Cannabis cultivation and the environment in California

Prof. Eric Biber, UC Berkeley School of Law
Co-Director, Cannabis Research Center
Cannabis Research Center at UC Berkeley

https://crc.berkeley.edu/
Water Quality Protection

- Standards from State Water Resources Control Board
  2017 General Order on Cannabis Cultivation Activities
- [https://www.waterboards.ca.gov/water_issues/programs/cannabis/cannabis_water_quality.html](https://www.waterboards.ca.gov/water_issues/programs/cannabis/cannabis_water_quality.html)
Levels of Water Quality Regulation

- **Conditional Exemption**
  - Soil disturbance of less than 2,000 square feet
  - No steep slopes, setbacks, comply with BPTC
- **Tier 1** (less than one acre disturbance)
- **Tier 2** (one acre or more disturbance)
- Tiers also ranked by risk level (low, moderate, high) based on steep slopes, setbacks
Water Rights

- Info about water source
- Surface water diversions require water rights
- Small Irrigation Use Registration program
- Comply with State Water Board Cannabis Policy
  - https://www.waterboards.ca.gov/water_issues/programs/cannabis/cannabis_policy.html
- Limits on diversion during dry season
- Need storage water right
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Local Land-Use Regulation

- Must have local approvals to get state license (B&P C 26055(d)-(g))
- Local regulations can limit cultivation (B&P C 26200, 26060)
- Examples:
  - Setbacks from neighbors, schools, parks
  - No visibility from public right of way
  - Security fences
  - Prohibition on generators
- Building code requirements can be costly for growing infrastructure
It’s Not Easy Being Green
How the Cannabis Industry Can Adapt to Evolving Environmental Laws, Regulations & Litigation

Panelists: Rachel Kurtz, Eric Biber, Janis McFarland, Kathryn Szmuszkovicz & Jason Lang
Moderator: Christopher D. Strunk

September 20, 2019
Environmental Challenges for the Cannabis Industry

- Huge number of non-environmental regulations occupy participants in the industry.
- Environmental risks “lost in the shuffle”
- But a **plant** is at the heart of the industry, with traditional agricultural needs:

**Disclaimer:** The information contained in this presentation is not intended to constitute legal advice. Possession, use, distribution and sale of “marijuana,” as that term is employed in the Controlled Substances Act, 21 U.S.C. §§ 812 et seq., is illegal under federal law and nothing in this presentation is intended to provide any guidance or assistance in violating federal law.
Light

Water
Soil
Nutrients
Protection from Pests
In addition . . .

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Indoor grows use energy . . .
Drying & processing generates odors . . .
When used as intended, cannabis has a psychoactive effect . . .
Cannabis use triggers strong emotions in the general public . . .
These factors combine to create unique environmental and litigation risks for the industry.

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Litigation Risks & Issues
Civil RICO

• April 2, 2019: *Momtazi Family LLC v. Yamill Naturals LLC*
  – New Oregon Civil RICO case
  – Brought by Preserve Legal Solutions, PC, which markets itself as being dedicated to filing these cases

• August 27, 2019 – court denies defense motion to dismiss on standing grounds, holding that customer cancellation of grape order was “concrete injury” conferring standing.

• Follows rationale of *Safe Streets* and other cases that marijuana growth is a racketeering activity.
Other litigation concerns

• Products liability
  – *Flores v. LivWell* (CO 2015)
  – Andrew *Kirk v. Gaia’s Garden* (CO 2016)

• Vaping – a new frontier?

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Air issues: odors & nuisance
Water

Prof. Eric Biber, UC Berkeley School of Law
Co-Director, Cannabis Research Center
Environmental Risks & Issues

• Illegal water diversion
Environmental Risks & Issues

• Chemical discharge directly into rivers, streams and lakes
Water

Prof. Eric Biber, UC Berkeley School of Law
Co-Director, Cannabis Research Center
Water Quality Protection

• Standards from State Water Resources Control Board 2017 General Order on Cannabis Cultivation Activities
  – https://www.waterboards.ca.gov/water_issues/programs/cannabis/cannabis_water_quality.html
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Local Land-Use Regulation

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Pesticides
Industrial Hygiene Issues in Cannabis
Questions?
THE GLOBAL COMMODIZATION OF MARIJUANA AND HEMP:
WHERE IN THE WORLD IS CANNABIS HEADED?

September 19-20, 2019

American Bar Association ▪ Tort Trial & Insurance Practice Section
From Regs to Riches: Navigating the Rapidly Emerging Field of Cannabis Law

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*Materials reflect a collaboration of the panelists’ written work, edited and prepared by Charles E. Feldmann.*
I. Overview.

This international panel of legal and industry experts will discuss the growing worldwide commodity known as cannabis. New countries are legalizing marijuana and hemp for import and export every month and the global supply chain becomes increasingly complex. These experts will discuss a wide range of topics that every cannabis attorney should be fluent in so as to advise their clients on how they can stay viable and compete in the globalization of this industry.

II. The Basic Statistics – Big Money.

World-wide Legal Cannabis has a projected worth of $57 billion expected in the next decade, according to Arcview Market Research and its research partner BDS Analytics.1 According to Arcview, 67% will be attributable to adult recreational use and 33% to medical marijuana.2 The “2019 Update to the State of Legal Marijuana Markets” provides the following statistics regarding the world-wide legal cannabis market:

a) $6.9 billion in global sales in 2016
b) $9.5 billion in worldwide revenue in 2017
c) Estimated $12.2 billion in 2018
d) Global sales are expected to grow 38% in 2019 to $16.9 billion.3

There are big, familiar players making sizeable investments:

a) Constellation brands invested $4 billion in Canopy Growth in 2018 (38% Stake)
b) Marlboro cigarettes Altria Group Inc., invested $12.8 billion in e-cigarette maker Juul for a reported stake of around 35%
c) Altria recently invested $1.8 billion in Cronos Group Inc. (45% stake)
d) Coca Cola in the works of making a CBD-based water/soft drink.4

Mergers and acquisitions are happening left and right:

a) Hexo, a Quebec-based marijuana producer, partnered with Molson Coors and recently acquired Newstrike Brands Ltd. for $263 million
b) Aurora Cannabis acquired MedReleaf for $3.2 billion
c) Canopy Growth announced plans to purchase Acreage Holdings for $3.4 billion

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2 Pellechia, supra note 1.
d) Green Thumb Industries, Inc., acquired Essence Cannabis for a reported figure of $290 million.\(^5\)

An overview of recent stock highlights evidences the capital potential of this viable worldwide industry:

a) Charlotte’s Web, a CBD product company, conducted an IPO at C$7.00; stock gained more than 200% since the IPO in September 2018.

b) Tilray, Canadian licensed producer, conducted a NASDAQ IPO in July 2018 at $20/share; within months, traded as high as $300.

c) Jefferies, Cowen & Piper Jaffray have all initiated coverage of cannabis stocks.

d) After Aurora Cannabis’s gross revenue in fiscal 2019 3Q was announced to be $75.2 million on May 14, shares rose nearly 3% in after-hours trading.

III. Projected Sizes of Key Markets.

According to LGC, cannabis is the fastest growing consumer product in North America, with reports showing an annual compound growth of almost 40% since 2012.

The United States alone is projected to reach $75 billion by 2030. Roth Capital Partners estimates U.S. cannabis penetration rates will reach 20% (1:5 adult Americans). As a comparison, it is estimated that roughly 160 million Americans consume alcohol and spend roughly $100/month on alcohol.

Canada is estimated to achieve $10 billion by 2024.

Europe is estimated to reach a market value of $98 billion by 2025—should it become recreationally legalized.\(^6\)

IV. The Flight of Import/Export: Countries With Laws Providing for Some Form of Import/Export of Cannabis to Date.

Importing: Argentina; Australia; Austria; Brazil; Cayman Islands; Canada; Chile; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Hungary; Iceland; Ireland; Italy; Lesotho; Macedonia; Mexico; Netherlands; Peru; Poland; Switzerland; United Kingdom; United States\(^7\)

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\(^7\) Research data acquired by Gateway Professional Services (GPS.Global) (2019).
Exporting: Australia; Belgium; Canada; Chile; Colombia; Cyprus; Denmark; Greece; France; Israel; Jamaica; Lesotho; Macedonia; Netherlands; Switzerland; United States; Uruguay; Zimbabwe


Global markets mean global innovation, and global innovation means that Intellectual Property (“IP”) protections are vital. To operate globally and develop your brand, the IP strategy should come first.

Cannabis as an emerging global industry is so bogged down in this disjointed country-to-country, state-to-state regulatory framework that many clients forget they are developing a business and that IP comprises 80% of the value of a company.9 The 2018 Agricultural Improvement Act (“Farm Bill”) provides for the import and export of hemp to and from the United States, thereby connecting the U.S. to the global hemp market.10


Patents do not distinguish between legal and illegal substances.11 Cannabis and hemp patents must meet the same criteria as any other patentable subject matter:

1. Not an Abstract idea
2. Novel
3. Non-Obvious
4. Has Utility (Must work – not required to work well, or be a good idea, but must work)12

Cannabis patents typically comprise methods of treatment, formulations, and unexpected uses.13 Plant patents are an option but are less valuable than utility patents because plant patents only provide a narrow degree of protection.14 The plants must be asexually reproduced, and as such, the only protection is essentially for that of clones.15 This is problematic in the cannabis family

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10 Agricultural Improvement Act of 2018 § 12608(a) (December 20, 2018) (wherein the Agricultural Improvement Act amends the Controlled Substances Act by eliminating hemp from the definition of “marihuana”).
12 Id.
14 Id.
of plants, which tend to have plant-to-plant variation even within the same family (Cannabis Sativa L., the plant genus which both hemp and marijuana belong to).  

Utility patents can protect the chemical compositions of plants, treatment or product formulations, and methods of using a product in treatment of a condition. In the United States, we use method claims: medical diagnostic methods, methods of using specific drugs on specific patients, and methods of dosage, while in Europe certain patents may require second medical use or swiss claims. U.S. patent claims related to personalized medicine are commonly challenged on the basis of patentable subject matter.

In Europe, on the other hand, patent claims commonly arise out of questions concerning novelty and inventive steps. Pharmacogenomics inventions concerning new patient subgroups being defined by a biomarker are generally not eligible for patent because such is often seen as lacking novelty. Further, the use of a known drug treatment in a subgroup characterized by a biomarker that presents in a significant proportion of patients will likely be rejected by the European Patent Office (“EPO”) on novelty grounds (lack thereof). As for dosage claims, the EPO and the USPTO take similar stances and allow patenting of dosage regimens (timetables by which drugs are administered to patients).

