



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTIETH LEGISLATURE, 2019**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 1523, RELATING TO WORKERS' COMPENSATION.

**LATE**

**BEFORE THE:**

SENATE COMMITTEES ON LABOR, CULTURE AND THE ARTS  
AND ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

**DATE:** Wednesday, February 6, 2019      **TIME:** 9:00 a.m.

**LOCATION:** State Capitol, Room 229

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Robyn M. Kuwabe, Deputy Attorney General

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Chairs Taniguchi and Baker and Members of the Committees:

The Department of the Attorney General provides the following comments.

The bill makes medical cannabis reimbursable under the Workers' Compensation laws, chapter 386, Hawaii Revised Statutes (HRS), by amending section 386-21.7 to include medical cannabis as medication employers must furnish to employees as long as reasonably needed, provided the employees enroll in the medical cannabis program pursuant to chapter 329, HRS. It also provides conditions for obtaining reimbursement for medical cannabis and proposes to amend section 329-124, HRS, which currently does not require insurance coverage for the medical use of cannabis, to require coverage for medical use of cannabis as provided in chapter 386, HRS.

Cannabis is a Schedule I controlled substance that is illegal to produce, possess, sell, or use according to the federal government and the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-904. The Food and Drug Administration (FDA) has not approved cannabis as a safe or effective drug for any purpose. Thus, any laws the State enacts purporting to legalize activities pertaining to cannabis may conflict with federal law, and federal authorities could take enforcement actions. The validity of such laws could also be subject to civil challenges.

State laws that require employers and their insurance carriers to reimburse claimants for medical use of cannabis have been successfully challenged. In Bourgoin

v. Twin Rivers Paper Company, LLC, 187 A.3d 10 (Me 2018), the Maine Supreme Court ruled that the CSA preempted the Maine Medical Use of Marijuana Act (MMUMA) when used “as a basis for requiring an employer to reimburse an employee for the cost of medical marijuana.” Id. at 21. The Bourgoin court stated, “[a]s invoked against [employer], the MMUMA requires what federal law forbids, and the authority ostensibly provided by the Maine law is ‘without effect.’” Id. at 21.

Thus, the provisions requiring employers and their insurance carriers to reimburse employees for cannabis for medical use may be subject to challenge.

In addition, if passed out, the following provisions need to be amended to be consistent with the wording in chapter 329, HRS.

- (1) Page 2, line 20, “medical cannabis” should be changed to “cannabis for medical use.” This change should be made throughout the bill.
- (2) Page 4, line 13, there is no health care provider fee schedule for cannabis.
- (3) Page 4, lines 14-20, the authorized health care provider determines medical treatment reasonable and necessary under chapter 386; however, conditions of use must be consistent with section 329-122, HRS.
- (4) Page 5, line 2, the physicians and APRNs certify a person for the medical use of cannabis based on the criteria in section 329-122, HRS; they are not certifying them for participation in a program.
- (5) Page 5, line 5, an individual is registered in accordance with section 329-123, HRS, rather than enrolled in a cannabis program.
- (6) Page 5, lines 15 and 17, there is no such thing as a licensed producer. There are licensed dispensaries and they have production centers and retail dispensing locations.
- (7) Page 6, lines 7-8, “pre-filled and sealed containers” is not the whole description of the allowed product in section 329D-10.

Thank you for the opportunity to provide testimony.



*Dedicated to safe, responsible, humane and effective drug policies since 1993*

TO: Senate Committees on Commerce, Consumer Protection & Health; Labor, Culture & the Arts

FROM: Carl Bergquist, Executive Director

HEARING DATE: February 6, 2019, 9AM

RE: SB1523, Relating to Workers' Compensation, **SUPPORT**

Dear Chairs Baker & Taniguchi, Vice Chairs Chang & Wakai, Committee Members:

The Drug Policy Forum of Hawai'i (DPFHI) **strongly supports** this measure to make medical cannabis reimbursable through the workers' compensation system in certain circumstances. This would increase consumer choice while fostering public health. It also helps decrease stigma around a medicine that became legal in Hawai'i nearly 20 years ago, and which is now more widely available via a regulated dispensary system. This bill, together with SB1524 (that prohibits discrimination of medical cannabis patients by employers), will work to promote a safer work environment.

