



Legislation Details (With Board Report)

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File created: 1/27/2020 **In control:** Board of Supervisors

On agenda: 2/4/2020 **Final action:**

Title: Receive a status report concerning the requirement in Chapter 7.90 of the Monterey County Code that all employees and property owners must undergo Live Scan to receive a Cannabis Business Permit; review options regarding the Live Scan requirement; and provide direction to staff as appropriate.

Sponsors:

Indexes:

Code sections:

Attachments: 1. Board Report, 2. MS PowerPoint Presentation (Presented During Hearing), 3. Item No. 19 Board Order

Date	Ver.	Action By	Action	Result
2/4/2020	1	Board of Supervisors	received	

Receive a status report from the Cannabis Program concerning the requirement in Chapter 7.90 of the Monterey County Code that all employees and property owners must undergo Live Scan to receive a Cannabis Business Permit; review options regarding the Live Scan requirement; and provide direction to staff as appropriate.

RECOMMENDATIONS:

It is recommended the Board of Supervisors:

- a. Receive a status report concerning the requirement in Chapter 7.90 of the Monterey County Code that all employees and property owners must undergo Live Scan to receive a Cannabis Business Permit;
- b. Review options regarding the Live Scan requirement; and
- c. Provide direction to staff as appropriate.

SUMMARY/DISCUSSION:

Background on Live Scan Requirement

Monterey County Code (MCC) Section 7.90.050(C)(8) currently reads as follows: “All property owners, owners, supervisors, employees, and persons having a twenty percent (20%) or more financial interest must submit fingerprints and other necessary information for a criminal background check conducted by the Monterey County Sheriff’s Office.” The Section was amended and approved by the Board of Supervisors on September 30, 2019. In short, the above detailed individuals must undergo Live Scan for a Cannabis Business Permit (CNB) to be issued.

At the November 20, 2019 Board Cannabis Committee meeting, public comment was received regarding the employee Live Scan requirement, including:

- Section 7.90.050(C)(8) pertaining to criminal background checks presents an interpretation issue and is prohibitive for operators and their workforce. Also, the Section should follow state law, which does not require employees to provide fingerprint screening.
- The Cannabis Industry is labor intensive, providing year-round jobs and above average pay and working

conditions. When polled about fingerprint requirements, employees stated they would seek other employment to avoid jeopardizing their immigration or asylum status.

The Program also received the following concerns regarding the property owner Live Scan requirement:

- Property owner has the ability to withhold undergoing the Live Scan, thus delaying the issuance of the CNB or renewal thereof.
- Property owner has been convicted of a felony or a drug related misdemeanor reclassified by Section 1170.18 of the California Penal Code (Proposition 47) within the past ten years which would then be grounds for the CNB and land use entitlement to be revoked.

On December 16, 2019, the Cannabis Program Enforcement Task Force met with internal cannabis departments to discuss the employee fingerprint requirement. The participants agreed the Program should evaluate operator compliance and continue to research Live Scan requirements, including analysis of Monterey County cities and other local jurisdictions.

On January 22, 2020, the Board Cannabis Committee met on this subject. The Program, District Attorney's Office, and Sheriff's Office presented a report on the Live Scan requirement for landowners and employees, including options for the Committee to consider. The Committee directed staff to move forward with a full Board presentation to gain direction on next steps. The Committee also requested the Program coordinate a stakeholder's meeting with our industry, Sheriff's Office and District Attorney's Office.

Further public comment was received at the meeting regarding the employee Live Scan requirement, including:

- The intrusiveness and burden of the Live Scan when considering other sufficient background check options.
- Live Scan, or any other background check, does not prevent employees from leaking sensitive and actionable information, and it is the responsibility of the operator to establish and maintain a secure facility.
- Monterey County is predominantly cultivation oriented, which requires a different workforce relative to other jurisdictions. This workforce is justifiably fearful of law enforcement.
- Because of the system of checks and balances offered by Track-n-Trace, sizable diversion would require owner/supervisor complicity; not employee.
- The cannabis industry should follow state liquor law, which prevents owners with felony records from profiting from the industry.

Staff has researched other county, city and state requirements as it relates to the Live Scan requirement for employees. However, it will require more time to compare the dynamics of each jurisdiction and interview appropriate authorities, as appropriate.

Understanding "Background Checks"

It is important for the Board to understand what is meant by a background check. Live Scan is a system where a person submits their fingerprints along with an application and a fee payment. Live Scan is a mostly automated system that checks state and federal criminal history information and then returns that information to the agency listed as the Originating Agency Identifier (ORI). Currently the Sheriff's Office holds the ORI account. If the Live Scan returns with criminal history information, a manual check is required to determine if any conviction would prohibit employment. If an arrest which could disqualify someone is listed, but there is no disposition information, this requires additional work to contact the jurisdiction where the arrest occurred.