The forgoing is important to bear in mind when drafting a utility application involving a formulation or treatment if the client intends to file outside of the United States. It’s imperative that the application is prepared with the illustrated types of claims in mind. In the United States, claims involving personalized medicine methods should be sure to include transformative steps, for example, isolating, extracting, incubating, washing, and removing or sequencing. With that, U.S. patent law provides for dosage inventions for medical use patents, but dosage regimen inventions are not patentable as product patents and are properly claimed as medical methods. In Europe, inclusion of supporting data in a patent application is an important consideration. Drafting diagnostic method claims in accordance with EPO standards should encompass the following: (1) avoidance of method of treatment claims directed to patient treatment; (2) avoidance of interventional steps (e.g., “providing a blood sample” is proper, in lieu of “drawing blood from a patient”); (3) avoidance of surgical step language; (4) inclusion of multiple claims.

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16 Jason Sawler, et. al., The Genetic Structure of Marijuana and Hemp, PLOS 10(8), (August 26, 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4550350/ (“Many hemp types have varietal names while marijuana types lack an organized horticultural registration system and are referred to as strains.”).
19 Id. (An example of a simplified, personalized medicine claim is as follows: “Compound X for use in treating disease Y in a patient with biomarker Z.”).
directed to use-limited product claims; and (5) inclusion of experimental data demonstrating a nexus between the presence of absence of the biomarker and the efficacy or safety in the treatment.  

**Current Issues with U.S. Trademarks and Hemp.** Hemp trademarks still may be refused based on failure to satisfy FDA/FDCA. Refusal typically occurs when applied to products that are food & beverage, supplements, and oils. Hemp processors/growers who are trademarking the service of growing must be able to show that they have complied with a USDA certified program. These programs are not yet in place as of August 2019 and therefore companies cannot provide this certification to the USPTO. As such, federal restrictions can be avoided through directly registering state cannabis trademarks in states that permit cannabis use and sales.  

Trademarks for hemp and marijuana can be registered with much greater ease in Canada. It can also be done in the EU, but it can get a bit tricky in some cases, as further detailed below.  

**Canada.** Amendments to the Canadian Trade-marks Act took effect on June 17, 2019, making it easier for Canadian cannabis companies to not only get their brands into the Canadian market, but to also launch them globally. The primary impact of this change is a move away from requiring Canadian cannabis companies to provide a commercial sale of their product or advertisement of a food service prior to formally registering their trademark. The new rules allow cannabis companies to immediately register their trademark upon completion of an advertising period. Canada now follows the international classification system under the Nice Agreement.  

**The Nice Agreement.** The Nice Agreement establishes a uniform system of classifying goods and services for the purposes of registering trademarks and service marks, known as the Nice Classification. There

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20 Id.  
23 Id.  
are a total of 88 contracting parties to the Nice Agreement, including the United States, most of the EU, Australia, China, Israel, and Canada.\textsuperscript{25}

\textit{The Madrid Protocol.}
On the global end, the new rules allow Canadian cannabis companies to reap the benefits of the Madrid Protocol.\textsuperscript{26} The Madrid Protocol is one of two treaties encompassing the Madrid System for international registration of trademarks.\textsuperscript{27} The protocol is a filing treaty that provides cost-effective ways for trademark holders to protect their marks in multiple countries by completing only a single filing, with one set of fees.\textsuperscript{28}

\textit{European Union.}
There is no harmonized law in the EU on cannabis, and contrary to popular opinion, not a single EU country’s laws allow for recreational use.\textsuperscript{29} The European Union Intellectual Property Office (EUIPO) does not have a blanket ban on cannabis related trademark registrations, but it also does not allow for easy access in the way Canada does.\textsuperscript{30} Further, cannabis-related trademark applications may be denied on the basis that it is “contrary to public policy or to accepted principles of morality.”\textsuperscript{31}

VI. \textbf{A Noteworthy Climate: An Exposition of the Legal Landscape in Mexico}
Following significant regulatory trends in other countries such as neighbors the United States and Canada, Mexico began taking steps toward allowing use of cannabis. The legislative process to amend certain provisions of the General Health Law (\textit{Ley General de Salud}, or “LGS”) resulted in the June 19, 2017 publication of amendments\textsuperscript{32} acknowledging the therapeutic benefits of

\textsuperscript{25} World Intellectual Property Organization, supra note
\textsuperscript{26} Zborovski.
\textsuperscript{28} USPTO (“While an International Registration may be issued, it remains the right of each country or contracting party designated for protection to determine whether or not protection for a mark may be granted. Once the trademark office in a designated country grants protection, the mark is protected in that country just as if that office had registered it. The Madrid Protocol also simplifies the subsequent management of the mark, since a simple, single procedural step serves to record subsequent changes in ownership or in the name or address of the holder with World Intellectual Property Organization's International Bureau. The International Bureau administers the Madrid System and coordinates the transmittal of requests for protection, renewals and other relevant documentation to all members.”).
\textsuperscript{29}Trademark Protection for a Growing Cannabis Market, \url{https://www.vennershipley.co.uk/resources/publications/2018/12/03/trade-mark-protection-for-a-growing-cannabis-market}, (December 3, 2018).
\textsuperscript{30} \url{https://www.vennershipley.co.uk/resources/publications/2018/12/03/trade-mark-protection-for-a-growing-cannabis-market}.
\textsuperscript{31} EUTMR Article 7(1)(f); Trade Marks Act 1994 Section 3(3)(a).
\textsuperscript{32} \url{http://www.dof.gob.mx/nota_detalle.php?codigo=5487335&fecha=19/06/2017}
tetrahydrocannabinol (“THC”), opening the door to the research and academic study of medicinal cannabis and, subject to a permit by the Federal Commission for the Protection of Sanitary Risks (“COFEPRIS”), allowing the importation of medications containing THC. At that time, cannabis products without a sanitary license, self-production, harvest and possession of cannabis was still prohibited.

Later, on October 30, 2018, COFEPRIS issued the Guidelines for the Sanitary Control of Cannabis and its Derivatives (Lineamientos en Materia de Control Sanitario de la Cannabis y Derivados de la Misma). Such guidelines set forth the agency’s criteria to be used in the evaluation and resolution of the applications filed to authorize medical and scientific use of cannabis and its pharmacological derivatives, as well as the commercialization, exportation and importation of cannabis products with 1% or less THC content for industrial use. This step, however, was reversed—on March 26, 2019, COFEPRIS announced the revocation of such guidelines on the grounds of omitted legal formalities that must be met for the issuance of government guidelines for general application. Reference was also made to the contradiction between import/export tax rules, which prohibit the importation of cannabis plants, and the now-revoked guidelines, which provided for the granting of import permits. It is important to note that the guideline revocation does not imply a reversion of the legalization of cannabis for medical and scientific use. Technically, applications for COFEPRIS permits could still be filed even if the new specific rules are not officially enacted. Also, if any of the permits or authorizations issued at the end of last year are cancelled, legal recourses would be available to the affected parties.

In this regard, on August 14, 2019 Mexico's Supreme Court ruled in favor of Mrs. Margarita Garfias, the mother to an epileptic son, that sued the Executive Branch (i.e. health ministry) for its failure to issue the legally-mandated rules for medical cannabis claiming that such omissions are affecting her son’s human right to health, setting an immovable deadline of 180 business days to issue such secondary regulation. Many of us expect, however, that some progress has already been made in drafting such rules.

On the judicial front, on October 31, 2018, the Mexican supreme court issued two separate amparo protection resolutions in favor of individuals challenging the constitutionality of certain LGS provisions prohibiting marihuana consumption. Based on the human right to self-determine one’s health and personality, these resolutions—the fourth and fifth issued by Mexico’s highest court—derived in mandatory jurisprudence, which main effects can be summarized as such: (a) any person who is denied a permit by COFEPRIS for the recreational use of marihuana is entitled to a favorable amparo resolution by a federal district court ordering COFEPRIS to issue such permit, and (b) Mexican Congress must amend the challenged provisions in order to permit, under certain guidelines, cannabis consumption. This jurisprudence did not imply an authorization or legalization of cannabis commercialization, supply, sale or distribution, or cannabis consumption without previously issued COFEPRIS authorization, or a general de-criminalization of marihuana.

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33 Amparo is a constitutional last-recourse appeal which, if granted, favors the appealing party against, in this case, existing provisions of Mexican law.
On the legislative front, there are several bills that have been introduced to both the Senate and Congress. There are two which we consider most notable mentioning:

On November 6, 2018, a bill was introduced at the Senate with a proposal to issue the Federal Law for the Regulation and Control of Cannabis (Ley General para la Regulación y el Control de Cannabis34). The bill was filed by then-Senator Olga Maria Sanchez-Cordero, a former supreme court justice who is now President Lopez Obrador’s ministry of the interior. The proposed law aims at regulating the full cannabis chain of value for personal (term favored in Mexico over “recreational”), commercial and scientific use. It includes the creation of the Mexican Institute for the Regulation and Control of Cannabis (Instituto Mexicano de Regulación y Control de Cannabis or IMRCC), an agency that would be dependent on the Ministry of Health, in charge of regulating, monitoring, sanctioning and evaluating the regulation system, as well as to manage the producers’ official registry.

More recently, on July 10, 2019, Senator Cora C. Pinedo introduced a bill to amend existing health laws and proposing a General Law for the Regulation of Cannabis for Self-Consumption Purposes and for Medical, Scientific, Therapeutic and Cosmetic Use (Ley general para regulación de la cannabis con fines de autoconsumo y para uso médico, científico, terapéutico y cosmético)35. The main feature worth highlighting is a distinction between the cannabis plant and industrial hemp, with the main reference to differentiate being based on the THC content (plus/minus 0.3%). This bill intends to regulate cannabis cultivation for self-consumption, medical and scientific, therapeutic and cosmetic purposes, the trade, distribution, sale and supply of cannabis products and finally what could be specific rules for the (legal) birth of an industrial hemp market in Mexico. There are indeed provisions that overlap or duplicate provisions in the bill mentioned in the preceding paragraph. We are hoping that a final legislative product will be a properly integrated set of rules.

There are still important loopholes to be filled in this process, likely through secondary regulations such as patent of cannabis variations, labeling, taxation, import/export, as well as consumer protection and advertisement rules under public health principles. Considering the ruling political party’s majority in Mexican Congress, it is likely that the proposed regulations will be passed, though perhaps modified in order to reflect the input by anti-legalization advocates.

