File No. 180321 Committee Item No. 2
Board Item No. 32

COMMITTEE/BOARD OF SUPERVISORS

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Comm: Public Safety & Neighborhood Services **Date:** May 16, 2018
Board of Supervisors Meeting: **Date:** May 22, 2018

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Prepared by: John Carroll **Date:** May 11, 2018
Prepared by: John Carroll **Date:** May 17, 2018

[Police Code - Required Agreements Between Cannabis Businesses and Labor Organizations]

Ordinance amending the Police Code to require Applicants for Cannabis Business Permits to enter into either a Labor Peace Agreement or a collective bargaining agreement with a Bona Fide Labor Organization.

NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
Additions to Codes are in *single-underline italics Times New Roman font*.
Deletions to Codes are in ~~*strikethrough italics Times New Roman font*~~.
Board amendment additions are in double-underlined Arial font.
Board amendment deletions are in ~~strikethrough Arial font~~.
Asterisks (* * * *) indicate the omission of unchanged Code subsections or parts of tables.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The Police Code is hereby amended by revising Sections 1602 and 1609, to read as follows:

SEC. 1602. DEFINITIONS.

* * * *

"Bona Fide Labor Organization" means any organization or any agency or employee representation committee or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be or to have been financed in whole or in part, interfered with, dominated or controlled by the employer or any employer association.

* * * *

"Labor Peace Agreement" ~~*has the meaning set forth in Section 26001 of the California Business and Professions Code, as may be amended from time to time.*~~*means an agreement between an*

Applicant and any Bona Fide Labor Organization that, at a minimum, prohibits such Bona Fide Labor Organization and members from engaging in picketing, work stoppages, boycotts, and any other economic interference with the applicants' business. As part of this Agreement, an Applicant also agrees not to disrupt efforts by such Bona Fide Labor Organization to communicate with, and attempt to organize and represent, the Applicant's employees. The agreement shall provide such Bona Fide Labor Organization access at reasonable times to areas in which the Applicants' employees work, for the purpose of meeting with employees to discuss their right to representation, employment rights under state law, and terms and conditions of employment. A Labor Peace Agreement shall not mandate a particular method of election or certification of a Bona Fide Labor Organization as an Applicant's employees' representative.

* * * ***SEC. 1609. PERMIT APPLICATIONS.**

* * * *

(b) **Information Required of All Applicants for Cannabis Business Permits.** The application form for all Cannabis Business Permit Applicants shall require the Applicant to provide the following information and documentation:

* * * *

(12) For Applicants with 10 or more employees, ~~*a statement that the Applicant will enter into, or demonstrate that it has already entered into, and abide by the terms of a Labor Peace Agreement;*~~ *each Applicant must* ~~demonstrate~~ agree that, as a condition of any permit awarded under this Article 16, the Applicant will enter into, and abide by the terms of, *either of the following* prior to the award of such a permit:

(A) ~~That the Applicant has entered into, and will abide by, the terms of a~~ A *Labor Peace Agreement; or,*

(B) ~~That the Applicant has entered into a~~ A *collective bargaining agreement with a Bona Fide Labor Organization.*

* * * *

Section 2. Effective Date. This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the ordinance.

Section 3. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal Code that are explicitly shown in this ordinance as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the ordinance.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: Matthew Lee
MATTHEW LEE
Deputy City Attorney

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FILE NO. 180321

REVISED LEGISLATIVE DIGEST

(Amended in Committee - May 9, 2018)

[Police Code - Required Agreements Between Cannabis Businesses and Labor Organizations]

Ordinance amending the Police Code to require applicants for Cannabis Business Permits to enter into either a Labor Peace Agreement or a collective bargaining agreement with a Bona Fide Labor Organization.

Existing Law

Existing law requires an applicant for a cannabis business permit to demonstrate that it will enter into a labor peace agreement, unless it has fewer than ten employees. Existing law does not necessarily require an applicant to have already entered into a labor peace agreement—or any other labor agreement with its employees—before a permit is issued, however.

Amendments to Current Law

This ordinance would require an applicant for a cannabis business permit to have entered into either a labor peace agreement or a collective bargaining agreement before the permit is issued, unless the applicant has fewer than ten employees

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BOARD of SUPERVISORS

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. 554-5184
Fax No. 554-5163
TDD/TTY No. 554-5227

MEMORANDUM

TO: Regina Dick-Endrizzi, Director
Small Business Commission, City Hall, Room 448

FROM: John Carroll, Assistant Clerk, Public Safety and Neighborhood Services Committee, Board of Supervisors

DATE: April 24, 2018

SUBJECT: REFERRAL FROM BOARD OF SUPERVISORS
Public Safety and Neighborhood Services Committee

The Board of Supervisors' Public Safety and Neighborhood Services Committee has received the following legislation, which is being referred to the Small Business Commission for comment and recommendation. The Commission may provide any response it deems appropriate within 12 days from the date of this referral.

