) The defendant's good faith, or lack thereof.
  - c) The defendant's history of previous violations.
- 5) Requires civil penalties awarded to be distributed 50 percent to the plaintiff and 50 percent to the Treasurer for deposit into the General Fund.
- 6) Provides that a defendant shall not be subject to more than one action pursuant hereto in connection with the same, or substantially similar, advertising or marketing. However, a subsequent action pursuant to this section to redress a recurring or continuing violation of Section 26152, after the defendant has

previously been found to have engaged in the same violation is not prohibited. Such an action may be brought and maintained if all of the following conditions are satisfied:

- a) The defendant has previously been found, in an action pursuant to this section, to have violated one or more subdivisions of Section 26152.
  - b) The defendant subsequently engages in the same advertising or marketing, or substantially similar advertising or marketing, that was previously found to violate Section 26152.
  - c) The subsequent action is limited to advertising or marketing that occurred after entry of judgment in the prior action.
- 7) Clarifies that the causes of action, remedies, and penalties provided by this section are cumulative to each other and to the causes of action, remedies, and penalties available under all other laws of this state. It does not limit the availability of any cause of action, remedy, or penalty otherwise available under any other law of this state. It shall not be construed to limit or otherwise alter, in any way, any authority conferred by law upon the Attorney General, the DCC, or any other state or local officer or agency. An action brought pursuant to this section shall not have preclusive effect upon the Attorney General, the department, or any other state or local officer or agency.

## COMMENTS

### 1. Regulation of the cannabis industry

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, pursuant to Proposition 64.<sup>3</sup>

Less than a year later in June 2017, the Legislature passed a budget trailer bill, SB 94 (Committee on Budget and Fiscal Review, Ch. 27, Stats. 2017), that integrated MCRSA with Prop 64 to create the Medical and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), to streamline and synthesize the licensing and regulatory regimes for medical and recreational cannabis.

In 2021, the DCC was established to centralize and align licensing, compliance and enforcement responsibilities by creating a single point of contact for cannabis

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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).) Fentanyl and other opioids, 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).

applicants, licensees and local governments. The goal was to ultimately simplify and centralize state regulatory efforts; improve coordination, including enforcement; reduce barriers to participation in the legal market; and incentivize greater local participation.

## 2. Under-enforcement of restrictions on advertising cannabis to children

As part of the regulatory scheme, specific restrictions on advertising were put into law with many focused on preventing advertising that was targeted to those under 21 years of age or that intended to encourage use amongst that population. Specifically, Section 26152 of the Business and Professions Code prohibits the following:

- Advertise or market on a billboard or similar advertising device located on an Interstate Highway or on a State Highway which crosses the California border.
- Advertise or market cannabis or cannabis products in a manner intended to encourage persons under 21 years of age to consume cannabis or cannabis products.
- Publish or disseminate advertising or marketing that is attractive to children.
- Advertise or market cannabis or cannabis products on an advertising sign within 1,000 feet of a day care center, school providing instruction in kindergarten or any grades 1 to 12, inclusive, playground, or youth center.

According to the author, DCC reports that it has received 130 complaints via its complaint portal of cannabis advertising marketed to youth since its inception in July 2021. DCC also reports that it has only issued one citation for violating Section 26152.

The author states:

It is presumed that many violators go unpunished due to DCC's resource constraints and the nimbleness of violators to quickly take down advertisements, only to resurface somewhere else. While we can appreciate [DCC] has finite resources to meet its health and safety mandates under MAUCRSA, not enforcing advertising and marketing laws that are aimed to protect youth is dangerous. This bill works to address this lack of action through a private right of action, without placing additional mandates on [DCC] or creating a new costly program for them to administer.

The author, recognizing that the state's current budget situation is unlikely to produce significant new investment in enforcement resources, seeks to empower individuals to enforce the law on their own. This bill thus creates a cause of action for a parent or guardian of a minor child to enforce specified provisions of Section 26152, which generally work to restrict advertising to children.

The bill provides for injunctive relief to a prevailing plaintiff. Plaintiffs may be awarded reasonable attorneys' fees and costs and a civil penalty of no more than \$5,000, but only under a series of conditions. The court must first find that it was "clearly established, under the law existing at the time of the defendant's conduct, that the defendant's conduct violated the relevant subdivision or subdivisions of Section 26152." Next, the plaintiff must have provided the defendant with written notice that the defendant was violating the law and allowed a reasonable opportunity to cure the violation before filing the action. The defendant must then refuse to cure the violation. However, the court must also find that the defendant, having failed to cure, did not have a reasonable, good faith basis for refusing to cure the clearly-established violation of law then were put on notice about.

Once each of these conditions is found to have been met, the court is then required to engage in a balancing test of specified factors before determining whether to award fees and costs and civil penalties, and if so, how much. Should any civil penalties be awarded, only half go to the plaintiff, with the other half going into the state's general fund.

This enforcement mechanism puts a plaintiff seeking to enforce these important laws through a gauntlet that does not guarantee success even when a violation is in fact occurring. In fact, even a successful prosecution of the law through this right of action could end up costing the plaintiff more than the defendant in violation of the law. As the author has pointed out, existing enforcement is hamstrung by "the nimbleness of violators to quickly take down advertisements, only to resurface somewhere else." By providing a right to cure in these situations, violators can continue this obstructive behavior, leaving individuals to play the proverbial whack-a-mole.

For instance, just last year, AB 1171 (Blanca Rubio, Ch. 467, Stats. 2023) authorized 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 is **entitled** to recover actual damages or statutory damages of up to \$75,000, along with reasonable attorney fees and costs. Additionally, the court can enjoin the unlicensed operator from continuing to engage in unlicensed cannabis activities.

To address the lack of enforcement in this space with an enforcement mechanism that is more nimble, the author has agreed to amendments that limit enforcement to public prosecutors, make clear the penalties are additive to any other existing remedies, and remove subdivision (c) of Section 26152.2 and the reference to it.

Writing in support, Youth Forward states:

[W]hile illegal, some cannabis operators choose to willfully violate prohibitions in current law by developing advertising content that's attractive to youth in the absence of DCC action. This inaction leaves the promise of Proposition 64, to protect youth from exposure to cannabis

advertising that is attractive to children, unfulfilled. . . . SB 1498 creates a new enforcement tool, outside of DCC, that allows parents and guardians of minors to take existing private right of action against bad actors that violate cannabis advertising laws created to protect youth.

### **SUPPORT**

Youth Forward

### **OPPOSITION**

None received

### **RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation:

AB 1171 (Blanca Rubio, Ch. 467, Stats. 2023) *See Comment 2.*

AB 1207 (Irwin, 2023) would have established various requirements for packaging, labeling, advertising and manufacturing cannabis or cannabis related products, as specified. It would have prohibited a manufacturer, distributor, or seller of cannabis or cannabis products from manufacturing, distributing, or selling any cannabis or cannabis related product or any packaging or labeling that is attractive to children. AB 1207 was vetoed by Governor Newsom who stated that the definition of “attractive to children” was overly broad.

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.

SB 94 (Committee on Budget and Fiscal Review, Ch. 27, Stats. 2017) *See Comment 1.*

### **PRIOR VOTES:**

Senate Business, Professions and Economic Development Committee (Ayes 7, Noes 0)

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