

1 TO THE HONORABLE SENATE:

2 The Committee on Economic Development, Housing and General Affairs to  
3 which was referred Senate Bill No. 241 entitled “An act relating to personal  
4 possession and cultivation of cannabis and the regulation of commercial  
5 cannabis establishments” respectfully reports that it has considered the same  
6 and recommends that the bill be amended as follows:

7 First: In Sec. 2, by striking out 20 V.S.A. § 2115 in its entirety and  
8 inserting in lieu thereof a new 20 V.S.A. § 2115 to read as follows:

9 § 2115. NO ACCOMMODATION REQUIRED; EMPLOYERS

10 Nothing in this chapter shall be construed to do any of the following:

11 (1) require an employer to permit or accommodate the use,  
12 consumption, possession, transfer, display, transportation, sale, or growing of  
13 cannabis in the workplace;

14 (2) prevent an employer from adopting a policy that restricts the use of  
15 cannabis by employees;

16 (3) prevent an employer from adopting a policy that prohibits the use of  
17 cannabis in the workplace;

18 (4) create a cause of action against an employer that discharges an  
19 employee for violating a policy that restricts or prohibits the use of cannabis by  
20 employees;

1           (5) prevent an employer from prohibiting or otherwise regulating the  
2           use, consumption, possession, transfer, display, transportation, sale, or growing  
3           of cannabis on the employer’s premises.

4           Second: After Sec. ???, by adding a Sec. ??? to read as follows  
5           Sec. ??? 21 V.S.A. chapter 5, subchapter 11 is amended to read:

6                               Subchapter 11. Drug Testing

7           § 511. DEFINITIONS

8           As used in this subchapter:

9                               \* \* \*

10           (9) “Reasonable suspicion drug testing” means drug testing that is  
11           conducted based on evidence that an employee is using or has used drugs in  
12           violation of an employer’s policy drawn from specific objective and articulable  
13           facts and reasonable inferences drawn from those facts in light of experience.  
14           Among other things, facts and inferences with respect to an employee may be  
15           based upon:

16           (A) observable phenomena while at work, including direct  
17           observation of drug use or physical symptoms of being under the influence of a  
18           drug;

19           (B) abnormal conduct or erratic behavior while at work or a  
20           significant deterioration in work performance;

1           (C) evidence that an employee has tampered with a drug test during  
2 his or her employment with the employer;

3           (D) information that an employee has caused or contributed to an  
4 accident while at work; and

5           (E) evidence that an employee has manufactured, sold, distributed,  
6 solicited, possessed with intent to sell or distribute, used, or transferred drugs  
7 while working or while on the employer’s premises or while operating the  
8 employer’s vehicle, machinery, or equipment.

9           (10) “Rehabilitation program” means an established program  
10 administered by a licensed or certified Vermont health care professional that  
11 provides drug or alcohol rehabilitation or therapeutic services in a confidential  
12 and timely manner, including the identification, assessment, and treatment of  
13 employee drug or alcohol abuse.

14           (11) “Specimen” means tissue, breath, hair, urine, or other product of  
15 the human body, excluding blood, that is capable of revealing the presence of  
16 drugs and that the Commissioner of Health has determined to meet the  
17 requisite standards for scientific and technical accuracy for drug testing and to  
18 afford the opportunity for strict forensic chain of custody procedures.

19           (12) “Threshold detection level” means the level at which the presence  
20 of a drug can reasonably be expected to be detected by a drug test performed  
21 by a designated laboratory. A threshold detection level indicates the level at

1 which a designated laboratory can conclude that a drug is present in an  
2 employee's specimen. The threshold detection level for the presence of  
3 alcohol shall be a blood alcohol concentration of 0.02.

4 § 512. ~~DRUG TESTING OF APPLICANTS; PROHIBITIONS;~~

5 EXCEPTIONS DRUG-FREE WORKPLACE PROGRAM

6 (a) ~~General prohibition. Except as provided in subsection (b) of this~~  
7 ~~section, an employer or an employment agency shall not, as a condition of~~  
8 ~~employment, do any of the following:~~

9 (1) ~~Request or require that an applicant for employment take or submit~~  
10 ~~to a drug test.~~

11 (2) ~~Administer or attempt to administer a drug test to an applicant for~~  
12 ~~employment.~~

13 (3) ~~Request or require that an applicant for employment consent,~~  
14 ~~directly or indirectly, to a practice prohibited under this subchapter.~~

