California Business & Professions Code 16102

Veteran Equity not being afforded to Veterans in Cannabis

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Utilization of California Business & Professions Code §16102

REVISTIED
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Executive Summary

This document outlines the challenges that Veteran-owned businesses face when trying to apply California Business & Professions Code §16102 to the Cannabis Industry. Specifically, B&P 16102 allows for honorably discharged Veterans to start a business to hawk, peddle, or vend their goods, wares, or merchandise, without paying the fees and taxes typically associated with the startup of an entity, so long as it is not sales of alcohol.

This paper outlines the application of the code to Veteran-owned sole-proprietors, without availing the same benefits to a Veteran-owned corporation or partnership, by the City of Sacramento. It also recognizes the failure of the Bureau of Cannabis Control to take action on the issue when presented with it.

Through the application of B&P 16102, Veterans will be able to join the industry and be afforded equity already granted to them by law since the law's establishment in 1901.

California Business & Professions Code 16102.

"Every soldier, sailor or marine of the United States who has received an honorable discharge or a release from active duty under honorable conditions from such service may hawk, peddle and vend any goods, wares or merchandise owned by him, except spirituous, malt, vinous or other intoxicating liquor, without payment of any license, tax or fee whatsoever, whether municipal, county or State, and the board of supervisors shall issue to such soldier, sailor or marine, without cost, a license therefor."

(Amended by Stats. 1941, Ch. 646.)

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Veterans are afforded equity and this section describes how that equity is to be given. This statute has been on the books in some form since 1901, with the last amendment in 1941, and case law as recent as 1987. The Attorney General for the State of California last issued an opinion on the subject in 2010.

Our initial understanding of this law is that the fees and permits typically associated with the startup of a Veteran-owned entity that is a sale, not service, related business is not charged, unless the Veteran-owned entity is in dealing with alcohol-related wares.

For a clear statutory history, see the below case, at 755. Also, please see Lexis printout of information about the statute.

***Brooks v. County of Santa Clara*, 191 Cal. App. 3d 750 (Ca. 1987)**

Further review of the statute led to the case of Brooks v. County of Santa Clara, 191 Cal. App. 3d 750 (Ca. 1987). In this case, the two points were brought into question by the court. First, the court weighed the ability of the Veteran-owned business, selling nuts from both fixed and mobile

("itinerate sales") location, to utilize §16102. Second, the court was faced with the question of whether the right under §16102 extended to the agents and employees of that Veteran whom is in ownership of the business.

In that case, the trial court initially found that "determining (insofar as relevant to this appeal) (1) that the section 16102 exemption does apply to license and permit fees imposed pursuant to Health and Safety Code section 510; (2) that the exemption applies to sales both from itinerant facilities and from fixed locations; (3) that the exemption is a "personal privilege" of the veteran but nevertheless extends to sales operations "by the agents and employees of a veteran . . . on behalf of the veteran"; and (4) that Brooks was entitled to recover $ 13,375. 50 as attorney fees under Code of Civil Procedure section 1021." (*Brooks v. County of Santa Clara*, 191 Cal. App.

3d 750, 754 (Ca. 1987).)

The Court affirmed the trial court's decision for *Brooks*, determining that "… the language, context, and history of section 16102 all support the trial court's conclusions," further finding that the Court could not "rewrite the statute" and stating that "…contentions that the veterans' exemption should be narrower must be addressed to the Legislature rather than to the courts." Further points of note that were found in this case were the following findings by the Court:

- This is relied upon based on "the general rule that a specific statutory provision "should be constructed with reference to the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme are harmonized

  (*Bowland v. Municipal Court*, 18 Cal. 3d 479, 489 (Ca. 1976)
- The court found that "[t]he last several words of the section make clear the Legislature's assumption that the veteran must have a license, but also its intent that he or she should receive it "without cost," consistent with the antecedent provision that the veteran should be permitted to do business "without payment of any license, tax or fee whatsoever . . . . " These provisions have been part of the veterans' exemption since 1901. The anomalous comma between the words "license" and "tax" appears to us to be insignificant: There was no comma in the phrase in the 1901 enactment, and we assume that insertion of the comma in section 4041. 14, as enacted in 1929, was inadvertent." (*Brooks v. County of Santa Clara*, 191 Cal. App. 3d 750, 755-56 (Ca. 1987).)

