



July 26, 2021

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AUG 31 2021
S.D. SEC. OF STATE

Mr. Brendan Johnson
Robins Kaplan LLP
140 N. Phillips Ave., Ste. 307
Sioux Falls, SD 57104

Re: LRC Review of Proposed Initiated Measure Amending Title 34 (Six Sections)

Dear Mr. Johnson:

In accordance with SDCL 12-13-24 and 12-13-25, the Legislative Research Council (LRC) is required to review each initiated measure submitted to it by a sponsor for the purpose of determining whether the measure is "written in a clear and coherent manner in the style and form of other legislation" and for the purpose of ensuring that the "effect of the measure is not misleading or likely to cause confusion among voters." Based on this review, the LRC provides written comments to the proposal's sponsor for the purpose of assisting the sponsor in meeting these requirements. This includes providing "assistance . . . to minimize any conflict with existing law and to ensure the [proposal]'s . . . effective administration." While there is no obligation to accept any of the suggestions contained in this letter, including the edits below, you are asked to keep in mind the legal standards established in SDCL 12-13-24 and 12-13-25.

LRC encourages you to consider edits and suggestions to the proposed text. We recommend the edits for sake of clarity and to bring the proposed measure into conformance with the style and form of South Dakota legislation. The latter is based upon the Guide to Legislative Drafting (<https://mylrc.sdlegislature.gov/api/Documents/127102.pdf>). Should you have any questions about the attached edits, or about the suggestions made in this letter, please feel free to contact this office. Please reference the enclosed, marked-up copy while reviewing the bulleted changes, organized by section:

Section 1

- Subdivision 1 uses a slightly different definition of "hemp" than the industrial hemp chapter, SDCL 38-35-1(2).
- Subdivision 4's "which" is revised to "that" to reflect the latter connotation of an essential, defining quality. "Which" should not be used in a definitions section or in law generally. Additionally, "specifically" is struck as superfluous.

Section 2

- Edits to the lead-in sentence strike redundant words. If the chapter expressly does not affect the laws listed, there is no need to declare the section as being "notwithstanding the provisions of this chapter." Indeed, the circular nature of the rationale would negate Section 2, since, as a "provision[] of this chapter," it would be notwithstanding itself.

- Subdivisions 1 and 2 are similar, yet the verb "transport" was left off subdivision 1. Was that intentional?
- Subdivision 9 includes the phrase "unless permitted by statute." If the thrust of this chapter is to permit marijuana use, then why would it need to be said that this chapter does not affect statutes that permit its use?
- Subdivision 13 includes the phrase "unless permitted by statute" also. In that case, LRC would recommend cross-referencing law that serves as an express exception. If the phrase is to account for any subsequent statute, it is likely redundant, as the later statute permitting such extractions would likely govern by statutory construction alone.

Section 3

- Again, on the lead-in sentence, edits address redundancy and circular concerns. Further, "notwithstanding" is redundant given the canon of statutory construction that a specific provision prevails over a more general principle.
- Added language to subdivision 1 specifies that it is employees to whom an employer is not required to permit or accommodate recreational marijuana use. This specification seems necessary given that it is specified in subdivision 2 but not subdivision 1.

Section 4

- The lead-in sentence required multiple edits for clarity concerns. "Notwithstanding" is again struck as redundant for the reason described in Section 3. A double negative ("not unlawful") was clarified. "Shall" is replaced by "may" because associating a negative with "shall" merely negates the duty, while associating it with "may" negates both the duty and permission to act.
- Subdivisions 1 and 4 do not make the sale of marijuana legal, only the distribution of marijuana without consideration and the sale of marijuana accessories, respectively. There does not appear to be authority in this initiated measure that allows for the lawful sale of marijuana. Is that intentional?
- In subdivision 2, "provided" is changed to "if" to simplify language. Similarly, in paragraph (2)(b), the phrase "in or on the grounds of" was replaced by the simpler and accurate "at."

