

Majority Support for “Ban the Box” Legislation Proposal to Impact Public Employers, Only

The aptly labeled “ban the box” legislation, adopted in states and cities around the nation, prohibits employers from asking applicants to disclose information concerning their criminal histories on an employment application form. In Maine, that policy initiative is being advanced in the form of LD 1566, *An Act To Enact the Maine Fair Chance Employment Act*. The bill received a public hearing in May 2017 before being carried over for further review during the 2018 legislative session.

As proposed, this bill would prohibit all Maine employers, public and private, from asking an applicant to disclose information concerning the applicant’s criminal history, or considering such information, until after the applicant received a conditional offer of employment. Additionally, the amendment would restrict the way employers could use criminal history information in the course of making employment decisions.

The Labor, Commerce, Research and Economic Development Committee voted last month to support an amended version of LD 1566 by a margin of 11 to 2. The amendment, which declares that it is the policy of the state to “increase meaningful employment opportunities for people with arrest and conviction records” would apply only to public sector employers, including the state, municipalities, plantations, counties, water districts, sanitary districts, hospital districts, municipal transmission and distribution utilities, and school administrative units.

The committee’s amendment proposes to replace the printed version of LD 1566 and impose several restrictions on public employers’ hiring practices.

The proposed changes include:

1. Prohibiting public employers from requesting criminal history information on an initial employment application form, except when a federal or state law prohibits a person with certain criminal

history from holding the position.

2. Allowing public employers to consider criminal history information during an interview or after a prospective employee has been deemed otherwise

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Pesticide Policy Preemption

It’s Back...

The now-perennial effort to strip municipalities of the right to adopt pesticide ordinances has resurfaced in LD 1853, *An Act To Ensure the Safe and Consistent Regulation of Pesticides throughout the State by Providing Exemptions to Municipal Ordinances That Regulate Pesticides*. The bill, sponsored by Sen. Tom Saviello of Franklin County on behalf of Governor LePage, proposes to exempt any state licensed pesticide applicator, or spray contracting firm, from any municipal ordinance regarding pesticides. This includes the requirement in some ordinances to apply for a locally issued pesticide application permit, or to adhere to the restrictions on where and how pesticides can be applied within a municipality.

Less than 10 months ago, a similar bill, LD 1505, *An Act To Create Consistency in the Regulation of Pesticides*, received a unanimous “ought not to pass” vote from the State and Local Government Committee.

Twenty-nine municipalities have adopted ordinances that in some way regulate the application of pesticides. None of the locally adopted ordinances contain an outright ban on pesticides or herbicides and only six ban the application

of pesticides through aerial or mechanical means. The purpose of these aerial and mechanical bans is to reduce the risk that pesticides will be accidentally released in sensitive areas, such as near an organic agricultural or aquaculture businesses. Instead, the adopted ordinances require pesticide applicators to obtain a locally issued permit in an effort to direct operations away from important natural, public, or economic resources.

Last week, the Senate requested that the Agriculture, Conservation and Forestry Committee hold the public hearing and work session on the bill. On Tuesday, however, the House rejected the Senate’s committee assignment, and instead referred the bill to the State and Local Government Committee. The final decision on which committee will hear the bill should be settled next week. If the House and Senate can agree on the committee of jurisdiction for LD 1853, a public hearing will likely be scheduled within a week of the referral to the committee.

In the meantime, all impacted municipalities are encouraged to prepare testimony they may wish to provide to legislators in response to this proposal, in anticipation of a quickly scheduled public hearing.

qualified for the position, unless the criminal history information is related to a deferred criminal adjudication, a criminal offense that has been dismissed or pardoned, a juvenile adjudication, infraction or civil violation, or a conviction that was adjudicated more than 3 years prior.

3. Allowing public employers to reject the applicant on the basis of criminal history, provided the offense does not fall in one of the exempted categories described above (e.g., deferred criminal or juvenile adjudication, dismissed offense, etc.) and only after considering whether: (1) the criminal history information is directly related to the duties and responsibilities of the position; (2) the position offers the opportunity for the same or a similar offense to occur; and (3) the amount of time that has passed since the offense occurred.