- The Court noted that Brooks was not exempt from *regulation* itself, but rather the fees associated with the requirement to *pay fee* associated with license and permit. (*Id.* at 756).
- "The county cannot avoid the plain meaning of 16102, which is that a qualified veteran is entitled to engage in the described business "without payment of any license, tax or fee whatsoever, whether municipal, county or State." (*Id.* at 757).
- And probably the **most important** section, that will apply later, "The section requires that the veteran personally own his inventory, but places no limitation whatsoever upon the manner in which he may "hawk, peddle and vend" it." (*Id.* At 760)
- This section does continue, in a way which will be important as well; "…but places no limitation whatsoever upon the manner in which he may "hawk, peddle and vend" it. The use of agents and employees to sell goods has been a well-understood practice throughout commercial history, and surely was within the knowledge (and thus, presumably, the contemplation) of the Legislature. We are unwilling to write the requested limitation into the statute: The county's concerns should be addressed through the legislative process." (*Id.*).

We will dive back into *Brooks* after we review a few more pieces we found during our original search.

Opinion 09-402, Attorney General of the State of California (2010)

The next piece of legal backing to our belief that this equity is to be applied to all Veteran-owned businesses was the July 19, 2010 opinion filed by Attorney General Ed. Brown, in which he clarified the utilization of Business & Professions Code §16102.

Specifically, in that opinion, the Attorney General clarified two questions:

1. Does Business and Professions Code section 16102, pertaining to the selling activities of certain military veterans, create a general exemption from taxes under the Sales and Use Tax Law?

2. Does the Board of Equalization have authority to promulgate a regulation designating qualified veteran itinerant vendors as consumers of the tangible personal property they offer for sale?

The conclusion by the Attorney General on each of the questions were the following:

1. Business and Professions Code section 16102 exempts qualified veterans from any fees or taxes that must ordinarily be paid to obtain business licenses to engage in the selling activities enumerated in that provision. Section 16102 does not establish a general exemption from taxes and has no effect upon state or local sales and use taxes.

2. The Board of Equalization lacks authority to promulgate a regulation designating qualified veteran itinerant vendors as consumers of the tangible personal property they offer for sale.

In that opinion, the Attorney General clarifies that the exemption is not from all tax and fees, but those associated with the startup of the entity:

> "Taking section 16102 in the context of the entire statutory scheme, as we must, we see that its whole purpose is to provide veterans with permission to engage in specific enterprises—namely, to peddle, hawk,

and vend certain goods, wares, or merchandise— without incurring any of the licensing costs associated with entry into those occupations, and that the exemption operates regardless of whether those entry costs are labeled "fees," or "taxes" (or "licenses"). But section 16102 does not purport even to address, much less to waive taxes on, any ensuing transactions that may occur once the veteran has obtained his or her cost-free license and has begun conducting business in the designated occupation."

Further, "[f]or these reasons, we conclude that the sole purpose and effect of Business and Professions Code section 16102 is to exempt qualified veterans from fees or taxes ordinarily paid to obtain licenses to engage in the occupations listed, and to ensure that such licenses be provided to qualified veterans without cost. Section 16102 does not establish a general exemption from taxes, and it has no effect upon taxes levied pursuant to the state Sales and Use Tax Law or the Bradley-Burns Uniform Local Sales and Use Tax Law." (Opinion 09-402 at 8-9.)

Questioning various government bodies about our findings

After reviewing these two critical pieces of supporting law, we began to question various government bodies about the ability to utilize this provision of law. Specifically, we started with the City of Sacramento, California, and the Bureau of Cannabis Control for the State of California.

Upon attempting to engage with the City of Sacramento, we were met with a cold shoulder and told to contact the Department of Cannabis Policy and Enforcement a month later. After attempting to draw attention to this issue at city cannabis stakeholder meetings, and being met with pushback from Joe Devlin, the Chief of the department, the City of Sacramento is taking the position that the entity is required to be 100% owned by the Veteran, in a sole-proprietorship, to utilize B&P §16102. While this may be positive initial action identifying the necessity of municipalities to uphold the law, we disagree with this position and will elaborate on why this position is not legally sound. Our advocacy efforts at the city level can be found either through the OCPE website (cityofsacramento.gov/marijuana) or at Loyalpenguin.com/action.

We also contacted the Bureau of Cannabis Control, eventually getting in contact with one of the Bureau attorneys, Ms. Freda Lin. When initially presented with the section at hand, Ms. Lin argued that the department was not required to comply with B&P §16102 based on provisions within Business & Professions Code §16100. When we responded, requesting further clarification, we were met with a phone call, informing us we would not be ignored, followed by six weeks of silence; this is despite many calls and emails requesting information about the status of the initial inquiry. It was only when six other partner companies joined our inquiry that the BCC responded.

The following sections elaborate, in our view, the logical responses to the questions presented to date, along with the potential issues that we see for governmental bodies that which to oppose the proper implementation of B&P §16102 for ALL Veteran-owned sales businesses.