VII. International Treaties: Enforcement a Moot Point?


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34 Proposed text can be found at http://infosen.senado.gob.mx/sgsp/gaceta/64/1/2018-11-06-1/assets/documentos/Inic_Morena_LC.pdf
35 Proposed text can be found at http://infosen.senado.gob.mx/sgsp/gaceta/64/1/2018-12-20-2/assets/documentos/Inic_PT_39_LS_y_LOAPF_Expediente_Clinico_Electronico_Unico.pdf
Narcotic Drugs and Psychotropic Substances of 1988.\textsuperscript{36} Most countries in the world have joined such treaties, including Canada, the United States, and Uruguay.\textsuperscript{37} Taken together, these drug control treaties provide requirements for state/country parties to limit its legal production, sale and use to medical and scientific purposes.\textsuperscript{38} Oddly enough, however, the treaties do not explicitly require criminalizing the classified substances—the 1961 Convention merely requires that the use of Schedule IV drugs such as marijuana be prohibited if the Party determines the “prevailing conditions in its country” dictate such prohibitions necessary as the “most appropriate means of protecting the public health and welfare” while the 1971 Convention prohibits any use of these substances except for scientific and limited medical purposes.\textsuperscript{39}

The treaties task three bodies with oversight and implementation roles: the Commission on Narcotic Drugs (CND), the International Narcotics Control Board (INCB), and the World Health Organization (WHO).\textsuperscript{40} INCB is tasked with ensuring implementation of the international drug control conventions.\textsuperscript{41} INCB’s first line of power for implementation is to propose remedial measures to governments that are failing to comply with provisions of the treaties; as a last resort, INCB has the power to recommend that parties cease importing drugs from defaulting countries and/or exporting drugs to the defaulting country.\textsuperscript{42} In sum, the strongest (and perhaps only) enforcement tool behind these treaties is the power to recommend an embargo.

In January 2019 the WHO released a recommendation proposing cannabis be removed from the Schedule IV category of drugs in the 1961 convention.\textsuperscript{43} On June 24, 2019 the CND—a United Nations body comprised of 53 member countries that oversees the triad international drug conventions—held its first meeting discussing the WHO’S January 2019 recommendation.\textsuperscript{44} The leading opponent-countries included Russia, Pakistan, China and Nigeria, while Mexico raised

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\textsuperscript{37} P.J. Meyer, L. W. Rosen, L. N. Sacco, Marijuana Legalization in Canada: Implications for U.S. Policy and International Drug Control (November 7, 2018), at 2.
\textsuperscript{38} Id. at 2.
\textsuperscript{39} 1961 Convention Article 2 § 5 b; 1971 Convention Articles 5 and 7.
\textsuperscript{40} Amira Armenta & Martin Jelsma, The UN Drug Control Conventions, https://www.tni.org/en/publication/the-un-drug-control-conventions#6 (October 8, 2015).
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Madelaine Drohan, Canada’s Cannabis Conundrum, June 28, 2019, https://www.opencanada.org/features/canadas-cannabis-conundrum/ (“Drugs in that category are considered particularly harmful with few therapeutic uses. Removing cannabis from Schedule IV but leaving it in Schedule I, a category for drugs that have a high potential for abuse and addiction, would allow more research and freer trade in medical cannabis but would not change the illegal status of recreational cannabis.”).
\textsuperscript{44} Id.
\end{flushright}
comparisons between cannabis, sugar and caffeine, and Canada suggested looking into tobacco and alcohol use—two substances absent from the conventions.45

VIII. International Trade Issues in Cannabis and Hemp.46

Introduction.
International trade in cannabis and hemp products gives rise to both transnational and local compliance concerns and obligations.

Core transnational customs law issues include determining the finished good’s proper customs classification, value for appraisement, and country of origin. Classification and appraisement are harmonized at the international level and implemented by national legislation (frequently with additional refinement).

Core local issues include the importing nation’s laws and regulations governing consumer protection, product labeling, and false advertising. There may also be state and municipal level regulations and compliance obligations that must be met.

Failing to properly ascertain compliance obligations at the transnational, national, state, or municipal level can lead to seizures, exclusions, recalls, fines, penalties, liquidated damages, and other mischief in the country of importation and final place of sale within that country.

Transnational Customs Issues: Classification, Valuation, & Country of Origin.

A. Classification

Classification of goods in international trade is harmonized at the six-digit level under the auspices of the World Customs Organization:

The Harmonized Commodity Description and Coding System generally referred to as ‘Harmonized System’ or simply ‘HS’ is a multipurpose international product nomenclature developed by the World Customs Organization (“WCO”).

It comprises about 5,000 commodity groups; each identified by a six-digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification.

45 Id.
46 Prepared by Michael T. Cone, Esq. – Partner, FisherBroyles, LLP. © 2019
The system is used by more than 200 countries and economies as a basis for their Customs tariffs and for the collection of international trade statistics. Over 98% of the merchandise in international trade is classified in terms of the HS.47

Determining proper classification is crucial, as different tariff provisions carry different rates of duty,48 and failure to properly classify goods can result in incorrect pricing to customers as well as exposure in the foreign jurisdiction to retroactive and unforeseen duty payments, plus possible penalties for prior underpayments.

WTO member countries use the HS as the base from which they develop their final – and usually more detailed – tariff provisions. In the United States, the result is the Harmonized Tariff Schedule of the United States (“HTSUS”), which goes on to provide two additional levels of sub-classification for each product entering the country, resulting in a ten-digit classification used to enter the goods into the United States.49

Although all countries are allowed to make additional sub-classifications beyond the six-digit HS Code, harmonization at the six-digit level is designed to facilitate international trade by creating a significant level of comfort as to how goods will be classified upon entering the territory of trading partners.

Despite the significant degree of harmonization across the globe with respect to classification, goods are not always classified the same way in different countries, and classification disputes between importers and customs officials routinely arise. Because proper classification is often unclear and frequently a subject of dispute, countries around the globe have implemented administrative classification ruling request procedures to help provide comfort and transparency to stakeholders.

Some examples of classification rulings issued by U.S. Customs and Border Protection (“CBP”) involving cannabis and hemp include:

CBP Ruling N301281 (November 19, 2018) – Imported CBD medicinal preparation marketed under the brand Epidiolex® classified under HTSUS 3004.90.9230 as a “medicament”, which provision carries a duty-free rate;

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48 Whereas tariff classification is harmonized to the six-digit level under the HS, countries remain free to determine the rates of duty that will apply to imported goods. In other words, duty rates are not harmonized across countries.
49 The proper ten-digit classification must also be determined in order to properly fill out a Shipper’s Export Declaration (SED), a document which must be filed with the U.S. government in connection with every commercial shipment leaving the country.
CBP Ruling N301829 (December 6, 2018) – Tariff classification, country of origin, marking and status under the NAFTA of imported hemp powder called “HempBev 65”; classified under HTSUS 2306.90.0130 as “Oilcake and other solid residues . . . of hemp”, dutiable at 0.32 cents per kilogram;

CBP Ruling N301911 (December 17, 2018) – CBD in bulk powder form classified under HTSUS 2907.29.9000, which covers “Polyphenols; phenol-alcohols: Other” and carries a duty rate of 5.5 percent ad valorem.

B. Valuation

Valuation concepts are harmonized at the transnational level by virtue of the WTO Valuation Agreement. Determining the proper valuation for customs purposes is crucial because the amount of duties payable upon importation is usually derived from an ad valorem assessment against the dutiable value of the goods. In other words, declaring a value that is lower than the legal appraised value will normally result in underpayment of customs duties.

Transaction value is the key concept under the WTO Valuation Agreement, and is broadly defined at the international level as follows:

[Transaction Value is defined as the price actually paid or payable [and] is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods, and includes all payments made as a condition of sale of the imported goods by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller.50

Where parties are unrelated and the transaction is otherwise at arm’s length, as a general proposition, this definition allows the buyer to use the foreign seller’s invoice price as the value to be declared to customs authorities.

However, many circumstances can give rise to a situation where the foreign seller’s invoice price cannot serve as the sole basis for declaring customs values. As just one example, where the importer has provided the foreign seller with something at a reduced cost or free of charge that is incorporated into the final good (called an “assist” in customs parlance), the appraised value declared to customs authorities must include the value of the assist. For example, if a U.S. importer buys CBD oil from a Mexican producer but sends vials with labels to that Mexican producer who then fills the vials with its CBD oil before shipping the goods to the U.S., the appraised value declared to CBP must include the foreign seller’s invoice price for the CBD oil plus the value of the vials sent by the U.S. importer to the Mexican producer.

C. Country of Origin

50 https://www.wto.org/english/tratop_e/cusval_e/cusval_info_e.htm
Along with properly classifying and valuing merchandise, importers are also required to determine and declare the proper country of origin for their imported goods.

The general rule in the U.S., which applies to goods not covered under a Free Trade Agreement (e.g., NAFTA), is referred to as the “substantial transformation” test. Under the substantial transformation test, goods originate in the last country where they underwent a process resulting in a good with a new “name, character, or use”.

Thus, starting with cannabis in one country and ending with CBD oil in that country would result in a substantial transformation, with the finished good being a product of that country. On the other hand, starting with bulk CBD oil and ending with CBD oil in vials would not result in a substantial transformation in the country where the CBD oil was produced.

Where a Free Trade Agreement (FTA) between trading partners exists, the substantial transformation test is usually relaxed by special so-called “tariff shift” and related country of origin “marking” rules. Regardless of what test applies, country of origin determinations can be notoriously complex when more than one country is involved with producing a finished imported good.

*Local Issues in the Country of Importation:*
*Consumer Protection, Product Labeling, and False Advertising.*
Local compliance issues in the country of importation involve consumer protection, product labeling, and false advertising.

In the U.S., federal agencies involved with these issues as they relate to cannabis and hemp products include the FDA (food, nutritional supplements, product labeling) and the FTC (false advertising, eco/natural/organic claims, Made in the USA). In addition, individual states enact laws subject to the Supremacy Clause (examples: Indiana hemp law, Washington ban on foods containing CBD).

Foreign countries and the provinces, states, and municipalities within them, may have laws and regulations in force that must be followed. Any non-compliance with local laws can lead to nightmare scenarios including recalls, penalties, import bans, etc.

*Conclusion: Don’t Try This At Home (Alone).*
Although the framework for customs classification and valuation starts with internationally harmonized precepts, arriving at conclusions acceptable to customs authorities in any given jurisdiction is not always straightforward. Challenges also routinely arise in determining the correct country of origin of a finished good when more than one country was involved in its production.

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Therefore, while experienced U.S. customs attorneys can help narrow down the customs law answers in foreign jurisdictions, hiring an experienced customs attorney licensed and practicing in the foreign jurisdiction is the only approach reasonably calculated to ensure smooth sailing.

* A fortiori, hiring local counsel to help navigate consumer protection, labeling, and false advertising laws in a foreign jurisdiction is even more important, as there is no internationally harmonized backbone from which to extrapolate compliance requirements in those areas of law, while the gravest of consequences can arise from non-compliance.

IX. **Cannabis as a Global Commodity.**

Cannabis as a commodity is no different than gold, oil, wheat, corn: whoever can produce the highest quantity at the lowest price will lead the game. Global cannabis is estimated to be a $300 billion annual cash crop, with the potential for a trillion dollars of global market capitalization in the next decade.52

*Endless, End Products.*

A primary cause for interest in the cannabis industry is the world’s recognition of cannabis’s potential well beyond merely smoking the product. Cannabis presents a seemingly endless array of end-products, including but not limited to: beauty and wellness, pharmaceutical, medicine, concrete (“hempcrete”), dry wall, paper, bio diesels, alcohols, tobacco industry, textiles, hemp plastic, pet supplements, and food & beverages.53 To be sure, in the new era of cannabis products, consumers will eat it, drink it, lather it onto their skin, and even take a bubble bath in it.