Presently, a worker who is injured on the job and who chooses or needs to use medical cannabis as part of their treatment faces two Hobson's choices. First, they must pay for the medicine themselves, take other reimbursable medicines, such as opioids, or suffer in pain. Second, should they decide pay for medical cannabis out of pocket, they risk being terminated by their employer for merely doing what works best for them. In issuing a ruling holding that the Department of Public Works in Freehold Township, New Jersey must pay for an injured worker's medical cannabis, a New Jersey Worker's Compensation Judge recently addressed the issues at stake:

Because the Workers' Compensation statute "is social legislation and it changes with the times," the court properly determined that "it's time for us, as the Division of Compensation, to try to get away from these opioids which are killing people." In fact, the court found that not only is marijuana cheaper, safer and less addictive than opioids in general, in this particular case it was better for the immediate treatment of the muscular spasticity from which McNeary suffers, and the long term prognosis is better.<sup>1</sup>

The Judge also held that by simply signing a check, the employer would "never possess, never distribute, never intend to distribute" the medical cannabis and put it in the crosshairs of the federal law that still holds all forms of cannabis to be illegal.

A New Mexico appellate court reached a similar conclusion, while the Minnesota Department of Labor rewrote its regulations to explicitly hold that medical cannabis is reimbursable for workers' compensation claims.<sup>2</sup>

This legislation addresses the issues raised in the other states as well as here in Hawai'i by the 2018 Hawaii Employers' Mutual Insurance Company (HEMIC) decision to not reimburse a mother of four who was trying to get off addictive opioids for her use of medical cannabis. We humbly request that you passed it out of your committees.<sup>3</sup>

Mahalo for the opportunity to testify.

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<sup>1</sup> <https://www.law.com/njlawjournal/2018/09/24/workers-compensation-payments-include-medical-marijuana/?slreturn=20190105042418>.

<sup>2</sup> <https://www.defenselitigationinsider.com/2017/10/06/medical-marijuana-and-workers-compensation-coverage/>.

<sup>3</sup> <https://www.staradvertiser.com/2018/07/02/hawaii-news/insurer-rescinds-pot-payout/>.

Hawaii State Legislature  
Committee on Commerce, Consumer Protection and Health  
Senator Rosalyn H. Baker, Chair  
Senator Stanley Chang, Vice Chair

February 3, 2019

Committee on Labor, Culture and the Arts  
Senator Brian T. Taniguchi, Chair  
Senator Les Ihara, Jr., Vice Chair

*Filed via electronic testimony submission system*

**RE: SB 1523, Workers' Compensation – Cannabis Coverage – NAMIC's Testimony**

Thank you for providing the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to your committee for the February 6, 2019 public hearing. Unfortunately, I will not be able to attend the public hearing, because of a previously scheduled professional obligation. NAMIC's written comments need not be read into the record, so long as they are referenced as a formal submission and are provided to the committee for consideration.

The National Association of Mutual Insurance Companies (NAMIC) is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC members represent 40 percent of the total property/casualty insurance market, serve more than 170 million policyholders, and write nearly \$225 billion in annual premiums. NAMIC has 84 members who write property/casualty/workers' compensation in the State of Hawaii, which represents 28% of the insurance marketplace.

NAMIC and its member companies fully support the use of medical treatments and prescription medications that help injured workers recover with a minimal amount of pain and discomfort in their healing and treatment. Unfortunately, there is a fundamental difference between state and federal law (Controlled Substances Act) on the legality of the possession, use, and payment for cannabis products. National workers compensation carriers have legal concerns that they may be arguably in violation of federal law by paying for the purchase of a federally illegal scheduled narcotic. Since there is no U. S. Attorney General legal opinion stating that a national insurer may pay for cannabis as an insurance coverage benefit when it is illegal at the federal level, the proposed law improperly places insurers in the middle of a political disagreement between the state of Hawaii and the federal government. NAMIC suggests that the State of Hawaii's Congressional Delegation should seek an

amendment to federal law to de-classify cannabis products from federal controlled substances law, so that there is no potential criminal liability exposure for insurers.