Section 5

- *Guide to Legislative Drafting*, pg. 25: "The federal drafting style, which is also used in a few states, assigns a subdivision designation to each paragraph of a multiparagraph section. This practice is **not** used in South Dakota[.]" (Emphasis in original.) Accordingly, LRC suggests a lead-in sentence that appears to capture the intent of the section. In doing so, it substantially shortens each of the subdivisions and makes them clearer.
- Throughout this section, new civil penalties are laid out. References to civil penalties should indicate who is assessing the civil penalty and where the collected penalty will be deposited, as is the statutory practice. *Id.* at 13.
- Subdivision 5 uses the term "fine" when the term "civil penalty" is used in all other references to the concept. "Fine" is struck and replaced by "civil penalty" for sake of consistency.

Section 6

- The first sentence contains a stylistic edit from "shall" to "must," reflecting that the subject "section" is inanimate.
- In the third sentence, "shall" is struck and replaced by "may" because associating a negative with "shall" merely negates the duty, while associating it with "may" negates both the duty and permission to act.

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In addition to the above changes, in general, the initiated measure should have leadlines that reflect the convention used for legislation (e.g., "Section 1. That title 34 be amended . . ."). There is also no need to indicate "chapter" in the first leadline, since Section 1 contains a reference to a chapter, providing Code Counsel with enough guidance on how it should be codified if approved by voters.

Fiscal Impact

It has been determined during this review that this proposed initiated measure may have an impact on revenues, expenditures, or fiscal liability of the state and its agencies and political subdivisions. Please provide the Legislative Research Council a copy of the initiated measure as submitted in final form to the Attorney General, so we can develop any fiscal note required by SDCL 2-9-30.

Finally, this letter constitutes neither an endorsement of the initiated measure nor a guarantee of its sufficiency. It is a recognition that your responsibility to submit the draft proposal to the LRC for review and comment, as required by SDCL 12-13-25, has been fulfilled. If you proceed with the proposal, please ensure neither your statements nor any advertising imply that this office has endorsed or approved the proposal.

Sincerely,



Reed Holwegner
Director

RH/jg/bh

Enclosure

CC: ✓ The Honorable Steve Barnett, Secretary of State
The Honorable Jason Ravnsborg, Attorney General

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

Section 1. That title 34 be amended by adding a NEW CHAPTER SECTION to read:

~~§ 1.~~ Terms used in this chapter mean:

- (1) "Hemp," the plant of the genus cannabis, and any part of that plant, including theseeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis;
- (2) "Local government," means a county, municipality, town, or township;
- (3) "Marijuana," the plant of the genus cannabis, and any part of that plant, including, the seeds, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including hash and marijuana concentrate. The term includes an altered stateof marijuana absorbed into the human body. The term does not include hemp, or fiber produced from the stalks, oil or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products;
- (4) "Marijuana accessory," any equipment, product, or material, ~~which that is specifically~~ designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling, or otherwise introducing marijuana into the human body.

Section 2. That title 34 be amended by adding a NEW SECTION to read:

~~§ 2. Notwithstanding the provisions of this chapter, this~~ This chapter does not ~~limit or~~ affect laws that ~~prohibit or~~ otherwise regulate:

- (1) Delivery or distribution of marijuana or marijuana accessories, with or without consideration, to a person younger than twenty-one years of age;
- (2) Purchase, possession, use, or transport of marijuana or marijuana accessories by a person younger than twenty-one years of age;
- (3) Consumption of marijuana by a person younger than twenty-one years of age;
- (4) Operating or being in physical control of any motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana;
- (5) Consumption of marijuana while operating or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport, while it is being operated;
- (6) Smoking marijuana within a motor vehicle, aircraft, motorboat, or other motorized form of transport, while it is being operated;
- (7) Possession or consumption of marijuana or possession of marijuana accessories on the grounds of a public or private preschool, elementary school, or high school, in a school bus, or on the grounds of any correctional facility;
- (8) Smoking marijuana in a location where smoking tobacco is prohibited;
- (9) Consumption of marijuana in a public place, unless permitted by statute;
- (10) Consumption of marijuana as part of a criminal penalty or a diversion program;
- (11) Conduct that endangers others;
- (12) Undertaking any task under the influence of marijuana, if doing so would constitute negligence or professional malpractice; or
- (13) Performing solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol, unless permitted by statute.