File No. 180321

Ordinance amending the Police Code to require applicants for Cannabis Business Permits to enter into either a Labor Peace Agreement or a collective bargaining agreement with a Bona Fide Labor Organization.

Please return this cover sheet with the Commission's response to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, California 94102.

****

RESPONSE FROM SMALL BUSINESS COMMISSION - Date: _____

_____ **No Comment**

_____ **Recommendation Attached**

_____
Chairperson, Small Business Commission

BOARD of SUPERVISORS

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. 554-5184
Fax No. 554-5163
TDD/TTY No. 554-5227

MEMORANDUM

TO: William Scott, Police Chief
Nicole Elliot, Director, Office of Cannabis

FROM: John Carroll, Assistant Clerk,
Public Safety and Neighborhood Services Committee,
Board of Supervisors

DATE: April 9, 2018

SUBJECT: LEGISLATION INTRODUCED

The Board of Supervisors' Public Safety and Neighborhood Services Committee has received the following proposed legislation, introduced by Supervisor Sheehy on April 3, 2018:

File No. 180321

Ordinance amending the Police Code to require applicants for Cannabis Business Permits to enter into either a Labor Peace Agreement or a collective bargaining agreement with a Bona Fide Labor Organization.

If you have any comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

c: Rowena Carr, Police Department
Kristine Demafeliz, Police Department
Ray Law, Office of Cannabis

Carroll, John (BOS)

From: Michael Colbruno <michael@milogroupca.com>
Sent: Wednesday, May 16, 2018 7:54 AM
To: Carroll, John (BOS); matthew.lee@sfgkv.org
Cc: Breed, London (BOS)
Subject: NLRA preemption .pdf
Attachments: NLRA preemption .pdf

Categories: 180321

Matt and John,

This was given to the Public Safety Committee members regarding possible legal concerns related to the cannabis industry LPA matter that is being heard today.

I wanted to ensure that both the Clerk and City Attorney had copies.

Thank you,
Michael Colbruno
510-385-9414

SEYFARTH SHAW

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May 14, 2018

VIA EMAIL -- [redacted]

[redacted]

Dear [redacted]:

The following provides our requested analysis of labor peace agreement ("LPA") requirements under the Medical Cannabis Regulation and Safety Act ("MCRSA"—California Business and Professions Code ("B&P") Section 26051.5(a)(5) and California Code of Regulations ("CCR") Title 16, Section 5002(b)(23)) and the proposed San Francisco Ordinance amending the Police Code to require applicants for Cannabis Business Permits to enter into either a Labor Peace Agreement or a collective bargaining agreement with a Bona Fide Labor Organization (the "SF Ordinance").

The MCRSA at B&P 26001(x) incorporates an LPA definition from B&P Section 19330.5, which requires that unions forego disruptive picketing in exchange for reasonable access, and that the LPA *"shall not mandate a particular method of election or certification of the [union]."*

But the California Department of Health enforces these MCRSA LPA provisions in a completely unlawful manner by requiring card-check neutrality agreements ("CCN"). These CCN agreements require cannabis businesses to relinquish federal rights as a condition of receiving a business license and are thus unlawful.

The proposed SF Ordinance also requires an unlawful CCN *or execution of a collective bargaining agreement* ("CBA") as a condition of doing business in San Francisco. The SF Ordinance even more clearly violates federal law.

In 1935, Congress enacted the National Labor Relations Act ("NLRA"—29 U.S.C. 15 *et seq.*) to establish government neutrality as between labor and management, and to preclude state or local political processes that are intended to, or have the effect of, favoring one side or the other. In 1947, Congress enacted the Labor Management Relations Act ("LMRA"— 29 U.S.C. 141 *et seq.*), which codified the employer's constitutional right to oppose unionization. The NLRA and LMRA are enforced by the federal National Labor Relations Board ("NLRB").

The NLRB has recognized two types of preemption under the NLRA: (1) "Garmon preemption," which prevents states or localities from regulating activity that the NLRA "protects, prohibits or arguably protects or prohibits," *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and (2) "Machinists preemption," which forbids states or localities from regulating conduct that "Congress intended to be unregulated and left to be controlled by the free play of economic forces." *Lodge 76, International Association of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

Pursuant to the U.S. Constitution's Supremacy Clause, the NLRA completely preempts state or local laws that violate one or both of these doctrines. The United States Supreme Court has recognized the broad and powerful scope of NLRA preemption of state and local laws, and numerous courts have employed NLRA preemption to strike down laws that interfere with these doctrines.