The Cannabis Program is researching whether it would be more efficient for them to become the ORI. This is the extent of the “background check”, no references or other verification is done. This is the least labor-intensive manner of screening.

An alternative to Live Scan would be to have those required to be checked submit their information and an agency with access to a criminal database would individually look up that person and determine if any local criminal history existed and if so if that prevented the person from being employed in the cannabis industry. This would be extremely labor intensive as it is often difficult to identify whether the name submitted is the person listed in the criminal history database being searched and once identified would require cross reference to judicial records. This would also be the least comprehensive method as convictions from outside the local jurisdiction and outside the state would not be captured.

While not fully investigated, the possibility exists that employers could be required to submit employees to criminal background search through a private company. Such companies often charge a fee for each search or for unlimited searches. This would require setting standards of what is sufficient for the background search to be acceptable. This would place the responsibility on the employer but would require Cannabis Program staff, or other County staff, to verify the check was done and was sufficient. While this may capture information from outside of our jurisdiction, it is unknown how accurate or comprehensive these private search company’s information would be.

District Attorney’s Office Position on Live Scan for Employees

The District Attorney is opposed to a change in the Monterey County Code that would remove the requirement that employees submit to a background check, or what is often called, “get live scanned”. The District Attorney is tasked with reducing the illegal market, protecting employees, protecting consumers, and protecting the public. The District Attorney’s ability to perform these duties will be seriously hampered if employees are not required to submit to a background check.

The District Attorney believes the background check requirement serves several purposes:

1. Deters those with criminal records from gaining access to inside information on the location of cannabis product, cash, and the security system in place at a cannabis business.
2. Discourages employers from failing to obtain workers compensation insurance or failing to pay unemployment taxes as there will be a record of who was employed at the business.
3. Prevents the employment of those who are prohibited by the MCC from working in the cannabis industry.
4. Prevents the hiring of individuals under 21 years of age from being employed in the cannabis business, which the State and the MCC both prohibit.
5. Discourages the hiring of labor contractors that use human trafficking to provide cheap labor.
6. Provides law enforcement with necessary tools to conduct investigations into illegal activity at a cannabis business.
7. Sets Monterey County as the gold standard in the State for being a clean, professional, and legitimate industry in a county that is striving to reduce the illegal market share and protect workers and consumers, as well as the environment.

Law enforcement cannot be everywhere at once, so providing confirmation to our office of who is working at the cannabis business sites is an important part of the overall enforcement puzzle. This requirement was included in Chapter 7.90 as part of an overall scheme of enforcement, and it is not an uncommon requirement. Every security officer, school employee or volunteer, even the cable guy who enters your home, has to complete a background check. Many county employees also must undergo a background check.

The District Attorney's Office understands that by submitting to a background check the applicant is connecting themselves to cannabis and that the current federal position is to deny citizenship to those connected to cannabis. While we do not believe this should be the deciding factor in our local legislation, if the Board of Supervisors believes this potential issue for a small percentage of the population is more important than public safety and enforcement of our local ordinances, then a compromise position is listed below.

The local cannabis industry has faced numerous rule changes and regulations and still has not stabilized. We are still in the grey area where many cultivation operations do not have their CNB. Now is not the time to try an experiment of allowing felons into the operations of unsuspecting business operators. MCC Section 7.90.100(A)(19) prohibits employees that have had a felony or drug related conviction within the past 10 years from working in the cannabis industry in the County of Monterey. Without a background check, employers will have no means of determining who is ineligible to be employed. Over the past two years, when the District Attorney's Office has evaluated different potential dispositions in criminal cases involving cannabis, one consideration has been that obtaining a conviction will prevent that defendant from being employed in the cannabis industry. If employers and employees are aware that no background check is required, the conviction will not be a deterrent. The alternative to a Live Scan would be for the Cannabis Program, or other county agency, to conduct searches of local criminal records. This would be time consuming and likely require at least one additional county employee.

The local cannabis industry has said that they will have an insufficient supply of employees, but the District Attorney's Office does not agree with this argument. Higher wages and better working conditions are the deciding factors, not a background check requirement. The background check requirement should stay the same and staff can evaluate whether there is an employee shortage. The Board can always revisit the issue, but imposing the requirement later is unlikely to happen. Additionally, with the possibility of big business coming into the cannabis industry, and workers coming from other areas, it makes sense to have this minimal screening of those working within the industry. Finally, it has been reported that the general agriculture industry is losing employees due to the cannabis industry offering higher wages. The decisions made about the cannabis industry are likely to impact other agriculture in our County.