15 (b) ~~Exception. An employer may require an applicant for employment to~~  
16 ~~submit to a drug test only if all of the following conditions are met:~~

17 (1) ~~Conditional offer of employment. The applicant has been given an~~  
18 ~~offer of employment conditioned on the applicant receiving a negative test~~  
19 ~~result.~~

20 (2) ~~Notice. The applicant received written notice of the drug testing~~  
21 ~~procedure and a list of the drugs to be tested. The notice shall also state that~~

1 ~~therapeutic levels of medically prescribed drugs tested will not be reported.~~

2 ~~The notice required under this subdivision may not be waived by the applicant.~~

3 ~~(3) Administration. The drug test is administered in accordance with~~  
4 ~~section 514 of this title.~~

5 An employer may elect to implement a drug-free workplace program  
6 pursuant to this subchapter.

7 (b) An employer that elects to implement a drug-free workplace program  
8 pursuant to this subchapter may require an employee to submit to a drug test  
9 permitted pursuant to section 513 of this subchapter. An employer may  
10 terminate an employee who refuses to submit to a drug test that is permitted  
11 pursuant to section 513 of this subchapter.

12 (c) If a drug test of an employee's specimen that was collected during the  
13 employee's work hours detects the presence of a drug above the threshold  
14 detection level or, for a therapeutic drug, at a nontherapeutic level established  
15 by the Commissioner of Health pursuant to section 518 of this chapter, the  
16 employer may do either of the following:

17 (1) Discipline the employee pursuant to the employer's policy, including  
18 by terminating the employee.

19 (2) Refer the employee to a drug rehabilitation program. An employee  
20 who agrees to participate in a rehabilitation program may not be terminated  
21 while he or she is participating in the program. However, the employee may

1 be suspended for the period of time necessary to complete the program, but in  
2 no event for longer than three months.

3 (d) A drug-free workplace program adopted pursuant to this subchapter  
4 shall have the following three elements:

5 (1) the provision of written notice prior to drug testing as required  
6 pursuant to subsection 520(a) of this subchapter;

7 (2) the provision to all employees of an annual notice that it is a  
8 condition of employment that no employee is permitted to report to work or  
9 work under the influence of a drug, and that an employee who refuses to  
10 submit to a drug test permitted pursuant to section 513 of this subchapter is  
11 subject to termination; and

12 (3) a drug rehabilitation program that the employer makes available to  
13 employees for voluntary participation and by referral.

14 (e) Nothing in this section shall be construed to prohibit a collective  
15 bargaining agreement from requiring or prohibiting the implementation of a  
16 drug-free workplace program pursuant to this section.

17 ~~§ 513. DRUG TESTING OF EMPLOYEES; PROHIBITIONS;~~

18 ~~EXCEPTIONS~~

19 ~~(a) General prohibition. Except as provided in subsection (c) of this~~  
20 ~~section, an employer shall not, as a condition of employment, promotion or~~

1 ~~change of status of employment, or as an expressed or implied condition of a~~  
2 ~~benefit or privilege of employment, do any of the following:~~

3 ~~(1) Request or require that an employee take or submit to a drug test.~~

4 ~~(2) Administer or attempt to administer a drug test to an employee.~~

5 ~~(3) Request or require that an employee consent, directly or indirectly,~~  
6 ~~to a practice prohibited under this subchapter.~~

7 ~~(b) Random or company wide tests. An employer shall not request, require~~  
8 ~~or conduct random or company wide drug tests except when such testing is~~  
9 ~~required by federal law or regulation.~~

10 ~~(e) Exception. Notwithstanding the prohibition in subsection (a) of this~~  
11 ~~section, an employer may require an individual employee to submit to a drug~~  
12 ~~test if all the following conditions are met:~~

13 ~~(1) Probable cause. The employer or an agent of the employer has~~  
14 ~~probable cause to believe the employee is using or is under the influence of a~~  
15 ~~drug on the job.~~

16 ~~(2) Employee assistance program. The employer has available for the~~  
17 ~~employee tested a bona fide rehabilitation program for alcohol or drug abuse~~  
18 ~~and such program is provided by the employer or is available to the extent~~  
19 ~~provided by a policy of health insurance or under contract by a nonprofit~~  
20 ~~hospital service corporation.~~

