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BILL ANALYSIS

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Senate Bills 852 and 853 (as introduced 3-17-20)
Sponsor: Senator Dan Lauwers
Committee: Agriculture

Date Completed: 6-17-20

CONTENT

Senate Bill 852 would create the "Industrial Hemp Growers Act" to do the following:

- **Require the Michigan Department of Agriculture and Rural Development to establish, operate, and administer an industrial hemp program.**
- **Create the "Industrial Hemp Fund" and provide for the disposition of money from Fund.**
- **Prohibit a person from growing industrial hemp in Michigan unless the person was a grower.**
- **Require a person applying for registration as a grower to do so on an application to the Department and prescribe the information that would have to be included with the application.**
- **Require the Department to approve or deny an application for a registration within 120 days after it was submitted.**
- **Prescribe reporting, signage, and recordkeeping requirements for growers.**
- **Prohibit a grower from engaging in certain conduct, including growing industrial hemp that did not comply with the grower's registration or in a location that was not disclosed on the grower's application.**
- **Require a grower who intended to harvest or destroy an industrial hemp crop to contact the Department at least 20 days before harvest or destruction to collect a representative preharvest sample of each variety of industrial hemp.**
- **Prescribe the process and procedures to be used for testing industrial hemp.**
- **Specify that if the results of a test indicated a total delta-9-tetrahydrocannabinol (THC) concentration that was greater than 0.3% on a dry weight basis, the testing facility would have to provide a certified report stating the results of the test, and require the grower to destroy the industrial hemp crop.**
- **Allow the Department to promulgate rules to implement the Act.**
- **Provide that a grower who engaged in certain conduct would be in violation of the Act and prescribe penalties for violations.**

Senate Bill 853 would amend the sentencing guidelines in the Code of Criminal Procedure to include the felony proposed under Senate Bill 852 as a Class E crime against the public trust with a statutory maximum sentence of five years' imprisonment.

Senate Bill 853 is tie-barred to Senate Bill 852. Senate Bill 852 is discussed in greater detail below.

Creation of Industrial Hemp Program

The Department would have to establish, operate, and administer an industrial hemp program, and would have to develop and submit to the United States Department of Agriculture (USDA) for approval an industrial hemp plan for Michigan that complied with Federal law. After approval, the Department would have to use the plan to implement the program. "Industrial hemp" would mean that term as defined in Section 7106 of the Public Health Code: the plant *Cannabis sativa* L. and any part of that plant, including the viable seeds of that plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9-THC concentration of not more than 0.3% on a dry weight basis. The term includes industrial hemp commodities and products and topical or ingestible animal and consumer products derived from the plant *Cannabis sativa* L. with a delta-9-THC concentration of not more than 0.3% on a dry weight basis.

The Industrial Hemp Fund would be created within the State Treasury. The State Treasurer could receive the fees collected under the Act, and money or other assets from any other source for deposit into the Fund. The State Treasurer would have to credit to the Fund interest and earnings from Fund investments. Money in the Fund at the close of the fiscal year would remain in the Fund and would not lapse to the General Fund. The Department of Agriculture and Rural Development would the administrator of the Industrial Hemp Fund for auditing purposes.

The Department would have to spend money from the Fund to establish, operate, and enforce the program.

Application & Registration

The bill would prohibit a person from growing industrial hemp in Michigan unless the person was a grower. "Grower" would mean a person registered as described below. "Grow" or "growing", unless the context required otherwise, would mean to plant, propagate, cultivate, or harvest live plants or viable seed. The terms include drying, storing, or possessing live plants or viable seed on a premises where the live plants or viable seed are grown before the live plants or viable seed are transported to the first point of sale.

A person applying for a registration would have to do so on an application and in a manner provided by the Department. The applicant would have to include with the application all of the following information:

-- The applicant's name, date of birth, mailing address, telephone number, and e-mail address; if the applicant were not an individual, the application would have to include the applicant's employer identification number and, for each key participant, his or her full name, date of birth, title, and e-mail address.
-- The total acreage and greenhouse or other indoor square footage where industrial hemp would be grown.
-- The address and legal description of and global positioning system (GPS) coordinates for each field, greenhouse, building, or other location where industrial hemp would be grown.
-- Maps depicting each field, greenhouse, building, or other location where industrial hemp would be grown that indicated entrances, field boundaries, and specific locations corresponding to the GPS coordinates provided above.
-- A criminal history report for the applicant, or, if the applicant were not an individual, a criminal history report for each key participant.
-- If the applicant intended to sell industrial hemp to a processor, a request by the applicant that the registration include a designation authorizing the applicant to do so.