To obtain a state license, only the business owner must undergo a background check. However, the state law was written so that local governments could be more strict than state law. Who is working in the local cannabis industry is a local issue. In Monterey County, five of the seven municipal jurisdictions that allow commercial cannabis require background checks for employees. Removing this requirement from Chapter 7.90 will likely impact the cities which have the requirement.

Lastly, there have been several robberies of licensed grow operations. This is likely to continue as the cannabis industry remains a cash business because of the federal prohibition against cannabis. Employees of cannabis operations quickly learn this and become aware of the location of where the cash is being stored. Whether they return after hours, months after leaving employment, or simply share the information with others, the "inside job" will remain a problem for this industry. The fact that firearms are being used in these robberies means it is only a matter of time before the violence escalates. If employees are scanned, there will be a record of who worked there, and connections to any suspects can be developed via other investigative techniques.

- There have been numerous cases of employees in the cannabis industry not being covered by worker's comp insurance. While this charge is not usually prosecuted because it is so rampant in the industry, there have been several cases where this has been documented. During investigations it is difficult to speak with employees or get employee contact information. If the industry was required to Live Scan employees, those responsible for hiring would know that we have information that they are employing

people, and in turn would know they have to comply with workers comp and EDD laws.

- Human trafficking remains a concern. Requiring those labor contractors that bring in crews to Monterey County to get their employees checked will discourage those wishing to operate illegally. It will also allow those who are legitimate to succeed since they are not competing with an underpaid workforce.

Four Options for the Employee Live Scan Consideration

Option 1. Leave as is.

Option 2. Remove the employee background check requirement.

Option 3. Add a new section that grants the Appropriate Authority the ability to grant a waiver of the Live Scan requirement for employees upon a written application. For example, each business entity could be limited to 10 waivers per year. The Appropriate Authority may consult with the District Attorney's Office to determine if the person for whom a waiver is sought has any criminal history. Such action would not include submission of any personal information but would allow searches of criminal history databases.

Option 4. Amend Chapter 7.90 to add the requirements of obtaining and maintaining employee documentation and require sharing that information with local law enforcement. This would include requirements such as photocopying each employee identification provided, providing a photograph of the employee as well as an address and phone number, private company background checks and ensuring that all records are maintained for seven years (same as state law). Additionally, add a requirement that as part of the employment application process, the employee must list any felony and drug related convictions on a document that is signed under penalty of perjury and maintained by the employer. Employers shall require all employees, during the term of employment, to report any felony arrests and any drug related arrests to the employer who shall report this to the Appropriate Authority. This information would be required as part of the CNB application process and part of the "badge" process. Failure to satisfy all requirements of this section shall be punishable as a misdemeanor or CNB revocation. This option would likely require at least one additional FTE who would be capable of accessing and reviewing criminal history information.

Property Owner Live Scan Requirement

Property owners are currently required to submit to Live Scan checks to ensure that there is no improper influence from someone who is otherwise prohibited from participating in the cannabis industry. Some landowners physically live or work on the premises while others are part of larger investment group that is leasing out space or land to various businesses. Rather than try and define the different types of owners with different requirements, the Cannabis Program recommends that a system of waivers be implemented which would allow for the concerns of the industry.

Three Options for the Property Owner Live Scan Consideration

Option 1. Leave as is.

Option 2. Remove the property owner background check requirement.

Option 3. Add a new section that grants the Appropriate Authority the ability to grant a waiver of the Live Scan requirement for landowners upon a written application. For example, each business entity could be limited to two waivers per year. The Appropriate Authority may consult with the District Attorney's Office to

determine if the person for whom a waiver is sought has any criminal history. Such action would not include submission of any personal information but would allow searches of criminal history databases.

OTHER AGENCY INVOLVEMENT:

The Cannabis Program, District Attorney’s Office, Sheriff’s Office, Resource Management Agency, Treasurer-Tax Collector’s Office, and the Office of the County Counsel were involved in the preparation of this report.

FINANCING:

Monterey County’s Cannabis Program is funded in County Administrative Office - Department 1050, Intergovernmental and Legislative Affairs Division - Unit 8054, Cannabis. There will be a cost associated with a “Cannabis Industry Stakeholder’s” session but this has not been determined at the time of this writing. It is believed the cost of such session will be absorbed within the Cannabis Program budget.

BOARD OF SUPERVISORS STRATEGIC INITIATIVES:

The Monterey County Cannabis Program addresses each of the Strategic Initiative Policy Areas that promote the growth of a responsible and legal Monterey County cannabis industry.

Mark a check to the related Board of Supervisors Strategic Initiatives

- X Economic Development
- X Administration
- X Health & Human Services
- X Infrastructure
- X Public Safety

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