4. Requiring public employers to provide an applicant who is denied employment due to criminal history with the reasons for the denial, a copy of the criminal history record obtained by the public entity, if any, and information on the processes that may be available to challenge the denial.

5. Requiring public employers to maintain a publicly accessible record of the number and a list of applicants subjected to criminal background checks; the instances where the background check revealed a conviction history; the number of applicants denied employment in whole or in part because

of criminal history; and the number of applicants hired despite having a criminal history.

Municipal officials oppose LD 1566 both as originally printed, and more so in its amended form. Reviewing an applicant’s criminal history is an entirely warranted and appropriate step in the hiring process. Whether the position is law enforcement, code enforcement, tax collection, harbor master, animal control, or General Assistance administration, there is a logical nexus between the municipality’s charge to serve the public

and the interest in preventing a person who has committed a crime from being provided the opportunity to violate the public trust again.

Furthermore, the ability to fully assess a candidate’s aptitude should not be the exclusive right of private employers.

The committee will review the amended version of LD 1566 before the bill is advanced to the entire Legislature for its consideration. Municipal officials concerned with this legislation are urged to contact members in the House and Senate.

A POTpourri of Updates

The following is a summary of progress on bills of municipal interest covered in previous editions of the *Legislative Bulletin*.

Medical Marijuana

For well over a month, a subcommittee of the Health and Human Services (HHS) Committee has been working diligently to craft legislation updating various aspects of Maine’s medical marijuana program. As municipal officials throughout the state have learned, the Medical Use of Marijuana Act has established a significant ambiguity regarding local authority to regulate or restrict medical marijuana caregivers. Apart from dispensaries, it is very unclear in state law whether or how municipalities are authorized to regulate medical marijuana cultivation and distribution operations.

It is the position of municipal officials that communities should be afforded the same regulatory capacity to oversee marijuana-related businesses, both medical and non-medical, as towns and cities currently have to regulate similarly situated businesses under their home rule authority.

Over several weeks, MMA worked with the subcommittee as well as stakeholders to strike the right balance in crafting language that would clearly provide municipalities the authority to

regulate commercial medical marijuana operations.

The straightforward, single sentence agreed on is: *Pursuant to the home rule authority granted under the Constitution of Maine, Article VIII, Part Second and Title 30- A, section 3001 of the Maine Revised Statutes, a municipality may regulate registered medical marijuana caregivers, testing facilities, processors and dispensaries, except that municipalities may not prohibit or limit the number of registered caregivers.*

The exception or limitation at the end of the above sentence reflects a compromise. Representatives of medical marijuana caregivers agreed to remove their longstanding objections to municipal regulation in exchange for the assurance that municipalities could not shut them down simply for being registered medical marijuana caregivers.

Fortunately, votes taken at a Wednesday work session by the full HHS Committee on LD 1539, *An Act To Amend Maine’s Medical Marijuana Laws*, demonstrate the committee members’ unanimous willingness to provide local regulatory authority over medical marijuana operations.

Unfortunately, the committee’s vote on their “omnibus” overhaul of the state medical marijuana program split on one issue unrelated to municipal regula-

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tion. The divide came in response to a significant change to law advanced in the committee's bill that removes the limit on the number of patients that any single registered caregiver may serve. Registered caregivers are currently only allowed to serve five patients, although many have used the law's allowance for a "rotating" fifth patient to serve far more patients. In exchange for lifting the caregiver patient cap in law, two of the committee's thirteen members voted in turn to remove the cap on the number of dispensaries allowed under state law.

There is currently a statewide limit of eight dispensary licenses. In the minority's view, the free market should dictate how many dispensaries are able to operate, not the Legislature. The majority of the committee voted to allow the state to issue an additional six dispensary licenses over the next three years, and then to lift the cap altogether after the three-year mark.

Given the current political makeup of the Legislature, a divided committee report can often spell doom for a bill's chances of enactment. Because the municipal regulation agreement is included in each report, MMA remains hopeful the sentence clearly acknowledging home rule authority will find its way to adoption in one of the two amended versions LD 1539 being advanced by the committee.