Additionally, since many states have legalized medical cannabis, data is just starting to be collected and analyzed as to the practical realities of the growth and widespread use of cannabis products as an alternative medicine and its practical impact upon drivers and workers. NAMIC suggests that the state legislature should hold off on enacting any law on point until after the medical and occupational injury experts have had time to thoroughly evaluate data on whether cannabis use by injured workers may have negative implications that hinder the patient's medical recovery and ability to safely return to work. We suggest that the legislature proceed cautiously, so that cannabis use by injured workers does not become the next opioid-type substance abuse problem that has a harmful effect upon injured workers and the entire society.

For the aforementioned reasons, NAMIC recommends that the state legislature be thoughtful, cautious, and deliberate in its consideration of the legal, business, and consumer implications of workers' compensation insurance coverage for medical cannabis. Consequently, we are respectfully asking for a **NO VOTE on SB 1523**.

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at [crataj@namic.org](mailto:crataj@namic.org), if you would like to discuss NAMIC's written testimony.

Respectfully,



Christian John Rataj, Esq.  
NAMIC Senior Regional Vice President  
State Government Affairs, Western Region

**SB-1523**

Submitted on: 2/5/2019 8:38:27 AM

Testimony for LCA on 2/6/2019 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Melodie Aduja	Testifying for O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments:

# American Property Casualty Insurance Association

To: The Honorable Brian T. Taniguchi, Chair  
The Honorable Les Ihara, Jr., Vice Chair  
Senate Committee on Labor, Culture and the Arts

**LATE**

The Honorable Rosalyn H. Baker, Chair  
The Honorable Stanley Chang, Vice Chair  
Senate Committee on Commerce, Consumer Protection and Health

From: Mark Sektnan, Vice President

Re: **SB 1523 – Relating to Workers’ Compensation**  
**APCIA Position: In Opposition**

Date: Wednesday, February 6, 2019  
9:00 a.m., Conference Room 229

Aloha Chairs Taniguchi and Baker, Vice Chairs Ihara and Chang and Members of the Committees:

The American Property Casualty Insurers Association of America (APCIA) is opposed to SB 1523 which would require that workers registered with the department of health's medical cannabis program be reimbursed for the out of pocket cost of medical cannabis through the workers' compensation system in certain circumstances. Representing nearly 60 percent of the U.S. property casualty insurance market, the American Property Casualty Insurance Association (APCIA) promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA represents the broadest cross-section of home, auto, and business insurers of any national trade association. APCIA members represent all sizes, structures, and regions, which protect families, communities, and businesses in the U.S. and across the globe.

APCIA respects the fact that Hawaii allows qualified patients to access medical marijuana and voluntarily assume the risk of federal prosecution. However, no state should adopt legal decisions, agency rules, or law that forces an unwilling person to participate in a crime and involuntarily assume the risk of federal prosecution. Until the US Congress resolves the conflicts between federal law and state law, states should respect the Supremacy Clause and not force unwilling stakeholders to violate federal law.

The Controlled Substances Act (CSA) does not exempt marijuana used for medical purposes from its prohibition of possession or distribution of even small amounts of marijuana. By requiring reimbursement for medical cannabis for a work-related injury, the state is forcing the employer and/or insurance carrier to become an accomplice to the



commission of a federal crime as clearly identified in the Controlled Substances Act<sup>1</sup> and as further expanded in the “aiding and abetting”<sup>2</sup> and “conspiracy”<sup>3</sup> statutes found in Title 18 of the federal criminal statutes. Furthermore, transporting or transmitting funds known to have been derived from the distribution of marijuana is illegal.<sup>4</sup> Financial institutions, including insurance companies, that conduct transactions generated by marijuana related conduct face criminal liability under the Bank Secrecy Act.<sup>5</sup> The United States Supreme Court has addressed the conflict between state medical marijuana laws and federal CSA and unequivocally held that any conflict must be resolved in favor of the CSA pursuant to the Supremacy Clause of the US Constitution.<sup>6</sup>

Arizona, Florida, Louisiana, North Dakota, and Vermont have language in their medical marijuana statutes that expressly excludes reimbursement under workers compensation. This provision was recently upheld in Vermont. (*Hall v. Safelite Group*). Other states do exempt property and casualty insurers or private insurance carriers as well.