"Key participant" would mean any of the following:

-- For a sole proprietorship, a sole proprietor.
-- For a partnership, a partner.
-- For a corporation, an individual with executive managerial control including a chief executive officer, a chief operating officer, or a chief financial officer.

The Department would have to approve or deny an application for a registration within 120 days after the application was submitted.

The Department would have to grant a registration if the applicant did all of the following: a) submitted a completed application; b) paid the applicable fees; and c) met the qualifications for registration.

The Department would have to deny an application for a registration if any of the following applied:

-- The application was incomplete.
-- The applicant was under the age of 18.
-- The applicant's location for growing industrial hemp was not located in Michigan.
-- The applicant had not demonstrated a willingness to comply with the Act or rules promulgated under the Act.
-- The applicant had unpaid fees or civil fines owed to the State under the Act.
-- The applicant had made a false statement or representation to the Department or a law enforcement agency.
-- The applicant had a registration revoked in the immediately preceding five-year period.
-- The applicant or, if the applicant were not an individual, a key participant was convicted of a controlled substance felony in the immediately preceding 10-year period.

"Controlled substance felony" would mean a felony violation of the laws of any state having to do with controlled substances or a felony violation of Federal law having to do with controlled substances.

If the Department denied an application because it was incomplete, the Department would have to notify the applicant of the denial within 120 days after the application was submitted and state the deficiency and request additional information. If the Department denied an application for a registration, the applicant could appeal the denial by submitting a written request for a hearing to the Department within 15 days after the date of the denial.

The Department would have to issue a document to a grower that evidenced the granting of a registration.

An initial registration would expire at midnight on November 30 in the year in which the registration was granted. A subsequent registration would be valid for one year beginning on December 1 and would expire at midnight on the following November 30. To renew a registration, an applicant would have to submit an application in a form and manner provided by the Department. The application would have to be submitted on or before November 30. An application submitted after November 30 would be subject to a $250 late fee. A registration would be nontransferable.

If an applicant provided express written consent to disclose personal information on an application, the applicant's name, electronic mail address, and telephone number could be disclosed to a grower or another person authorized by the Department. If the applicant did

not provide consent, any information submitted by the applicant to the Department would not be subject to the Freedom of Information Act.

Grower Requirements

A grower would have to report the following information to the USDA Farm Service Agency immediately after the grower was granted a registration:

-- The address and total acreage of and GPS coordinates for each field, greenhouse, building, or other location where industrial hemp would be grown.
-- The grower's registration number.

A grower would have to do all of the following:

-- Allow the Department or a law enforcement agency to enter onto and inspect all premises where industrial hemp was or would be located, with or without cause and with or without advance notice.
-- Produce a copy of the grower's registration for inspection on request from the Department or a law enforcement agency.
-- Contact the Department to collect a preharvest sample.
-- Harvest the industrial hemp crop within 15 days after receiving a certified report.
-- Destroy any of the following without compensation: a) cannabis that had a total delta-9-THC content greater than 0.3% on a dry weight basis; b) industrial hemp that was at a location that was not disclosed on the grower's registration application; c) industrial hemp that was grown in violation of the Act.

"Preharvest sample" would mean a sample from the floral material of a representative part of a homogenous cannabis variety taken from a grower at the location where the cannabis is growing. "Total delta-9-THC" would mean the total available THC measured as the sum of delta-9-THC and 87.7% of the delta-9-tetrahydrocannabinol acid reported on a dry weight basis. "Variety" would mean a subdivision of a species that has the following characteristics: a) the subdivision is uniform, in the sense that variations between the subdivision and other subdivisions in essential and distinctive characteristics are describable; b) the subdivision is distinct, in the sense that the subdivision can be differentiated by one or more identifiable morphological, physiological, or other characteristics from all other known subdivisions; and c) the subdivision is stable, in the sense that the subdivision will remain uniform and distinct if reproduced.

A grower would have to post signage in a conspicuous location at each boundary line of each location where industrial hemp is grown. The signage would have to include the statement, "Industrial Hemp Registered with the Michigan Department of Agriculture and Rural Development", and the grower's name and registration number. The signage would have to be at least eight inches wide and 10 inches tall, would have to use writing that was clearly legible, and would have to be made of weather-resistant material.