*Job Market.*

The job market presents a wide array of opportunity, with sectors within the field including cultivation, production, manufacture, distribution, cannabis-focused biotechs and ancillary products and services such as consulting, hydroponics, lighting systems, and packaging.

*Entering the Cannabis Space.*

New entrants to the market typically struggle to grapple with commoditization. At the state level, we see consumer-driven price controls: buyers are not going to tolerate paying triple the amount for products as the state next door. The same concept will unfold at the global level; competition, supply and demand, and public sentiment will be the driving forces. There will be price compression and constant pressure from the consumer for lower prices. Understanding the natural cause-and-effects inherent in the cannabis market is critical to a cannabis business’s success at the local, state, national, and international levels.

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The Dueling Faces of the Cannabis Craze

In the United States, there are currently 33 states and the District of Columbia that have passed laws legalizing the medicinal use marijuana. (Governing The State and Localities, 2019). Eleven of those states and the District of Columbia have legalized marijuana for adult use also known as recreational use. (Governing The State and Localities, 2019). Due to the legalization of cannabis in the states, revenue for the cannabis industry was reported to be between $8.6 billion and $10 billion in 2018. (Zwirn, 2019). Projected revenue for the cannabis industry is expected to rise to over $100 billion dollars in 2023. (Zwirn, 2019). Despite this projected economic boom, there are noticeable disparities within this industry. The disparities in the industry can be defined as the lack of minority representation in the ownership of businesses in the cannabis industry, the non-acknowledgment of those who have been affected criminally and socially, and the disregard of the communities that have been devastated due to marijuana being classified as a schedule one drug.

According to Marijuana Business Daily, only 19% of marijuana businesses are owned by minorities. (Daily, 2017). The 19% minority – owned breakdown is as follows: 2.4% Asian, 4.3% African American, 5.7% Hispanic/Latino, and 6.7% classified as other. (Daily, 2017). In addition to the above, minorities have faced harsh criminal penalties due to the war on drugs and are still facing the same criminal penalties despite the revenue generated by the legalized cannabis industry in most states. According to the American Civil Liberties Union (hereinafter “ACLU), 52% of all drug arrests in 2010 were for marijuana. (ACLU, 2010). The
ACLU further reported that in 2010, Blacks were 3.73 time more likely to than Whites to be arrested for marijuana. (ACLU, 2010). Due to the disparities, the following phrases should be examined: (1) criminal justice reform, (2) social justice and (3) social equity.

Prior to starting a conversation on criminal justice reform, social justice, and social equity, it is imperative to review briefly the Controlled Substances Act, which arguably starts the beginning of the war on drugs. “The Controlled Substances Act (hereinafter referred to as CSA) Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is the federal U.S. drug policy under which the manufacture, importation, possession, use and distribution of certain narcotics, stimulants, depressants, hallucinogens, anabolic steroids, and other chemicals are regulated.” (L. Anderson, 2018). “The CSA was signed into law by President Richard Nixon on October 27, 1970. The addition, deletion or change of schedule of a medicine or substance may be requested by the U.S. Drug Enforcement Agency (DEA), the Department of Health and Human Services, the U.S. Food and Drug Administration (FDA), or from any other party via petition to the DEA.” (L. Anderson, 2018).

The CSA can be found in Title 21 of the United States Code. There are five schedules of controlled substances, which are listed below:

“Schedule I – (A) The drug or other substance has a high potential for abuse;

(B) the drug or other substance has no currently accepted medical use in treatment in the United States; (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision. 21 U.S.C. § 812(b).
Schedule II – (A) The drug or other substance has a high potential for abuse; (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions. 21 U.S.C. § 812(b).

Schedule III – (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedules I and II; (B) The drug or other substance has a currently accepted medical use in treatment in the United States; (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

Schedule IV – (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III; (B) The drug or other substance has a currently accepted medical use in treatment in the United States; (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

Schedule V – (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV; (B) The drug or other substance has a currently accepted medical use in treatment in the United States; (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.” (U.S. Department of Justice, 2019).
Any composition containing marihuana (marijuana) and tetrahydrocannabinols (THC) are classified as Schedule I drugs. (U.S. Department of Justice, 2019). Furthermore, based on the classification of being a schedule I drug, drug offenses relating to marijuana are harsher than those listed in other schedules. The federal guidelines for the definition and sentencing of those in possession of marijuana have been mirrored on the state level. The harsh criminal penalties are carried out every day in the very states that have legalized marijuana both medically and recreationally. It is ironic, however, that while marijuana is listed federally as drug with no known medicinal benefits most of the 33 states operate under a contrary notion that medicinal marijuana does have a medicinal benefit for a variety of illnesses but still choose to enforce marijuana as one of the highest tier drugs for criminal penalties.

**Criminal Justice Reform**

Criminal justice reform has been broadly defined in different spaces. The Drug Policy Alliance has identified key issues associated with criminal justice reform such as (1) drug decriminalization, (2) mass incarceration and criminalization, (3) race and the drug war, (4) women and the drug war, (5) LGBTQIA+ people and the drug war, and (6) asset forfeiture reform. (Drug Policy Alliance, 2019). According to Bill Keller, “reform aims to reduce the numbers of Americans who are removed from society and deprived of their freedom, and
to do it without making us less safe.” (Keller, 2017). The federal government and some states have made strides in attempting to address criminal justice reform.

In 2018, Congress passed, and President Trump signed into law The FIRST STEP Act provide for programs to help reduce the risk that prisoners will recidivate upon release from prison, and for other purposes. (Rep. Doug Collins, 2018). “The First Step Act is an important piece of legislation that begins to address rehabilitation. This bill will put the focus back on rehabilitation and finding ways to give people an opportunity to come home and succeed. (#FirstStepAct, 2019). The FIRST STEP Act does the following:

a. “Fix good time credits ensuring that incarcerated individuals can earn 54 days of good time credit per year and not just the 47 days that the BOP currently allows.
b. Major incentives for participating in programs, allowing for 10 days in prerelease custody for every 30 days of successful participation, with no cap on the prerelease credit that can be earned.
c. Availability of prerelease custody by requiring the BOP to transfer law and minimum risk prisoners to prerelease custody, either a half-way house or home confinement.
d. Creation and expansion of life-changing classes by authorizing $250 million over five years to the BOP for the development and expansion of programming focused on skill-building, education and vocational training.
e. Prioritize people inside who need it most because evidence shows that individuals who are at the greatest risk of future crime are the most in need of treatment, classes, and counseling.

f. Move people closer to home because contact with family is one of the most important aspects that will help individuals reintegrate into society successfully.

g. Dignity for women by banning shackling of pregnant women and extending those protections to three months after her pregnancy.

h. Provide IDs to ensure that individuals leaving federal prison have their ID prior to their release.

i. Expand compassionate release by reducing the minimum age of prisoner eligibility for elderly release from 65 years of age to 60 years of age, and minimum time served of prisoner eligibility for elderly release from 75% to 2/3.” (#FirstStepAct, 2019).

According to the National Conference of State Legislatures, the following has occurred in states that have legalized marijuana:

a. “Twenty-six states and the District of Columbia have decriminalized small amounts of marijuana;

b. Other state actions have reduced criminal penalties for marijuana convictions, generally following a trend to reduce adverse consequences of some marijuana crimes;
c. At least fifteen states have passed laws addressing expungement of certain marijuana convictions. In most of these states, expungement measures pair with other polices to decriminalize or legalize.” (National Conference of State Legislatures, 2019).

While there have been strides on the federal level and the state level to address the criminal penalties, decriminalization, and expungements of those who have been affected by marijuana laws and the war on drugs, the laws do not go far enough to eliminate the disproportionate impact faced by minorities and underserved populations. The decriminalization of small amounts of marijuana does not automatically equate to zero jail time or the elimination of a civil penalty. There must be a consideration of those who may have previous convictions pertaining to marijuana and those who cannot afford the civil penalties if caught with these variously defined small amounts of marijuana. If states are to truly address criminal penalties in conjunction with the legalization of marijuana, the states should carefully consider its definitions of marijuana, how it classifies marijuana, and whether the criminal penalties accurately reflect its current public policy on marijuana. Only then can states truly move toward criminal justice reform. In addition to the above, most states prohibit entry into the legal cannabis market if a person has a marijuana conviction.

Expungements are an important part of criminal justice reform. Less than half of the states that legalized marijuana address expungement of those persons who have been convicted of marijuana crimes. The entry into the marijuana market is automatically
barred for those individuals in most legal states. For those states that have enacted some type of expungement laws, there are fees of expungement that may be cost prohibitive and processes that are burdensome and based on the prosecuting attorneys or other decision making authority who may not want to give approval to move forward in the expungement process. Therefore, it would be imperative that expungements of marijuana convictions be automatic to enable those individuals who have been most adversely affected to enter not only the marijuana market but any job market that may be available to them.

**Social Equity and Social Justice**

The terms of social justice and social equity have often been used interchangeably. To identify how states should evaluate their policies when it comes to incorporating minorities and underserved populations into the spectrum of the marijuana business, both social justice and social equity must be addressed. Social equity has been defined as:

“The fair, just and equitable management of all institutions serving the public directly or by contract; and the fair and equitable distribution of public services, and implementation of public policy; and the commitment to promote fairness, justice and equity [emphasis added] in the formation of public policy.” (Norman-Major, 2011).

According to Marijuana Business Daily, there are only seven states (Maryland, California, Massachusetts, Ohio, Pennsylvania, Michigan, Illinois) that have social equity provisions in its legislations. (McVey, 2019). The social equity programs in these states
provide application points if minorities are involved in the marijuana business, provide education for minorities who wish to enter the marijuana business and at least one provides loan assistance for minorities who wish to enter into the market. (McVey, 2019).

The amount of states with social equity programs equal just a small fraction of the states that have legalized marijuana. The abovementioned states are attempting to promote fairness when distributing license within its states’ borders. It is a difficult task to develop and implement such a program; however, if many states do not attempt to address the issue of diversity in its licensing process, those states will fail to reap the benefits of a diversified market. While those programs help to build a diverse cannabis industry, social equity programs do little to provide for the barrier of cost to the entry into the market. It is understandable that states want to now incorporate a diversity social equity component into its application process. Rushing this thought process along will only lead to stories like that of Ohio whose social equity program was declared unconstitutional. (McVey, 2019). A state’s social equity program should not only seek to diversify the number of licensees in a state, but it should also seek to help those very licensees to scale the cost barrier into the industry. Awarding licenses mean nothing without the capital to see the business come to fruition.