Either through that bill or MMA's own LD 672, *An Act To Clarify a Municipality's Authority To Adopt and Enforce Land Use Regulations for Marijuana Facilities*, it is vital that Maine statutes are amended this year to clarify the local authority to regulate medical marijuana operations. Given the expiration of the statewide moratorium on non-medical marijuana activities, as well as the uncertainty surrounding whether this Legislature will garner enough votes to amend Maine's non-medical Marijuana Legalization Act, it is more important than ever that municipal officials be authorized to work together with medical marijuana caregivers in order to minimize the impacts of black market operations.

Discontinued Roads

The Jan. 26 edition of the *Legislative Bulletin* included an article describing the State and Local Government Committee's approval of road discontinuation-related legislation that would (1) require municipal officials to better inform abutters of their right to reach private legal access agreements (such as forming a road association) prior to discontinuing a road; and (2) require municipalities to retain public easements upon discontinuing a road when the abutters are unable to privately negotiate access between themselves.

As edited during a language review on Wednesday, the amended version of LD 1588, *An Act To Maintain Mail Routes and Access to Residential Structures*, replaces the bill as originally printed. The refined version of LD 1588 will slightly mitigate some of the language in the original amendment that would have put municipal officials in the awkward adjudicatory position of verifying that abutters have formed legally binding agreements. Now, municipal officials will only be required to verify that agreements have been filed in the registry.

In addition, the committee's amended bill would extend the residential property disclosure notice requirement in Title 33 section 173 regarding abandoned roads, discontinued roads, or public easements on or abutting the property to non-residential properties as well.

Municipal officials concerned about seeing this proposal enacted are encouraged to contact their legislators.

Municipal Consolidation

Last week's edition of the *Legislative Bulletin* detailed the public hearing on LD 1840, *An Act To Revise the Municipal Consolidation Referendum Process*. The bill would require referendum approval to form a joint charter commission based on a citizen petition, but retain existing law allowing a majority of each community's municipal officers to form a commission without going to referendum.

There was no opposition to the bill at its public hearing, but a minor point of disagreement among municipal officials,

which was also shared by some members of the State and Local Government Committee, was how long to require a higher threshold of petition signatures following the failure of a consolidation referendum. The bill proposed that for 10 years, valid petitions would require signatures of 30 percent of the voters rather than 10 percent, and some viewed that as too long of an interim period.

On Wednesday, the committee settled unanimously on a six year "cooling off period," while also agreeing to incorporate a couple of minor technical edits to the consolidation law suggested by stakeholders at the hearing.

Remote Meetings Bills Stall

On Tuesday, Feb. 27, the Judiciary Committee voted 7-3 against passage of a bill that would have imposed an outright statewide prohibition on the use of audiovisual technology by members of boards, committees, and commissions to participate in public meetings of those bodies. The committee also voted 8-2 against passage of one that would have allowed remote participation while imposing several conditions on its use. The public hearing on those bills, LD's 1831 and 1832 respectively, was described in the Feb. 23 edition of the *Legislative Bulletin*.

Many members of the committee seemed somewhat persuaded by comments made at the public hearing, where no one testified in favor of a total prohibition. Because consensus language could not be agreed upon within the work session's time constraints, a majority of the committee's members voted against passing either bill this year.

One legislator who voted in the minority on LD 1832 intends to keep working on a more widely acceptable amendment to that bill, with the hope that he can persuade his fellow legislators to pass it before the end of this year's legislative session.

Because these votes could be reconsidered before the committee sends each bill to the full legislature, future editions will report on any significant new developments.

LEGISLATIVE HEARINGS

Note: You should check your newspapers for Legal Notices as there may be changes in the hearing schedule. Weekly schedules for hearing schedules and work sessions can be found at: <http://legislature.maine.gov/Calendar/#PHWS/>.

Tuesday, March 13

**Labor, Commerce, Research & Economic Development
Room 208, Cross State Office Building, 1:00 p.m.
Tel: 287-1331**

LD 1856 – An Act Regarding Permits for Burial of Cremated Remains.

Wednesday, March 14

**Education & Cultural Affairs
Room 202, Cross State Office Building, 1:00 p.m.
Tel: 287-3125**

LD 1843 – An Act To Amend Career and Technical Education Statutes.