A grower would have to provide a record of sale to each person that purchased industrial hemp from the grower, which would have to include all of the following information:

-- The name of the person purchasing the industrial hemp.
-- Evidence that the person purchasing the industrial hemp was authorized to do so.
-- The total weight and sale price of industrial hemp purchased.
-- The date of the sale.
-- The certified report of the total delta-9-THC testing for each variety of industrial hemp purchased.

A grower would have to maintain records containing all of the following information: a) each record of sale generated; b) the name and mailing address of any person from whom the grower purchased viable industrial hemp seed; c) the name of each variety of industrial hemp the grower grew; d) evidence that the information required to be reported to the USDA Farm Service Agency was submitted and received; and e) a destruction report, if applicable. A grower would have to maintain these records for three years and would have to make the records available to the Department upon request.

Before implementing a modification to a site location listed in a registration, the grower would have to submit a site location modification request on a form provided by the Department and a site location modification fee ($50 for each form submitted), based on the number of requested modifications, and obtain approval from the Department. The Department could not approve a site location modification request unless the grower had paid the site location modification fee in full.

A grower could sell industrial hemp to a processor that was licensed under the Medical Marihuana Facilities Licensing Act.

Sampling, Testing, & Disposal

The proposed Act would require a grower who intended to harvest or destroy an industrial hemp crop to contact the Department at least 20 days before harvest or destruction to collect a representative preharvest sample of each variety of industrial hemp. Sampling would have to be conducted at least 15 days before the grower's anticipated harvest or destruction, and the grower or the grower's authorized representative would have to be present.

When the Department conducted the sampling, the grower would have to provide the Department with complete and unrestricted access to both of the following during normal business hours: a) all cannabis; and b) all acreage, greenhouses, indoor square footage, fields, buildings, or other locations, including any location listed in the registration application, where cannabis is growing or stored.

The Department would have to transport a preharvest sample to a testing facility for total delta-9-THC testing. A testing facility that performed total delta-9-THC testing would have to do all of the following:

-- Adopt a laboratory quality assurance program that ensured the validity and reliability of the total delta-9-THC test results.
-- Adopt an analytical method selection, validation, and verification procedure that ensured that the total delta-9-THC testing method was appropriate.
-- Demonstrate that the total delta-9-THC testing ensured consistent and accurate analytical performance.
-- Adopt method performance selection specifications that ensured that the total delta-9-THC testing methods were sufficient to detect the total delta-9-THC as required under the Act.
-- Report the measurement of uncertainty of the total delta-9-THC test.
-- Adopt a total delta-9-THC testing method that included a postdecarboxylation test or other similar method.

A testing facility would have to ensure that a preharvest sample of industrial hemp was not commingled with any other preharvest sample of industrial hemp, and would have to assign a sample identification number to each preharvest sample of industrial hemp.

A testing facility would have to report all of the following information to the Department and to the USDA for each test performed: a) the grower's full name and mailing address; b) the grower's registration number; c) each sample identification number; d) the testing facility's name and Drug Enforcement Agency registration number; e) the date the total delta-9-THC testing was completed; and f) the certified report of the total delta-9-THC testing.

If the results of a THC total delta-9-THC test indicated a total delta-9-THC concentration of not more than 0.3% on a dry weight basis, the facility would have to provide to the grower, the Department, and the USDA a certified report stating the results of the total delta-9-THC test. If the results of the test indicated a total delta-9-THC concentration that was greater than 0.3% on a dry weight basis, the testing facility would have to provide the grower and the Department a certified report stating the results of the total delta-9-THC test, and the grower would have to destroy the industrial hemp crop.

The grower would have to harvest an industrial hemp crop within 15 days after receiving the certified report. If the grower failed to do so, the grower could submit a request for a second collection of a preharvest sample. The second sample would have to be tested, and the grower would have to harvest the remaining crop within 15 days after receiving a second certified report.

A grower that received a certified report indicating a total delta-9-THC concentration that was greater than 0.3% on a dry weight basis would have to destroy that crop within 15 days using one of the following methods:

-- Plowing under using a curved plow blade to rotate the subsoil to the surface and bury the industrial hemp below the subsoil.
-- Mulching, disking, or composting the industrial hemp and blending it with existing soil, manure, or other biomass material.
-- Mowing, shredding, deep burial, or burning.

The industrial hemp would have to be rendered irretrievable or not ingestible.

A grower that destroyed industrial hemp would have to create and submit to the USDA and the Department a destruction report that contained all of the following information: a) the date of the disposal; b) the method of disposal; c) the total acreage disposed of; and d) a copy of the certified testing report.