Social justice is a bit more difficult to define. Social justice has been defined as “the distribution of advantages and disadvantages.” (Novak, 2009). Novak explored the phrase of “distribution of advantages and disadvantages” and constructed a more robust mean of the term social justice. Novak defined social justice as follows:
“Although it is difficult to agree on the precise meaning of “social justice” I take that to most of us it implies, among other things, equality of the burdens, the advantages, and the opportunities of citizenship. Indeed, I take that social justice is intimately related to the concept of quality, and that the violation of it is intimately related to the concept of inequality.” (Novak, 2009).

Social justice in the cannabis industry looks a little differently than criminal justice reform and social equity. Hundreds of communities have been destroyed by the CSA and state drug laws. Talent was taken from the community and families were destroyed. The marijuana industry has generated billions of dollars. To fulfil the needs required of social justice, the cannabis industry should invest in the very communities that have been destroyed by the drug laws. Social justice investments by the cannabis industry means educational programs, after school programs, college scholarships, and other community building endeavors. As stated above, the cost of entry into the cannabis market is a barrier within itself even in states that have social equity programs. Therefore, it is imperative that states invest in community programs to systemically bring about change from the casualties of the war on drugs. Once grassroot community investments are envisioned, implemented and sustained, states will see an increase in its desire to bring about criminal justice reform and viable social equity programs.

For diversity to become a staple in the cannabis industry, states must explore criminal justice reform, social equity platforms, and social justice initiatives.
References


It's Not Easy Being Green: How The Cannabis Industry Can Adapt To Evolving Environmental Laws

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"From Regs to Riches: Navigating the Rapidly Emerging Fields of Cannabis & Hemp Law"

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INTRODUCTION

Marijuana is a Schedule I controlled substance and remains illegal, for all purposes, under Federal law. (See, e.g., 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812, Schedule I (c), (d).) But after 2018’s ballot initiatives, and Illinois’ 2019 legislative passage, 34 states plus the District of Columbia have legal medical and/or recreational cannabis regimes.

Some of the most significant — and underappreciated — challenges facing the emerging cannabis industry are in the environmental arena. Litigation is a significant risk; toxic tort and product liability claims, civil lawsuits under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968, and claims under California’s Safe Drinking Water and Toxic Enforcement Act of 1986 have all been filed. Criminal indictments for illegal dumping of hazardous waste have also been filed. In addition, the industry faces state regulatory challenges in terms of resource use (water, land), sustainability and energy use, compliance with waste disposal and pesticide laws. Recognition of these issues and risks is the first step towards productively addressing them.

A. General Litigation Risks

- Litigation poses an existential risk to any business:
  - Cannabis-based businesses face “NIMBY” neighbors and others opposed to cannabis for myriad reasons, as well as lawyers focusing on suing the industry and encouraging others to do the same. All of this leads to an environment ripe for litigation.

Product Liability

- Product liability claims are a significant potential risk.
The National Center for State Courts’ Court Statistics Project recently estimated that approximately 15,000,000 civil cases were filed in 2016.

Of those cases, more than 300,000 were tort claims, with approximately 56,000 of those cases filed in California alone. (See Judicial Council of California, “2017 Court Statistics Report, Statewide Caseload Trends, 2006 – 2007 through 2015 – 2016” (2017), pp. 121 – 125.)

- Potential vulnerabilities include labeling, packaging, and quality control.

- Exemplar cases
    - This was one of the first product liability cases involving cannabis. Plaintiffs attempted to argue that the economic value of their cannabis was diminished because the grower and distributor, LivWell, used a fungicide that was not registered by the U.S. Environmental Protection Agency (EPA) for use on cannabis plants.
    - The case was decided on standing under *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). An economic interest alone was insufficient.
    - *Flores* as a roadmap to future lawsuits?
    - Surviving children of Richard Kirk alleged that consumption of “Karma Kandy Orange Ginger” caused “psychotic behavior, following ingestion of the marijuana infused edible candy” which led Richard Kirk to shoot and kill his wife, Kristine Kirk, at their family home.
    - Complaint advanced multiple causes of action, including strict liability and negligent failure to warn. The matter resolved for an undisclosed amount.
• Labeling & packaging concerns


  - Edible products were involved in more than 50% of the exposures, and that for 9% of the exposures scenarios, the products were not in a child-resistant container.

  - In California, cannabis-infused gummies allegedly were responsible for sickening 19 people, mostly teens and children, at a birthday party. (Lindzi Wessel, “Mass marijuana overdose in California is latest in worrisome trend of children poisoned,” Stat (August 9, 2016))

  - While some states like Colorado have responded by advancing legislation to ban cannabis products in shapes likely to attract children, others have not.

  o Contaminated cannabis. Lack of national standardization and quality control during harvesting, processing/extraction and/or point of sale may result in unintended bacterial or chemical exposures to consumers. (Penelope Overton, “Lack of mandated testing could expose cannabis users to toxins,” Portland Press Herald (December 30, 2018))

  o Engineered cannabis strains or extracted cannabis concentrates with high tetrahydrocannabinol (THC) may themselves be a source of liability, as consumers unfamiliar with or unaware of the potential effects may allege injury as a result.

  o General lack of warnings.

Civil RICO Claims

• Private plaintiffs, often backed by moneyed anti-cannabis interests, have sued legal cannabis business owners in Federal court under the Racketeer Influenced and Corrupt Organizations (RICO) Act in

• Initially, these suits prompted settlements of some claims.
  
  o In 2017, in Safe Streets Alliance et al. v. Hickenlooper, 859 F.3d 865 (10th Cir. 2017) the Tenth Circuit held that landowners in Colorado could move forward with a civil suit under RICO against a licensed marijuana cultivation enterprise located on an adjacent property.
  
  o However, on October 31, 2018, a jury returned a decision in favor of the marijuana cultivation enterprise, finding that the plaintiffs had not suffered an injury. The verdict in Safe Streets was quickly followed by two decisions out of the Ninth Circuit — Ainsworth v. Overby, 326 F. Supp. 1111 (D. Or. 2018) and Bokaie v. Green Earth Coffee LLC, 2018 WL 6813212 (N.D. Ca. 2018) — which each held that plaintiffs failed to properly allege injury to person or property under RICO and dismissed the claims.
  
  o While civil RICO lawsuits have been largely unsuccessful against the industry, the cases continue to be brought, and there remains a risk that the cases may be appealed to a U.S. Supreme Court with a conservative majority.

B. California-specific issues

• Safe Drinking Water and Toxic Enforcement Act of 1986 ("Prop 65")
  
  o Prop 65 requires businesses to provide warnings to Californians about significant exposures to chemicals that cause cancer, birth defects, or other reproductive harm. Cal. Health & Safety Code §§ 25249.5 et seq.
  
  o Enforceable by private right of action in addition to action by California Attorney General.
  
  o "Marijuana smoke" was added to the Prop 65 list of chemicals on June 19, 2009.
  
    ▪ Over the last two years, hundreds of cannabis-related Prop 65 notices of violation have been served. Many entities opt to pay to extract themselves from cases rather than fight them.
• California Environmental Quality Act ("CEQA")

  o In California, CEQA generally requires that a proposed business evaluate its environmental impacts and means of mitigating significant impacts. (Cal. Pub. Res. Code §§ 21000 et seq.)

  o On July 1, 2019, temporary CEQA exemptions granted to municipalities such as the city of Los Angeles expired, which may require the businesses themselves to directly participate in the compliance process.

  o On August 19, 2019, the California Supreme Court ruled on a fundamental California Environmental Quality Act (CEQA) issue: when is a zoning ordinance amendment considered a “project” subject to CEQA? The ordinance at issue was San Diego’s attempt to regulate the construction and operation of cannabis dispensaries within the City. The City concluded that the ordinance was not a “project” because it did not have the potential to cause a physical change in the environment.

  o The California Supreme Court disagreed with the City. In Union of Medical Marijuana Patients, Inc. v. City of San Diego (UMMP) the Court held that CEQA does not automatically apply to all zoning ordinance amendments (overruling a previous Court of Appeals’ decision holding to the contrary). However, it held that the zoning ordinance amendments at issue in San Diego were certainly a “project” and thus do not evade CEQA review on the basis San Diego provided.

  o The Court’s ruling has direct implications for those businesses depending on such zoning amendments, providing an opportunity for a municipality or stakeholder to argue that any desired amendment does not necessarily trigger CEQA review. It is also of great importance to the cannabis industry, who can now be near certain that zoning ordinance amendments specifically for dispensary construction and operation may qualify as “projects” subject to CEQA.

C. Industrial Hygiene Issues in the Cannabis Industry

  • There are a large number of new businesses of all sizes. Environmental Health & Safety (EHS) responsibilities are generally

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1 By Jason Lang, CIH, CSP Manager
assigned to workers with little to no background or training. There is a general lack of understanding of health and safety requirements of an employer, and management of EHS programs can be difficult and overwhelming. This often leads to a “head in the sand” approach to EHS until there is an incident, regulatory inspection, or in preparation for the sale of a business.

- **OSHA**

  - Generally, cannabis employers must abide by State and Federal OSHA laws.

  - Areas of non-compliance observed during my audits include:
    - Lack of Required OSHA programs and training (HazCom / Chemical Hygiene / Illness Injury & Prevention / LOTO / Confined Spaces / etc.)

- **Use of Flammable Chemicals**

  - Wide use of chemicals, including flammable gases and solvents in extraction processes. This has led to several explosions when there is a lack of engineering controls or improper installation and use of equipment.

  - Lack of employee exposure data to chemicals which often leads to improper use of respirators.

- **Waste**

  - The handling of plant waste can provide many challenges as each state deals with plant waste differently.

  - Waste from the extraction process can be an even more complicated issue since it may include residuals of flammable chemicals and may need to be disposed of as hazardous waste.

D. **Water Issues**

- California water regulations are among the most complicated and rigorous of any in the country. They provide a good lens from which to view the

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2 By Eric Biber.
importance of water regulation to the cannabis industry.

- **Water Quality Protection**
  
  - This applies to discharge or runoff water from a cultivation site into waterways. Taking water out of waterways is covered by a separate regulatory system.
  
  - This requires evidence of either enrollment in an applicable state or regional water quality control board program, or written verification from the appropriate regional board that no enrollment is needed.
  