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Rebuttals

Business & Professions Code §16100

The first rebuttal to discuss is the initial response from the BCC, and most cited response to other companies in the industry, Business & Professions Code §16100. To begin, the language of that section is as follows:

> **§16100**
>
> (a) The board of supervisors may in the exercise of its police powers, and for the purpose of regulation, as herein provided, and not otherwise, license any kind of business not prohibited by law, transacted and carried on within the limits of its jurisdiction, including all shows, exhibitions, and lawful games, and may fix the rate of the license fee and provide for its collection by suit or otherwise.
>
> (b) No license fee levied pursuant to subdivision (a) that is measured by the licensee's income or gross receipts, whether levied by a charter or general law county, shall apply to any nonprofit organization that is exempted from taxes by Chapter 4 (commencing with Section 23701) of Part 11 of Division 2 of the Revenue and Taxation Code or Subchapter
> F (commencing with Section 501) of Chapter 1 of Subtitle A of the Internal Revenue Code of 1986, or the successor of either, or to any minister, clergyman, Christian Science practitioner, rabbi, or priest of any religious organization that has been granted an exemption from federal income tax by the United States Commissioner of Internal Revenue as an organization described in Section 501(c)(3) of the Internal Revenue Code or a successor to that section.
>
> (c) Before a county issues a business license to a person to conduct business as a contractor, as defined by Section 7026, the county shall verify that the person is licensed by the Contractors' State License Board.
>
> (Amended by Stats. 1996, Ch. 936, Sec. 2. Effective January 1, 1997.)

Drawing closer and more specific attention to subsection (a), which is the section attempting to be applied, the main point noted is "… and not otherwise, license any kind of business not prohibited by law, transacted and carried on within the limits of its jurisdiction, including all shows, exhibitions, and lawful games, and may fix the rate of the license fee and provide for its collection by suit or otherwise." The highlighted section is where the BCC initially tried to hide, which would be stating that the Cannabis

Industry is an illegal activity. While this may be recognized by the federal level courts,

California has taken various actions to legalize cannabis. Specifically, in October of

2017, AB 1159 was passed and signed into law. Let's take a moment to review the summary of that bill.

> **AB 1159**
>
> Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act
>
> (AUMA), an initiative measure enacted by the approval of Proposition 64 at the November 8, 2016, statewide general election, authorizes the consumption of nonmedical marijuana, also known as adult-use cannabis, by persons over 21 years of age and establishes a system for the licensure and regulation of certain commercial nonmedical marijuana activities. Existing law, the

> Medicinal and Adult-Use Cannabis Regulation and Safety Act, expands and modifies this system to also include the licensure and regulation of certain commercial medicinal cannabis activities.

Existing law prescribes the manner in which contracts may be created and requires that a contract be for a lawful object. Under existing law a contract that is contrary to an express provision of law, contrary to the policy of express law, or that is otherwise contrary to good morals is not lawful.

> This bill would provide that commercial activity relating to medicinal cannabis or adult-use cannabis conducted in compliance with state law and any applicable local standards and regulations is lawful object of a contract, is not contrary to an express policy or provision of law or to good morals, and is not against public policy…" (California Assembly Bill 1159, Legislative Counsel's Digest, (Oct. 2017).

Effective October 2017, based on the intent and language contained in AB 1159, the Cannabis Industry is viewed as a legal industry, by the State of California. Here, that is the only governmental body that is making the determination of legality within their jurisdiction: California.

The State and others have hidden behind the alleged illegality of Cannabis, yet the State, which is the only jurisdiction that the State will look to when making a determination of legality within their borders, is currently taxing an industry that they find illegal…?

The only logical and legal determination that is made here is that:

Given AB 1159, and the taxation of cannabis type businesses pursuant to the Adult Use of Marijuana Act (AUMA; Prop. 64) by the California Department of Tax and Fee Administration (CDTFA), Loyal Penguin holds the understanding that the Cannabis

Industry is a legally recognized industry and, as such, Business & Professions Code § 16100 **does not** prevent cannabis businesses from utilizing relief granted under B&P §16102.

Sole Proprietorship

The next piece to refute, is a barrier placed by the City of Sacramento. Their current belief is that B&P §16102 does apply to the Cannabis industry, however, it is the opinion of their counsel, according to Joe Devlin, that the "[e]ntity must be a sole proprietorship owned 100% by a veteran." When questioned initially, our response was that it doesn't matter if we like it or not, that was their counsel's determination… we disagree with that assessment by Mr. Devlin.