In Maine, the state Supreme Court overturned underlying decisions that ordered employer reimbursement for medical marijuana on a workers compensation claim. In June 2018, the Maine Supreme Court ruled in *Bourgoin v. Twin Rivers Paper Co.* overturned a prior order that had required reimbursement, citing the supremacy of federal law (the CSA over the Maine Medical Use of Marijuana Act).

The New Mexico Court of Appeals has issued a series of decisions in which they held that the employer and/or workers compensation carrier can be required by the Workers Compensation Administration to reimburse for medical cannabis under the Lynn and Erin Compassionate Use Act. Those decisions are primarily based on the Court of Appeals interpretation of federal law and federal public policy as enunciated in two memorandums issued by the United States Department of Justice.<sup>7</sup> The DOJ guidance may inform patients and industry participants that they may not be a current enforcement priority, but it is not a promise not to prosecute in the future.<sup>8</sup> In addition, federal courts remain duty bound to enforce the legal proscriptions arising out of the Controlled Substances Act.<sup>9</sup> The Department of Justice memorandums are not law and DOJ has no

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<sup>1</sup> 21 U.S. Code §§ 812, 822, 823(f)

<sup>2</sup> 18 U.S. Code §2

<sup>3</sup> 18 U.S. Code §371

<sup>4</sup> 18 U.S. Code §1960

<sup>5</sup> 31 U.S. Code §5318(g); DOJ memorandum February 14, 2014 at page 2

<sup>6</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005)

<sup>7</sup> Memorandums from James M. Cole, Deputy Attorney General, to United States Attorneys (August 29, 2013 and February 14, 2014) frequently referred to as the “Cole Memos”

<sup>8</sup> The Cole Memos expressly acknowledge that the memorandum “does not alter in any way the Department’s authority to enforce federal law, including laws relating to marijuana, regardless of state law.”

<sup>9</sup> See *In re Arenas*, 535 B.R. 845 (10<sup>th</sup> Cir. BAP 2015) refusal to give debtors bankruptcy relief because their marijuana business activities are federal crimes; *The Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*, (Civil Action No. 15-cv-01633-RBJ, US District Court for District of Colorado) decision January 5, 2016 upholding federal reserve bank refusal to grant master account to credit union formed to provide banking services to marijuana businesses in compliance with state law but in violation of CSA

authority to create federal public policy. Only the United States Congress has those powers. Congress has not yet resolved the conflict between the Controlled Substances Act and the state medical marijuana statutes.

Most support for medical marijuana use is anecdotal. Without high quality scientific study into the efficacy and treatment applications of medical marijuana, it is not appropriate for use in evidence-based treatment plans. The lack of FDA approval and variances in purity and potency makes the development of standards difficult.

Legislation to require workers compensation carriers would clearly need language to create a federal safe harbor to protect insurers from being in violation of federal law as they seek to comply with state law. In addition, workers compensation reimburses for benefits, including pharmacy benefits based on the state adopted fee schedule. Medical marijuana would need to be added to the pharmacy fee schedule.

For these reasons, APCIA asks the committee to hold this bill in committee.

**SB-1523**

Submitted on: 2/4/2019 11:41:41 AM

Testimony for LCA on 2/6/2019 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Destiny Brown	Individual	Support	No

Comments:

Aloha Committe Chair and Members,

I am writing in support of SB1523.

Thank you,

Destiny Brown

Constituent Senate District 25

Constituent House Distrct 13

Student Hawaii Pacific University