  - Enrollment standards or exemptions are determined by a state general order issued by the State Water Resources Control Board in 2017 (https://www.waterboards.ca.gov/)
  
  - Three categories under that order
    
    - Conditionally Exempt
    
    - Tier 1
    
    - Tier 2
  
  - Which category is determined by how much and what kind of land a cannabis grower is disturbing for its crop:
    
    - Conditionally exempt if it disturbs less than 2,000 square feet, is not on steep slopes, and complies with regulatory practices (Best Practicable Treatment or Control (BPTC) measures), and is set back from waterways
    
    - Tier 1 is less than one acre
    
    - Tier 2 is one acre or more
  
  - Conditionally exempt businesses do not need to enroll in the program, as long as they confirm they fall within the exemptions
  
  - Tier 1 and 2 dischargers are sorted by risk
    
    - Low risk: not steep slopes, setback from waterways
    
    - Moderate risk: steeper slopes, setback from waterways
    
    - High risk: Not setback from waterways
  
  - Depending on risk-level and tier, have varying fees, reporting requirements to state/regional board, and BPTC measures that must be implemented
•Reports that might be required include site management plans (compliance with BPTC), soil erosion and sediment control plans (for moderate- to high-risk sites), disturbed area stabilization plans (for high-risk sites), and nitrogen management plans.

  o Takeaway: if possible, avoid medium and high risk categories to minimize regulatory burdens and fees. Some of the reporting requirements are quite detailed and often require preparation by legal counsel, hydrologists, geologists, and hydrogeologists.

• Water rights:

  o General overview of water rights: vary largely by region.

    ▪ On the west coast (including California), the **prior appropriation doctrine** generally governs. “First in time, first in right.”
    ▪ Elsewhere, the **riparian doctrine** governs, which generally gives the owner of land bordering a river or stream the legal right to use the water from that river or stream.

  o A cannabis business will need to give information about what its water source is: water utility, well, rainwater, or diversion.

  o If it’s a diversion, the business will need to demonstrate that it has water rights under state law to support the diversion.

  o If a cannabis business lacks an existing water right, it will need to apply for a new water right from the SWRCB, or get a Small Irrigation Use Registration (SIUR).

  o Must also comply with diversion rules under SWRCB’s Cannabis Policy

    ▪ Prohibition of diversions during dry season (April through October)
    ▪ Means will generally need a storage water right for storage during dry season, or use alternative water sources.

  o SIUR application will require information about

    ▪ Point of diversion from the waterway
    ▪ Information about where, how, when water be used.
- Project description
- Information about any off-stream storage
- Maximum of 20 acre-feet/year, and caps on diversion to storage/day

  o All new rights (including SIUR) will be subject to senior rights holders, and may be cut off to protect those senior holders in times of shortage, or to protect natural resources in times of shortage

  o Takeaways: Get into SIUR if you can; will need a plan for the dry season.

E. Local Land-Use Regulations

• Apply in addition to state requirements

• CA is a local option state – local governments can generally speaking impose additional restrictions on, or prohibit entirely, commercial cultivation (with exception of growing up to 6 plants for personal use, H&S C 11362.2)

  o State license cannot be issued if local government tells state that no permit may be issued (B&P C 26055(d)-(g))

• Local regulations may constrain:

  o **Where you can cultivate** by limiting a cannabis business to certain zones or imposing additional distance restrictions;

  o **How you can cultivate** by imposing additional restrictions or requirements; and

• Local regulations may also impose additional fees and taxes.

• These restrictions may impose significant burdens on cultivators seeking permits, by restricting the scope of where they can grow, either in terms of selecting parcels or within a parcel.

• **Key takeaway:** Before deciding where to grow, do due diligence on local regulations and what they might allow before starting the process. There is no point wasting money on state permits if local rules make your site infeasible.

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3 By Eric Biber
F. Other Regulatory Issues

• Air


  o Notably, the *Green Freedom* case involved a complaint brought by a private landowner.

• Energy & Climate

  o The cannabis industry has also been singled out for its energy consumption, exacerbated by 24-hour lighting, heating, ventilation, and air conditioning requirements at large-scale indoor grow facilities. Melanie Sevcenko, “Pot is power hungry: why the marijuana industry’s energy footprint is growing,” The Guardian (February 27, 2016)

  o Potential allegations about impacts on climate

G. Pesticides & Enforcement


• EPA also regulates pesticides used for food or feed uses under the tolerance provisions of the Federal Food Drug and Cosmetic Act (FFDCA). Under the FFDCA, EPA establishes the maximum amount of pesticide residue allowed in or on food or feed (known as tolerances) or exemptions from tolerance.

• It is a violation of FIFRA for any person or entity to use a pesticide in a manner for which it is not registered. It is a violation of the FFDCA to introduce food or feed into interstate commerce without a required

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*By Kathryn E. Szmuszkovicz*
tolerance or exemption from tolerance (or for which residues exceed an established tolerance).

- In view of the illegal status of cannabis under federal law in the United States, EPA has not approved any registrations for pesticide use on cannabis, and EPA has not established any tolerances or tolerance exemptions for pesticide residues in or on cannabis that will be introduced into the diet.

- EPA may approve pesticides for use on industrial hemp with .3% or less THC by volume, given industrial hemp's new legal status under the Agricultural Improvement Act of 2018 (commonly known as the Farm Bill).
  
  - On August 23, 2019, EPA published in the Federal Register a notice announcing it has received, and is considering approving, the first 10 applications for use of particular pesticides on hemp.
  
  - All the pesticide products involved in these applications previously have been approved for similar types of terrestrial outdoor and residential outdoor use patterns, and all of the active ingredients in the pesticide products already have tolerance exemptions in or on all agricultural or food commodities.
  
  - EPA is taking public comment on its impending decisions until September 23, 2019. More details on the applications and information on how to submit public comments can be found at 84 Fed. Reg. 44296 (August 23, 2019). See Appendix A for a copy of EPA's Federal Register notice.
  
  - Access to safe and effective tools for managing pests in hemp is critical to the future success of hemp production and so it is particularly important to provide input to EPA through this public comment process.

- In the absence of any pesticides with federally registered cannabis uses at this time, a majority of those states where some form of cannabis is legal have adopted rules or guidance addressing the limited circumstances in which pesticides may be lawfully used on cannabis within their jurisdictions. (See Appendix B for specifics).

- Several states have also attempted to address this issue by invoking the “Special Local Needs” (SLN) provisions of FIFRA. Under Section 24(c), FIFRA provides that each state is authorized to register an additional use of a federally registered pesticide product if certain conditions are met. See 40 CFR § 162.152. To date, EPA has not accepted this approach for
cannabis uses, although it has indicated that it will consider SLNs for industrial hemp grown consistent with provisions of the Farm Bill.

CONCLUSION

As cannabis businesses establish and expand their operations, it is critical that they understand and adapt to the broad range of environmental compliance, enforcement and litigation exposure such enterprises face from the existing and evolving legal and regulatory landscape. Awareness of the issues is important, and engaging the consultants, experts, and legal counsel needed to address these issues will result in a stronger, environmentally sustainable industry.
Environmental Protection Agency

[EPA-HQ-OPP-2019-0369; FRL-9998-37]

Pesticide Product Registrations; Receipt of Applications for a New Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to add a new site (hemp) to the labeling of currently registered pesticide products that contain active ingredients with established tolerance exemptions. Due to EPA’s expectation that these initial applications involving hemp may be of significant interest to the public and to enhance transparency, EPA is hereby providing notice of receipt and opportunity to comment, although not required pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

DATES: Comments must be received on or before September 23, 2019.

ADDRESSES: Submit your comments identified by the EPA Registration Number of interest as shown in the body of this document, by one of the following methods:

• Federal eRulemaking Portal: http://www.regulations.gov. Follow the online instructions for submitting comments.

Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

• Mail: OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001.

• Hand Delivery: To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at http://www.epa.gov/dockets/contacts.html.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at http://www.epa.gov/dockets.

FOR FURTHER INFORMATION CONTACT: Robert McNally, Biopesticides and Pollution Prevention Division (BPPD) (7511P), main telephone number: (703) 305–7090, email address: BPPDFRNotices@epa.gov; or Michael Goodis, Registration Division (RD) (7505P), main telephone number: (703) 305–7090, email address: RDFRNotices@epa.gov. The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person’s name, division, and mail code. The division to contact is listed at the end of each application summary.

SUPPLEMENTARY INFORMATION:

1. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

• Crop production (NAICS code 111).
• Animal production (NAICS code 112).
• Food manufacturing (NAICS code 311).
• Pesticide manufacturing (NAICS code 32532).

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under FOR FURTHER INFORMATION CONTACT for the division listed at the end of the application summary of interest.

B. What should I consider as I prepare my comments for EPA?

1. Submitting CBI. Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in...
accordance with procedures set forth in 40 CFR part 2.  
2. Tips for preparing your comments. When preparing and submitting your comments, see the commenting tips at http://www.epa.gov/dockets/comments.html.  
3. Environmental justice. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, EPA seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Registration Applications

When the Agriculture Improvement Act of 2018 (2018 Farm Bill) was signed into law on December 20, 2018, hemp, defined therein as the plant Cannabis sativa L. and any part of that plant with a delta-9-tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis, was removed from the Controlled Substances Act. Consequently, interest in hemp production has substantially increased over the last several months and the availability of particular tools, such as pesticides registered under FIFRA, will likely be essential to supporting the success of this industry going forward. Because of these recent developments with regard to hemp, EPA has received applications to add hemp as a new site to the labeling of some currently registered pesticide products. These registered pesticide products contain active ingredients for which EPA previously determined the residues will be safe under any reasonably foreseeable circumstances and, pursuant to the Federal Food, Drug, and Cosmetic Act (FFDCA), establish tolerance exemptions, as indicated below, for those residues in or on all raw agricultural or food commodities. As these initial applications that involve hemp may be of significant interest to the public and to enhance transparency, EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by EPA on these applications. FIFRA section 3(c)(4) requires EPA to “publish in the Federal Register [...] a notice of each application for registration of any pesticide [...] if it would entail a changed use pattern.” As terrestrial outdoor and residential outdoor use patterns (40 CFR 158.100) were previously assessed and approved for the active ingredients listed below and because hemp, as proposed for addition to the labels of the products below, falls under these use patterns, EPA does not consider the use patterns to be changed with these applications. Thus, EPA is not statutorily required to provide an opportunity to comment and is doing so here because of the potential significant interest from the public in these initial applications and in furtherance of being completely transparent about these applications. For future pesticide registration applications that are similar to these applications and that are expected to be submitted with more regularity, EPA is not planning to notify the public of their receipt.


Authority: 7 U.S.C. 136 et seq.  
Robert McNally, Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.  
[FR Doc. 2019–18151 Filed 8–22–19; 8:45 am]  
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

Proposed Stipulated Partial Settlement Agreement, Endangered Species Act Claims

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed stipulated partial settlement agreement; request for public comment.