1           ~~(3) Employee may not be terminated. The employee may not be~~  
2           ~~terminated if the test result is positive and the employee agrees to participate in~~  
3           ~~and then successfully completes the employee assistance program; however,~~  
4           ~~the employee may be suspended only for the period of time necessary to~~  
5           ~~complete the program, but in no event longer than three months. The~~  
6           ~~employee may be terminated if, after completion of an employee assistance~~  
7           ~~program, the employer subsequently administers a drug test in compliance with~~  
8           ~~subdivisions (1) and (4) of this subsection and the test result is positive.~~

9           ~~(4) Administration of test. The A drug test is administered pursuant to a~~  
10           ~~drug-free workplace program shall be administered in accordance with section~~  
11           ~~514 of this title subchapter and shall comply with all applicable rules adopted~~  
12           ~~by the Department of Health.~~

13           (b) An employer may conduct the following types of drug tests as part of a  
14           drug-free workplace program:

15           (1) Job applicant drug testing. An employer may require job applicants  
16           to submit to a drug test and may refuse to hire a job applicant because the  
17           applicant refuses to submit to a drug test or because his or her drug test returns  
18           a positive, confirmed test result.

19           (2) Reasonable-suspicion drug testing. An employer may require all  
20           employees to submit to reasonable-suspicion drug testing.



1           (3) Employer-wide drug testing. An employer may require all  
2           employees to submit to a scheduled, employer-wide drug test if the test is  
3           conducted pursuant to the employer’s policy.

4           (4) Follow-up drug testing. If an employee in the course of employment  
5           with the employer enters a drug rehabilitation program, the employer may  
6           require the employee to submit to drug testing as a follow-up to the program at  
7           any time within two years after the employee’s completion of the program.

8           (5) Post-accident testing. If an employee has caused or contributed to  
9           an accident during the course of employment, the employer may conduct a  
10          post-accident drug test of the employee.

11          § 514. ADMINISTRATION OF TESTS

12          An employer may request an applicant for employment or an employee to  
13          submit to a drug test pursuant to this subchapter, provided the drug testing is  
14          performed in compliance with all the following requirements:

15               (1) Drugs to be tested. The test shall be administered only to detect the  
16               presence of alcohol or drugs, as defined in subdivision 511(3) of this title,  
17               above the threshold detection level, or, for therapeutic drugs, at nontherapeutic  
18               levels.

19               (2) Written policy. The employer shall provide all persons tested with a  
20               written policy that identifies the circumstances under which persons may be  
21               required to submit to drug tests, the particular test procedures, the drugs that

1 will be screened, a statement that over-the-counter medications and other  
2 substances may result in a positive test, a statement advising employees of the  
3 availability of a drug rehabilitation program, the consequences of refusing to  
4 submit to a drug test, the employee's rights following a positive test result, and  
5 the consequences of a positive test result. The employer's policy shall  
6 incorporate all provisions of this section.

7 \* \* \*

8 § 517. EMPLOYER'S AUTHORITY

9 (a) This subchapter shall not restrict an employer's authority to prohibit the  
10 possession, sale, solicitation, or nonprescribed use of drugs or alcohol during  
11 work hours, or restrict an employer's authority to discipline, suspend, or  
12 dismiss an employee for possessing, selling, or soliciting drugs, or for being  
13 under the influence of drugs or alcohol during work hours, except as that  
14 authority is restricted under ~~subsection 513(e)(3) of this title~~ subdivision  
15 512(c)(2) of this subchapter in reference to participation in ~~an employee~~  
16 assistance a rehabilitation program or suspension.

17 (b) No physician-patient relationship shall be created between an employee  
18 or job applicant and an individual performing or evaluating a drug test that is  
19 carried out pursuant to this subchapter.

20 \* \* \*

21 § 519. ENFORCEMENT

1       ~~(a) Private right of action. An applicant or employee aggrieved by a~~  
2       ~~violation of this subchapter may bring a civil action for injunctive relief,~~  
3       ~~damages, court costs and attorney's fees.~~

4       ~~(b) Burden of proof. In a private right of action alleging that an employer~~  
5       ~~has violated this subchapter, the employer has the burden of proving that the~~  
6       ~~requirements of sections 513, 514 and 516 of this title have been satisfied. In~~  
7       ~~any civil action alleging that a laboratory has violated the reporting or~~  
8       ~~confidentiality sections of this subchapter, the laboratory shall have the burden~~  
9       ~~of proving that the requirements of sections 514 and 516 of this title have been~~  
10       ~~satisfied.~~