Section 3. That title 34 be amended by adding a NEW SECTION to read:

~~§3. Notwithstanding the provisions of this chapter, this~~ This chapter does not:

- (1) Require that an employer permit or accommodate an employee to engage in

- conduct allowed by this chapter;
- (2) Affect an employer's ability to restrict the use of marijuana by employees;
 - (3) Limit the right of a person who occupies, owns, or controls private property from prohibiting or otherwise regulating conduct permitted by this chapter on or in that property; or
 - (4) Limit the ability of the state or a local government to prohibit or restrict any conduct otherwise permitted under this chapter within a building owned, leased, or occupied by the state or the local government.

Section 4. That title 34 be amended by adding a NEW SECTION to read:

~~§4. Subject to the limitations in this chapter, and notwithstanding any other law, the following acts, if done by a person at least twenty-one years of age, are not unlawful~~lawful and ~~shall~~may not, ~~under state law or the laws of any local government within the state,~~ be an offense ~~under state law or the laws of any local government within the state or;~~ be subject to a civil fine, penalty, or sanction, ~~or;~~ be a basis for detention, search, or arrest, ~~or to;~~ deny any right or privilege, ~~or to seize or forfeit assets under state law or the laws of any local government, if the person is at least twenty-one years of age~~ be a basis for asset seizure or forfeiture:

- (1) Possessing, using, ingesting, inhaling, processing, transporting, delivering without consideration, or distributing without consideration one ounce or less of marijuana, except that not more than eight grams of marijuana may be in a concentrated form;
- (2) Possessing, planting, cultivating, harvesting, drying, processing, or manufacturing not more than three marijuana plants and possessing the marijuana produced by the plants, provided if:
 - (a) The plants and any marijuana produced by the plants in excess of one ounce are kept at one private residence, are in a locked space, and are not visible by normal, unaided vision from a public place;
 - (b) Not more than six plants are kept ~~in or on the grounds of~~ at a private

residence at one time; and

- (c) The private residence is located within the jurisdiction of a local government where there is no licensed retail store where marijuana is available for purchase pursuant to this chapter;
- (3) Assisting another person who is at least twenty-one years of age, or allowing property to be used, in any of the acts permitted by this section; and
- (4) Possessing, using, delivering, distributing, manufacturing, transferring, or selling to persons twenty-one years of age or older marijuana accessories.

Section 5. That title 34 be amended by adding a NEW SECTION to read:

A person who commits the following acts is subject to a civil penalty not exceeding the amount specified:

- (1) ~~A person who cultivates~~ Cultivates marijuana plants, ~~pursuant to (2) of this section,~~ that are visible by normal, unaided vision from a public place ~~is subject to a civil penalty not exceeding~~ two hundred and fifty dollars.
- (2) ~~A person who, pursuant to (2) of this section, cultivates~~ Cultivates marijuana plants that are not kept in a locked space ~~is subject to a civil penalty not exceeding~~ two hundred and fifty dollars.
- (3) ~~A person who smokes~~ Smokes marijuana in a public place ~~is subject to a civil penalty not exceeding~~ one hundred dollars.
- (4) ~~A person who is~~ Is under twenty-one years of age and possesses, uses, ingests, inhales, transports, delivers without consideration or distributes without consideration one ounce or less of marijuana or possesses, delivers without consideration, or distributes without consideration marijuana accessories ~~is subject to a civil penalty not to exceed~~ one hundred dollars. The person shall be provided the option of attending up to four hours of drug education or counseling in lieu of the ~~fine~~ civil penalty.

Section 6. That title 34 be amended by adding a NEW SECTION to read:

~~§5.~~ This chapter ~~shall~~must be broadly construed to accomplish its purposes and intents. Nothing in this chapter purports to supersede any applicable federal law, except where allowed by federal law. If any provision in this chapter or the application thereof to any person or circumstance is held invalid or unconstitutional, such invalidity or unconstitutionality ~~shall~~may not affect other provisions or applications of the chapter that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this chapter are severable.