SUMMARY: In accordance with the EPA Administrator’s October 16, 2017, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements, notice is
Appendix B

The below represents a partial listing of various states’ guidance materials on cannabis pesticide use:

1. Alaska
   a. Alaska has published guidance on pesticide use on cannabis. 
      https://dec.alaska.gov/eh/pest/cannabis-and-pesticides/

   b. Alaska has published a partial list of pesticides that meet criteria to 
      be used on cannabis crops. 
      http://dec.alaska.gov/media/14350/cannabis-pesticides-alaska.xlsx

2. California
   a. California has published examples of pesticide products that can be 
      legally used on cannabis in California, provided they meet certain 
      criteria. 
      https://www.cdpr.ca.gov/docs/cannabis/can_use_pesticide.pdf 
      (many of the compounds on the list are exempt from FIFRA 
      registration requirements)

3. Colorado
   a. The Colorado Department of Agriculture has adopted Rules that 
      set forth the criteria by which pesticides are allowed for use in the 
      cultivation of cannabis in Colorado. These Rules are effective 
      March 30, 2016. 
      https://www.colorado.gov/pacific/agplants/pesticide-use-cannabis- 
      production-information

   b. Colorado has also published a list of pesticides that can be used on 
      cannabis. 
      https://drive.google.com/a/state.co.us/file/d/1upPu4MAr15Wcdy0e 
      OgP7fkgFDITSmQo0/view?usp=sharing

4. Maine
   a. Maine has published a flow chart to help determine whether or not 
      a pesticide may be applied to cannabis:

      ![Maine Pesticide Flow Chart](#)

      See also https://www.maine.gov/dafs/bbm/mmpm/pesticide
5. Maryland
   a. Maryland has published regulations regarding the use of pesticides on medical cannabis. [https://mmcc.maryland.gov/Pages/Pesticide-Application.aspx](https://mmcc.maryland.gov/Pages/Pesticide-Application.aspx)
   Maryland has also published a list of pesticides for use in the cultivation of medical cannabis:

6. Massachusetts
   a. Massachusetts has made clear that there is a regulatory prohibition of the application of any pesticide in connection with the cultivation of medical cannabis products, unless explicitly approved by the Department. The only pesticides that are considered approved are “25b” minimum risks pesticides.

7. Nevada
   a. Pursuant to Nevada Revised Statute Chapter 586, Nevada has established a list of pesticides that are not legally prohibited for use on medical/recreational cannabis.
   [http://agri.nv.gov/Plant/Environmental_Services/Pesticide_Use_on_Medical_Cannabis/](http://agri.nv.gov/Plant/Environmental_Services/Pesticide_Use_on_Medical_Cannabis/)

8. Oregon
   a. Oregon has published a guide list for pesticides and cannabis.

9. Washington
   a. Washington has published criteria for pesticides used for production of cannabis in Washington.
   [https://agr.wa.gov/FP/Pubs/docs/398-WSDACriteriaForPesticideUseOnCannabis.pdf](https://agr.wa.gov/FP/Pubs/docs/398-WSDACriteriaForPesticideUseOnCannabis.pdf)
   b. A searchable list of allowed pesticides is available here:
   [https://cms.agr.wa.gov/getmedia/2471d816-dc81-4c5f-849d-ed6dcd26aa02/Pesticidesalloweduseonmarijuana](https://cms.agr.wa.gov/getmedia/2471d816-dc81-4c5f-849d-ed6dcd26aa02/Pesticidesalloweduseonmarijuana) (last updated June 28, 2019).
Are Employment Rules Getting Hazier

A. Introduction

Marijuana prohibition in the United States began 80 years ago when the federal government banned the sale, cultivation, and use of the cannabis plant. It continues to remain illegal under federal law today. However, in recent years marijuana legalization has swept the United States and the globe at a rapid rate. In 2018 alone, Vermont became the first state to legalize marijuana through its legislature, rather than by ballot initiative; Canada legalized marijuana nationwide, becoming the first G7 country to do so; and Mexico’s Supreme Court ruled that marijuana prohibition is unconstitutional. Currently in the United States, 11 states and the District of Columbia allow recreational marijuana for adults over 21, and 33 states allow medical marijuana. These numbers are expected to continue to grow over the next few years as societal and political perspectives on cannabis continue to shift in favor of legalization. All signs point to the eventual legalization of marijuana at the federal level in the United States.

Despite this shift in perspective, marijuana still remains an illegal Schedule I drug under the federal Controlled Substances Act— in direct contrast with legalized marijuana at the state level. Although federal law is superior to state law, businesses must comply with both— even if federal and state laws conflict with one another. The chronic dispute between state and federal marijuana laws has left many employers confused about how to handle marijuana use in the workplace. With federal legalization on the horizon, the issue has become hazier than ever.

B. The Laws

The foundation of cannabis law in the U.S. depends largely on three sources:

- The Controlled Substances Act.
- State law.

U.S. employment law is drawn from many sources, including:

- The Americans with Disabilities Act.
- The Family and Medical Leave Act.
- The Occupational Safety and Health Act.
- The Drug Free Workplace Act.
- The National Labor Relations Act.
- State law.

C. Disability Laws and Use of Cannabis

1. The Family Medical Leave Act

The Family and Medical Leave Act (FMLA) requires covered employers to provide job-protected leave to eligible employees for certain qualifying reasons. The Act requires employers who fall under its provisions to provide up to 12, or 26, workweeks of leave to those eligible employees who can establish a FMLA-
qualifying reason for leave. Once an employee is eligible to take FMLA leave, a number of events can trigger the right to take time off. The employee can take this leave on an intermittent or reduced-work-schedule basis.

Drug addiction is a “serious health condition” under the Family Medical Leave Act and employee may use FMLA to participate in a substance abuse program. However, employees may not use FMLA to recover from the side effects of substance abuse (e.g. a hangover or drug-induced incapacity). Furthermore, FMLA is not a shield if the employee has already violated the employer’s drug-free workplace policy. Employers are allowed to seek a fitness for duty upon the employee’s return from work (e.g. the employer may drug test).

On the other hand, if an employee uses medical marijuana while on leave and is required to take a drug test upon their return to work, the question is debatable as to whether the employer would violate the FMLA if it refused the employee’s desire to return to work. While the law is still developing in this area, there is a risk of a retaliation claim.

2. The Americans with Disabilities Act

Employers with 15 or more employees are covered by Title I of the Americans with Disabilities Act (ADA), which prohibits private employers and state and local governments from discriminating against qualified individuals because of a disability. The ADA further requires covered employers to provide a reasonable accommodation to individuals with a disability if it would not impose an undue hardship on the employer. Drug addiction is a disability under the ADA. The ADA protects rehabilitated (non-using) drug addicts. The ADA does not protect the current use of illegal drugs by employees, which means that an employee is currently unable to bring a federal court claim against an employer under the ADA regarding employee’s use of medical cannabis.¹ Leave for rehab may be a reasonable accommodation, if requested before a policy violation. However, this would not apply to current users of marijuana. The EEOC has interpreted “current use” to mean recently enough to justify an employer’s belief that drug use is an ongoing problem. Courts have stated that “current use” is not limited to “the day of” or even within a matter of days or weeks before the event. Workers are excluded from protections of the ADA for their use of marijuana for medical purposes because the use of marijuana remains illegal under the Controlled Substances Act.

The ADA indicates that a qualified individual with a disability “shall not include any employee or applicant who is currently engaging in the illegal use of drugs.” So far, plaintiffs across the country have been unsuccessful in arguments that employers should accommodate their use of cannabis in the workplace. Not only is marijuana illegal under federal law, but, as a Schedule I substance, it is defined under federal law as having no accepted medical use. Courts have held this line with respect to cannabis’ status under federal law. Federal courts in California, Washington, and Montana² have concluded that a medical professional cannot legally, as a matter of federal law, supervise medical cannabis use so as to bring an

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² This and other lists of jurisdictions herein may not be comprehensive. Please research your state, county, and local laws to determine what provisions apply to you or your clients.
employee under the ADA’s protection. In 2012, the Ninth Circuit held that the use of medical cannabis was not protected under the ADA, and in 2013, a Colorado District Court came to a similar conclusion.

However, the legal implications of medical marijuana use are ever-evolving and challenges to this seemingly settled premise are working their way through the federal courts. Several cases have been filed looking to protect an employee’s lawful use of medical marijuana under federal law in the same manner that use of prescription medications. In the federal District Court of Arizona, a former UPS employee filed a lawsuit alleging that his use of medical cannabis may be permissible under the ADA and Arizona state law, challenging the precedent cited above.

3. State Disability Laws

A total of 34 states, District of Columbia, Guam, Puerto Rico and US Virgin Islands have authorized cannabis for medical use to a lesser or greater extent, but only some of those medical cannabis programs prohibit employment discrimination on the basis of medical cannabis use, registration, or identification cards. A number of states have included anti-discrimination provisions in their medical marijuana statutes. Typically, these provisions prohibit employers from discriminating against employees for being medical marijuana cardholders. However, some, such as Illinois, also offer reciprocal protection for employers who employ cardholders.

By contrast, some states that allow medical cannabis use expressly reserve the employers’ right to discriminate based on an employee’s marijuana use. For example, Montana’s statute provides that the law does not permit a cause of action against an employer for wrongful discharge or discrimination based on an employee’s use of cannabis.

Employers often still have rights even within states that have anti-discrimination provisions. For example, in New York, certified medical marijuana patients are deemed as having a “disability” for purposes of civil rights laws. Nevertheless, employers may still prohibit the employee from performing his or her duties while impaired by a controlled substance. Similarly, Nevada has included a provision in its medical cannabis program requiring employers “at tempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not: (a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.”

However, these protections generally do not apply to companies or employees that (a) receive federal funds (e.g. most if not all state universities), (b) receive funds that are guaranteed by the federal government (e.g. Medicare payments), (c) are parties to federal government contracts (e.g. Boeing), (d) 

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4 James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012).
7 Montana Code Ann. §50-46-301
are employed by an employer falling into the above categories, or (e) contract with an employer falling into the above categories. In addition, any company receiving a federal grant of any amount or contract of at least $100,000 is also subject to the Drug Free Workplace Act, which requires them to maintain a drug-free workplace policy and drug-free awareness program. Companies that fall into these categories are required by federal law to have a drug-free workplace and their employees may not invoke state protection.9

However, in Connecticut, the Federal District Court recently held that Bride Brook’s, a federal contractor, refusal to hire an individual who tested positive on a pre-employment drug test but had medical marijuana card was a violation of the state’s medical marijuana law. The court rejected the employer’s argument that the federal Drug-Free Workplace Act barred it from hiring the employee. Specifically, the court noted that the law does not require drug testing nor does it regulate employee’s off-duty use of illegal drugs outside of the workplace.10 The court also rejected the employer’s argument that hiring the employee would violate the False Claims Act.

State supreme courts can also be unsympathetic to medical cannabis use. The Colorado Supreme Court upheld the termination of an employee who tested positive for cannabis despite having used the drug off-duty to treat a legitimate debilitating medical condition. The Colorado Supreme Court affirmed that both state and federal compliance are required under the state's "lawful activities" statute. Therefore, employees consuming cannabis for medical purposes complying with state law but not federal law, are not protected by the statute.11 In Massachusetts, the Supreme Court held there is no separate private right of action for employees subject to adverse employment actions related to their use of medical cannabis. However, allowing off-site use of medical cannabis despite an employer’s drug-free workplace policy may be a reasonable accommodation under Massachusetts' disability discrimination law, if it is not an undue hardship on the employer's business.12

4. Drugs in the Workplace

Employers may still conduct drug tests if they are required by law to maintain a drug-free workplace. Generally, employers may require applicants to undergo drug tests. However, as state and local laws are quickly evolving, employers should evaluate whether including cannabis in pre-employment drug tests is still advisable. For example, the District of Columbia Council passed the Prohibition of Pre-Employment Marijuana Testing Act of 2015, which prohibits employers from testing employees for marijuana use until after an offer for employment has been made.