When a statute or ordinance appears to be "more properly characterized as an example of an interest group deal in public-interest clothing," it will likely be held preempted by the NLRA owing to concerns that the ordinance would "redirect efforts of employees not to bargain with employers, but instead, to seek to set [terms and conditions of employment] with political bodies." *See Chamber of Commerce v. Bragdon*, 64 F.3d 497, 504 (9th Cir. 1995) (county's ordinance mandating that employers pay prevailing wages to employees on wholly private construction projects costing over $500,000 preempted by NLRA); *520 South Michigan Avenue Associates, Ltd. v. Shannon*, 549 F.3d 1119, 1128 (7th Cir. 2008) (statutory amendment at issue preempted because although it purported to be a state-wide amendment, it applied to only one occupation (room attendants) in only one industry (hotels) and in only one county, and by passing a statute with such a narrow focus, there seemed to be a disincentive to collective bargaining and instead encouragement for employers or unions to focus on lobbying at the state capital instead of negotiating at the bargaining table).

A sick leave statute in *Hawaii Pacific Health v. Takamine*, 194 L.R.R.M. 2999 (D. Haw. Dec. 31, 2012), was found preempted by the NLRA because it did not affect union and nonunion employees equally. Specifically, it restricted only employers with collective bargaining agreements. *See also Associated Builders & Contractors, Golden Gate Chapter Inc. v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991) (in order to receive a permit, a builder had to either post a bond guaranteeing timely completion or agree to pay the general prevailing per diem wages to construction workers on projects costing more than $250,000—NLRA preempted).

In *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), a taxi company argued that the state interfered with labor by withholding the company's license until a strike ended. The city argued that it had an interest in ensuring uninterrupted citywide taxi services to the public by prohibiting a strike. *Id.* at 618. The court rejected the City's argument and found that the regulation regulated labor because the city did not operate the taxi's nor did it use the taxies for any government functions or services.

Here, the MCRSA and SF Ordinance CCN requirements force cannabis businesses to relinquish rights under the First Amendment of the Constitution, the LMRA, and Section 7 of the NLRA as a condition of receiving a license to do business. These are direct attempts to regulate the

relationships between unions and employers, where neither California nor San Francisco has a proprietary interest or are market participants.

The CCN provisions are clearly NLRA preempted. The process by which employees may choose or oppose union representation is governed exclusively by the NLRA. Section 7 of the NLRA gives all employees the right to choose or oppose union representation. The CCN provisions establish a required process for determination of union representation. The CCN provisions force cannabis businesses to relinquish their rights under the LMRA to oppose unionization and to prevent employees from exercising their Section 7 rights to oppose unionization.

Any state or local law which requires any individual or company to enter into a CCN and give up these federal rights as a condition of doing business is clearly unlawful as a matter of constitutional and NLRA/LMRA jurisprudence. Additionally, the proposed SF ordinance goes one step further in requiring an LPA *or collective bargaining agreement* as a condition of doing business in San Francisco. This is even more clearly unlawful (if that is even possible) under federal law.

We very much look forward to working with you to vindicate your federal rights with respect to the State of California and/or San Francisco.

Very truly yours,

SEYFARTH SHAW LLP

Eric M. Steinert

EMS

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Print Form

Introduction Form

By a Member of the Board of Supervisors or Mayor

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2010 APR -3 PM 4:45
Time stamp
BY _____ or meeting date

I hereby submit the following item for introduction (select only one):

- [x] 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- [ ] 2. Request for next printed agenda Without Reference to Committee.
- [ ] 3. Request for hearing on a subject matter at Committee.
- [ ] 4. Request for letter beginning :"Supervisor [ ] inquiries"
- [ ] 5. City Attorney Request.
- [ ] 6. Call File No. [ ] from Committee.
- [ ] 7. Budget Analyst request (attached written motion).
- [ ] 8. Substitute Legislation File No. [ ]
- [ ] 9. Reactivate File No. [ ]
- [ ] 10. Question(s) submitted for Mayoral Appearance before the BOS on [ ]

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

- [ ] Small Business Commission
- [ ] Youth Commission
- [ ] Ethics Commission
- [ ] Planning Commission
- [ ] Building Inspection Commission

Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.

Sponsor(s):

Supervisor Jeff Sheehy

Subject:

Police Code: - Requiring Agreements between Cannabis and Labor

The text is listed:

ORDINANCE Amending POLICE code to require Applicants for CannaBIS Permits into either a LaBOR Peace Agreement or a collective bargaining agreement w/ a Bona fide Labor organization

Signature of Sponsoring Supervisor: Jeff Sheehy

For Clerk's Use Only