Administration

The Act would allow the Department to promulgate rules to implement the Act under the Administrative Procedures Act. The Department also could create and maintain on its website a list of prohibited industrial hemp varieties.

By the first of each month, the Department would have to report all of the following to the USDA:

-- For each grower, the information provided on a registration application.
-- Each grower's registration number.
-- The status of each grower registration.
-- Any changes or updates to a grower's information provided in the registration application.
-- An indication that there were no changes or updates to the reports previously submitted, if applicable.
-- The date for which the information contained above was current.
-- The period covered by the report.

If a grower were required to destroy an industrial hemp crop, by the first of each month, the Department would have to report all of the following to the USDA:

-- The information provided on the grower's registration application.
-- The grower's registration number.
-- The total acreage of industrial hemp that was destroyed.
-- The date on which the industrial hemp was destroyed.

By December 15 of each year, the Department would have to report to the USDA the total acreage of industrial hemp that was grown, harvested, and disposed of in the immediately preceding growing season.

The Department would have to maintain a registration application for three years.

The Department's testing laboratory would be the official regulatory laboratory for testing under the Act. The Department could contract with a third-party laboratory to conduct the testing; however, that laboratory would have to meet the standards for testing described above.

Fees

Under the proposed Act, a grower would be subject to the following fees, as applicable:

-- A registration fee of $1,250
-- A site location modification fee of $50 for each location modification request form submitted.

A grower would have to pay a fee, by check or money order payable to the Department, when his or her registration application or location modification request form was submitted. The Department also would have to charge a fee charged for total delta-9-THC testing; the fee would be limited to the reasonable costs of conducting the testing.

The Act would prohibit a political subdivision of the State from adopting a rule, regulation, code, or ordinance that restricted or limited the Act's requirements, and would supersede a rule, regulation, code, or ordinance of a political subdivision of the State regarding industrial hemp.

Prohibitions

A grower would be prohibited from doing any of the following:

-- Growing industrial hemp that was not in compliance with the grower's registration.
-- Growing industrial hemp in a location that was not disclosed on the grower's application or that was not owned or completely controlled by the grower.
-- Growing industrial hemp in a dwelling.
-- Growing a variety that was on the list of prohibited hemp varieties.
-- Selling or transporting, or permitting the sale or transport of, viable industrial hemp plants to a location that was not disclosed on the grower's registration application or to a person in Michigan who was not a grower.
-- Harvesting or destroying industrial hemp before receiving the certified report of the total delta-9-THC test results.
-- Selling industrial hemp to a person in Michigan who was not authorized by the Department to receive it.

"Completely controlled" would mean to be solely responsible for all of the industrial hemp grown at a location.

Violations & Penalties

The proposed Act specifies that a grower would negligently violate the program if the grower failed to provide a legal description for each field, greenhouse, building, or other location where industrial hemp would be grown in a registration application; failed to obtain a registration; or grew industrial hemp that exceeded the acceptable THC level. "Acceptable THC level" would mean the application of the measurement of uncertainty to the reported total delta-9-THC concentration level on a dry weight basis that produces a distribution or range that includes 0.3% or less total delta-9-THC.

If a grower violated any of the above, the Department would have to issue the grower a notice of violation and the terms of a corrective action plan. The grower would have to comply with the terms of the corrective action plan. The plan would have to include the following terms: a) a reasonable date by which the grower would correct the negligent violation; and b) a requirement that for at least two years after a violation, the grower would have to make periodic reports to the Department about the grower's progress and compliance with the corrective action plan. A negligent violation would not be subject to criminal enforcement.

A grower who negligently violated the industrial hemp plan three times in a five-year period would be ineligible to grow hemp for five years from the date of the third violation.

If any of the following allegations were made concerning a grower, the Department would have to investigate and could suspend the grower's registration for up to 60 days:

-- The grower intentionally grew or was in possession of cannabis with a total delta-9-THC content greater than 0.3% on a dry weight basis.
-- The grower violated a provision of the Act.
-- The grower made a false statement to the Department or a law enforcement agency.
-- The grower failed to comply with an order from the Department or a law enforcement agency.

If the department suspended a registration, the Department would have to notify the grower in writing that the registration was suspended. If a registration were suspended, the grower could not harvest or remove industrial hemp from the location where the industrial hemp was located when the Department issued the notice of suspension, except as authorized by the Department.