Given no point of contention other than the manner in which the Veteran chooses to vend his goods and the ownership being 100% by *a* Veteran, we look to the case the City cited when saying they are able make it sole proprietorship, *Brooks.*

Drawing attention to the point presented from *Brooks* earlier,

> "Nevertheless this is perhaps the county's strongest argument: It may rationally be doubted that the Legislature would have intended a patriotically-inspired exemption to apply to a large organization of retail agents and employees of an individual veteran, or even (as in Brooks's case) to the use of a few agents or employees to conduct the veteran's business at more than one location. It would be an insufficient response to such doubts to suggest that the Legislature would have contemplated, and approved, use of a limited number of agents and employees (perhaps drawn, as in Brooks's case, from the veteran's immediate family) at a single location: There is no practical way, consistent with the language of section 16102, to draw such distinctions. The county's argument is necessarily absolute: The section 16102 exemption, in the county's view, does not extend to agents or employees of any kind.
>
> But once again the county cannot avoid the plain language of section 16102. The section requires that the veteran personally own his inventory, but places no limitation whatsoever upon the manner in which he may "hawk, peddle and vend" it. The use of agents and employees to sell goods has been a well-understood practice throughout commercial history, and surely was within the knowledge (and thus, presumably, the contemplation) of the Legislature. We are unwilling to write the requested limitation into the statute: The county's concerns should be addressed through the legislative process." (Brooks v. County of Santa Clara, 191 Cal. App. 3d 750, 760 (Ca. 1987).) While the City is resting on the language used by the court, pointing to their conclusion that this does not apply to other business types, if the entity is Veteran-owned, then there is "no limitation whatsoever upon the manner in which he may "hawk, peddle and vend." So, while the court and the city may not like the Corporate business type, the Court was clear that it would take legislative action at the State level to change that. As such, LLCs, C-Corps, and Partnerships all are to be afforded the opportunity to utilize this equity provision, so long as they are otherwise qualified.

Ownership

In discussion of the other section of the statement made by the City of Sacramento. As a reminder, the City stated that the "[e]ntity must be a sole proprietorship owned 100% by a veteran." We have already addressed the sole proprietorship dynamic. We believe there is no requirement that the ownership of a company be 100% owned by a Veteran. The City relies on the language used and cited in the previous section, pointing to the argument that this was a right extended to the Veteran, but they fail to continue to read that "…such a limitation is required to be addressed through the legislative process." (*Id.*)

We believe the City of Sacramento fails to recognize how protected-class groups that are entitled equity treatment per law. We are not aware of the mandate of any other protected-class groups in the State of California be 100% complete membership solely by those that are protected. Specifically, when looking at a "woman-owned business" or a "LGBT-owned business," the requirement is that they are 51% owned.

Looking back to B&P §16102, the statute specifically states that "EVERY soldier, sailor or marine of the United States who has received an honorable discharge or a release from active duty under honorable conditions from such service may hawk, peddle and vend any goods, wares or merchandise owned by him, except spirituous, malt, vinous

or other intoxicating liquor, WITHOUT payment of any license, tax or fee WHATSOEVER, whether municipal, county or State, and the board of supervisors SHALL issue to such soldier, sailor or marine, WITHOUT COST, a license therefor.

When you have two Veterans, coming together with a non-veteran partner making three members, with equal ownership, it would mean that each person owned 33.3%, with the Veterans owning 67% of the company. The goods owned by the company are owned by the

Veterans, and that predominant ownership, which is recognized for communities that haven't risked their lives in front of enemy fire, is extended after 51% ownership. It is for this reason that the additional barriers added by the City of Sacramento, which further creates limitations to the utilization of Business and Professions Code §16102 that the legislature did not input themselves, are resulting in the City of Sacramento not affording the legally afforded equity treatment to Veterans.

Please also see the attached list of links and additional resources to review if interested.

Conclusion

The plain language construction of the statute is that EVERY Veteran that honorably served his or her country should be able to come back from that time in service and be exempted from paying the fees typically associated with the startup of a sales related business.

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Additional Resources

AB 1206 (CA, 1949)

https://books.google.com/books?id=j0ZMAQAAMAAJ&dq=who%20has%20utilized%20Business%20and%20professions%20code%2016102&pg=PA120-IA309#v=onepage&q=who%20has%20utilized%20Business%20and%20professions%20code% 2016102&f=false

Opinion from the Attorney General of the State of California (1944)

https://books.google.com/books?id=-xQ4AAAAIAAJ&q=who+has+utilized+Business+and+professions+code+16102&dq=who+has+utilized+Business+and+professions+code+16102&hl=en&sa=X&ved=0ahUKEwixffJvJfaAhUGzVMKHd06BfAQ6AEIMjAC

Article from 2015 regarding the utilization of Business & Professions Code §16102:

http://www.sacbee.com/news/politics-government/politics-columns-blogs/danwalters/article20700675.html

Article from 2007

https://www.northcoastjournal.com/humboldt/which-vets-vend-free/Content?oid=2125680