11       ~~(e)(a) State action to obtain civil penalty. A person who violates any~~  
12       ~~provision of this subchapter shall be subject to a civil penalty of not less than~~  
13       ~~\$500.00 nor more than \$2,000.00.~~

14       ~~(e)(b) State action to obtain criminal penalty. A person who knowingly~~  
15       ~~violates any provision of this subchapter shall be fined not less than \$500.00~~  
16       ~~nor more than \$1,000.00 or shall be imprisoned not more than six months, or~~  
17       ~~both.~~

18       § 520. ~~TRANSITORY PROVISIONS~~ REQUIRED NOTICE

19       ~~(a) On or before July 1, 1989, the commissioner of health pursuant to~~  
20       ~~chapter 25 of Title 3 shall set nontherapeutic levels of therapeutic drugs by~~

1 ~~establishing a range of values by considering average medical use for each~~  
2 ~~particular drug or metabolite authorized to be tested under this subchapter.~~

3 ~~(b) Until July 1, 1989, the test shall be administered to detect the presence~~  
4 ~~of alcohol or drugs as defined in subdivision 511(3) of this title. Subdivisions~~  
5 ~~514(1) and 514(8) of this title insofar as they apply to testing only for~~  
6 ~~nontherapeutic levels shall not take effect until July 1, 1989.~~

7 ~~(c) Until July 1, 1989, if an applicant receives a positive test result and has~~  
8 ~~a valid predated prescription for the drug tested, the positive test result may not~~  
9 ~~in and of itself be sufficient reason for not hiring an applicant. Until July 1,~~  
10 ~~1989, if an employee receives a positive test result and has a valid predated~~  
11 ~~prescription for the drug tested, the positive test result may not in and of itself~~  
12 ~~be sufficient reason for requiring that the employee participate in an employee~~  
13 ~~assistance program or for disciplining or dismissing the employee.~~

14 ~~(d) The commissioner of health on or before January 15, 1989 shall issue a~~  
15 ~~progress report to the house and senate committees on general affairs on the~~  
16 ~~ability of the commissioner to comply with subsection (a) of this section. Prior~~  
17 ~~to drug testing, an employer shall provide all employees and applicants with~~  
18 ~~written notice of the test.~~

19 ~~(b) An employer that adopts a drug-free workplace program pursuant to~~  
20 ~~this subchapter shall provide its employees with 60 days' notice before it~~  
21 ~~implements the program and commences drug testing.~~

1        (c) An employer shall provide notice of its drug-free workplace program on  
2        all announcements of a vacant position for which drug testing is required.

3        (d) An employer shall post a notice of the employer’s drug-testing policy in  
4        a conspicuous location on the employer’s premises, and copies of the policy  
5        shall be made available for inspection by the employees or job applicants of  
6        the employer during regular business hours in the employer’s personnel office  
7        or other suitable locations.

8        § 521. DISCHARGE; DISQUALIFICATION FROM UNEMPLOYMENT

9                INSURANCE

10        An employee who has been discharged pursuant to this subchapter shall be  
11        deemed to have been discharged for gross misconduct and shall be disqualified  
12        from unemployment compensation benefits pursuant to subdivision  
13        1344(a)(2)(B) of this title.

14        Third: After Sec. ???, by inserting a Sec. ??? to read as follows:

15        Sec. ???. 21 V.S.A. § 649 is amended to read:

16        § 649. INJURIES NOT COVERED; BURDEN OF PROOF

17        (a) Compensation shall not be allowed for an injury caused by an  
18        employee’s ~~wilful~~ willful intention to injure himself, herself, or another or by  
19        or during ~~his or her intoxication~~ the employee’s impairment due to alcohol or  
20        drug use or by an employee’s failure to use a safety appliance provided for his  
21        or her use.

1        (b) An employee who claims to have suffered a work injury but has refused  
2        to submit to post-accident testing as required by an employer’s drug-free  
3        workplace program established pursuant to chapter 5, subchapter 11 of this  
4        title shall not be entitled to compensation under this chapter. The provisions of  
5        this subsection shall not apply if the employee’s employer had actual  
6        knowledge of and permitted or condoned the use of drugs or alcohol by the  
7        employee in the workplace.

8        (c) The burden of proof shall be upon the employer if he or she claims the  
9        benefit of the provisions of subsection (a) of this section.

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(Committee vote: \_\_\_\_\_)

\_\_\_\_\_

Senator \_\_\_\_\_

FOR THE COMMITTEE