The Department could not permanently revoke a suspended registration unless it notified the grower of the allegation against the grower and gives the grower an opportunity for a hearing to appeal the revocation. The Department would have to schedule a hearing on a revocation for a date that was not more than 60 days after the date of notification of a registration suspension. The Department would have to conduct the hearing pursuant to the Administrative Procedures Act.

If the Department found by a preponderance of the evidence that an allegation were true, it would have to revoke the registration. The revocation would be effective immediately, and the Department or a law enforcement agency would have to order the grower to destroy or confiscate all cannabis that is in the grower's possession. The Department or a law enforcement agency could not compensate or indemnify the value of the cannabis that was destroyed or confiscated. If the Department revoked a registration, the grower would be

barred from participating in the program in any capacity for at least five years from the date on which the registration was revoked.

If a grower violated the program three times within a five-year period, the grower would be barred from participating in the program in any capacity for a minimum of five years from the date of the grower's third violation.

If the Department did not find by a preponderance of the evidence that an allegation was true, the Department would have to remove the suspension imposed within 24 hours of its determination.

The bill would prohibit a grower from allowing a falsified preharvest sample to be tested by a testing facility. A grower that violated this would be guilty of a felony and could be imprisoned for up to five years.

The Act also would prohibit a grower from materially falsifying information required in a registration application. A grower that violated this prohibition would be ineligible to participate in the program.

A person who individually, or by the action of an agent or employee, or as the agent or employee of another, negligently or with a culpable mental state greater than negligence, violated the Act or a rule promulgated under the Act would be subject to an administrative fine. On the request of a person to whom an administrative fine was issued, the Department would have to conduct a hearing pursuant to the Administrative Procedures Act. The Department would have to impose an administrative fine as follows:

-- For a first violation, an administrative fine of at least $100 and up to $500, plus the actual costs of the investigation and double the amount of any economic benefit associated with the violation.
-- For a second violation that occurred within five years after the first, an administrative fine of at least $500 and up to $1,000, plus the actual costs of the investigation and double the amount of any economic benefit associated with the violation.
-- For a third or subsequent violation that occurred within five years after the first, an administrative fine of at least $1,000 and up to $2,000, plus the actual costs of the investigation and double the amount of any economic benefit associated with the violation.

Any violation made with a culpable mental state greater than negligence would have to be reported to the Attorney General, the USDA, and the chief law enforcement officer of the State.

A decision of the Department to impose an administrative fine would be subject to judicial review as provided by law. The Department would have to advise the Attorney General of a person's failure to pay an administrative fine. The Attorney General would have to bring an action to recover the fine. Any administrative fine, investigation costs, or recovery of an economic benefit associated with a violation that was collected would have to be paid to the State Treasury and deposited into the Fund.

MCL 777.12m (S.B. 853) Legislative Analyst: Jeff Mann

FISCAL IMPACT

Senate Bill 852

The bill would have a fiscal impact on the Department of Agriculture and Rural Development,

with an estimated annual cost of $1.0 million and 6.0 FTEs, which would be needed to fulfill the bill's provisions. The bill would include a $1,250 application fee for growers, which would be deposited in the proposed Industrial Hemp Fund, to offset some of the Department's costs. If one assumes that a projected 600 growers participate in the registration process, contributions of about $750,000 would be available annually to support the regulatory program. The remainder of the program's expenses, approximately $250,000, would have to be supported from general purpose funds or another fund source. The bill also would allow the Department to assess a $50 site modification fee, as well as fees for the Department's reasonable costs for sampling and testing of crops. The bill also provides for administrative fines to be deposited in the Fund, which would not be subject to a lapse to the General Fund.

The bill also would have a negative fiscal impact on the State and local government. New felony arrests and convictions under the bill could increase resource demands on law enforcement, court systems, community supervision, jails, and correctional facilities. However, it is unknown how many people would be prosecuted under the bill's provisions. The average cost to State government for felony probation supervision is approximately $3,024 per probationer per year. For any increase in prison intakes, in the short term, the marginal cost to State government is approximately $5,315 per prisoner per year. Any additional revenue from imposed fines would go to local libraries.

Senate Bill 853

The bill would have no fiscal impact on local government and an indeterminate fiscal impact on the State, in light of the Michigan Supreme Court's July 2015 opinion in *People v. Lockridge*, in which the Court ruled that the sentencing guidelines are advisory for all cases. This means that the addition to the guidelines under the bill would not be compulsory for the sentencing judge. As penalties for felony convictions vary, the fiscal impact of any given felony conviction depends on judicial decisions.

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