One thing to keep in mind: Current technology does not match the law. Most drug tests detect THC that has been in the system for several days, but often cannot detect very recent use. However, clinical trials are underway. Furthermore, may states have legal off-duty conduct laws protecting legal off duty use of marijuana. As a result, employers in states that prohibit discrimination based on an individual’s “card status” but allow employers to prohibit use during work face an uphill battle in enforcing.

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10 Noffsinger v. SCC Niantic Operating Co., LLC, dba Bride Brook Nursing & Rehab. Ctr.,
Employers should be mindful that their drug testing programs do not violate federal law as the ADA prohibits employers from discriminating against employees and applicants based on their disability. Because drug testing may reveal an employee or applicant’s disabilities, employers must conform to ADA requirements to avoid liability. Although the ADA, a federal statute, does not protect illegal drug use (marijuana remains illegal under federal law), employers who conduct pre-offer testing may unintentionally obtain more medical information about an applicant than the employer is entitled to have. This was the case in *EEOC v. Grane Healthcare Co. and Ebensburg Care Center, LLC*, 13 where the employer’s pre-offer urine test revealed four applicants’ lawful use of prescription medications and constituted a prohibited pre-offer “medical examination” under the ADA. With society’s growing acceptance of marijuana, and the legal risk that now arises from drug testing or taking disciplinary action against marijuana users, many employers are now questioning whether their workplace marijuana policies and practices should be revised.

Various state laws also regulate employers’ drug testing programs and tend to be more comprehensive than the ADA. State laws do not require private employers to test their employees for drugs. However, in the event that an employer chooses to implement a drug testing program, the majority of states provide legal guidance on how to properly do so. In addition, some states require drug testing for certain industries such as:

- Utah, employers must test employees if the employer’s organization stores or transfers high-level nuclear or radioactive waste within the exterior boundaries of the state (see Utah Code § 34-38-3(1)).
- Kentucky, drug and alcohol testing laws apply to both:
  - school bus drivers (702 Ky. Admin. Regs. 5:080(2)(a) and (c)); and

In some states, an employee’s use of medical cannabis outside of work may be a reasonable accommodation to an employer’s drug-free workplace policy. 14 Delaware law provides protections for medical cannabis users as employers are prohibited from assuming that an employee is under the influence of cannabis merely because it is detected in a drug test. 15 Even those employers who choose to accommodate an employee’s use of medical cannabis may require such employees to meet the same performance standards as other employees, even if poor performance is related to their use of medical cannabis.

Furthermore, companies in Industries with safety-sensitive employees that must comply with Department of Transportation regulations, such pilots, school bus drivers, truck drivers, train engineers, subway operators and emergency response personnel, among others cannot accommodate an employee’s use of medical marijuana under state law. 16 It is important that employers acknowledge times have changed and adjust accordingly by adopting effective drug testing policies that balance their interest in minimizing drug-related problems and maintaining a safe, adequate workforce. Employers should focus on prevention rather than punishment in order not to scare away potential applicants. Drug testing policies should (1)

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13 *EEOC v. Grane Healthcare Co. and Ebensburg Care Center, LLC, d/b/a Cambria Care Center, CV No. 3:10-250 (W. Dist. Pa. Mar. 6, 2014)*.

14 *Barbuto v. Advantage Sales and Marketing, LLC, 78 N.E. 37 (Mass. 2017))*.

15 16 Del. C. § 4907A.

16 49 CFR Part 40, at 40.151(e).
test only as necessary to protect safety and productivity; (2) encourage early intervention; and (3) leave room for management discretion.

C. Workers’ Compensation

Most employers are covered by state workers’ compensation laws. A majority of states require private employers with one or more employees to carry workers’ compensation insurance, but some states have an exception for small employers with less than a threshold number of employees. Some states allow employers to be self-insured for workers’ compensation. Workers’ compensation is generally the exclusive remedy for employees who are negligently injured during the course and scope of their employment, and can insulate employers from many tort claims by their employees based on workplace injuries.

In many states a worker’s use illegal drugs provides a basis for the employer to deny a workers’ compensation claim. However, given the increasing number of states legalizing medical cannabis an employers should pay attention to medical cannabis insurance issues. For example, the Connecticut Workers Compensation Commission in Pettrini v. Marcus Dairy, Inc. and Gallagher Bassett Service determined that medical cannabis should be reimbursable and rose to the level of necessary and reasonable care. The Connecticut case is under review as of the writing of this paper. However, the Maine Supreme Court held that, given the conflict between state and federal law, federal law preempted state law and vacated the Workers’ Compensation Board’s Appellate Division’s pro-employee decision on reimbursement for medical cannabis. These costs can be substantial, rising to the tens of thousands for just one year’s coverage for an employee’s prescription.

D. Health and Safety

Employers have a duty to protect employees and customers by providing a safe and healthy work environment. Historically, that meant that employers could develop and administer a zero-tolerance policy against workplace substance abuse and reserve the right to test for the presence of these substances.

For multi-state employers, it may be confusing when determining how to apply policies in a consistent fashion when there are operations with differing state laws on cannabis. There is no universal answer for all employers, and policies must take into account the goods and services each employer offers. For states without cannabis laws, employers can keep their current zero tolerance policy and rely on federal law.

Employers should also be aware of and comply with the Occupational Safety and Health Act as well as other laws/regulations governing safety in the workplace. While OSHA does not have a defined safety standard related to employee drug and alcohol use, there is a “general duty clause,” which requires an employer to provide a workplace free from recognized safety and health hazards. OSHA recognizes that impairment by drug (legal, prescribed or illegal) can constitute an avoidable workplace hazard. OSHA strongly supports comprehensive drug-free workplace programs. Thus, permitting employees who are under the influence of marijuana to work, especially in safety-sensitive jobs in the workplace, could create serious risks in the workplace and violate OSHA requirements. In some cases, drug testing may be

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necessary to provide a safe workplace under the general duty clause. This depends on the nature of the work and how drug use might affect safety.

The Act is also of particular import to cannabis farmers and processors, as both grow and processing facilities may have chemical hazards and toxic substances\(^{19}\) as well as indoor air quality issues.\(^{20}\) Processors often have confined spaces\(^ {21}\) and potentially dangerous equipment, such as extraction equipment and compressed gasses, and farmers should comply with the agricultural provisions where applicable.\(^ {22}\)

### E. Traditional Labor Issues

Traditional labor means labor unions, but its relevance spills over to non-unionized workforces too. The primary laws governing this area are the Railway Labor Act (RLA) and the National Labor Relations Act of 1935 (NLRA). The NLRA covers all employers engaged in interstate commerce above specified minimal standards. A common misunderstanding is that the NLRA only applies to unionized employers. Although many of the cases before the Board deal with a union environment, the NLRA applies equally to non-union employers. In recent years the Board has been more aggressively applying principles under the NLRA to non-union settings. The two primary purposes of the NLRA are to protect employees' rights to engage in concerted activity and regulate the collective bargaining agreement process.

The federal government has acknowledged the legitimacy of the ever-developing and expanding cannabis industry. In 2013, for the first time ever, the NLRB agreed to hear the case brought by United Food and Commercial Workers International Union against Wellness Connection of Maine involving a medical cannabis hemp division. Although the Maine case settled prior to the NLRB hearing, the industry as a whole found confusing the NLRB agreement to hear the case given that the Controlled Substances Act makes operations in cannabis unlawful under federal law. However, the NLRB’s Office of General Counsel/Division of Advice explained this confusion when it issued a memorandum detailing its recommendation to the regional NLRB to hear the Wellness Connection matter despite federal law. It included an explanation about why those working in the field of cannabis are "employees" for NLRA coverage purposes. It specified that NLRB jurisdiction was appropriate in the arena of medical cannabis because:

- Jurisdiction is prohibited only when exempted specifically by Congress.
- Even intended interstate commerce should not be a bar to NLRB jurisdiction.
- Labor disputes in this industry may have a meaningful impact because of the size and growth of its interstate commercial practices. Wellness Connection acquired enough supplies outside of its state to rise to the level of NLRB non-retail standards for jurisdiction and had sufficient revenue to achieve the standards for retail as well. In addition, medical cannabis labor disputes might interfere with intrastate regulation.

The NLRB took a second case involving a medical cannabis dispensary in 2015. The United Food and Commercial Workers Union filed an NLRB complaint after alleged anti-labor activity by New Jersey's Compassionate Care Foundation. The union alleged retaliation against those who favored unionizing by

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\(^{22}\) [https://www.osha.gov/dsg/topics/agriculturaloperations/generalresources.html](https://www.osha.gov/dsg/topics/agriculturaloperations/generalresources.html).
cutting their wages and work hours. As with the other case, it did not reach an NLRB hearing since the union withdrew its petition.

Still, cannabis industry employers must be careful with respect to their employment policies and procedures. The NLRB memo is not binding and does not have the force of law. However, it is uniquely persuasive guidance on NLRB priorities with respect to the topic. As a result, cannabis employers must account for the possibility of unionization and create policies that would withstand NLRB scrutiny.

F. Wage and Hour

One of the most complex issues in labor and employment, wage and hour law, may present additional challenges with respect to cannabis. For those with the kinds of conditions requiring the use of medical cannabis, accounting for working and non-working time may be tricky, for example, with those taking intermittent leave or making up for lost time with overtime hours. Those working in a startup environment common to the cannabis industry may work long hours with ill-defined positions, often performing the functions of multiple jobs within a given day or week. Many startups never contemplate paying overtime to their employees, operating under the false assumption that the overtime laws are inapplicable to startups. Key considerations for all industries, including cannabusiness include:

- Properly classifying workers as exempt or nonexempt.
- Complying with minimum wage and overtime laws.
- Ensuring workers are not improperly classified as independent contractors.

1. Classifying Workers as Exempt or Nonexempt

The classification of employees as exempt or nonexempt is a hotly litigated issue and poses a serious risk to businesses that get it wrong. Under the FLSA, employers must pay covered employees at least the minimum wage. Employees also must receive overtime payments for hours worked in excess of 40 hours per week unless they qualify for one of the statutory exemptions. The most common exemptions include those for:

- Administrative employees.
- Executive employees.
- Professional employees, including learned professionals and creative professionals.
- Computer professionals.
- Outside sales employees.
- Highly compensated employees.

(29 C.F.R. §§ 541.0-541.710.)

To qualify as an administrative, executive, professional, highly compensated, or computer professional employee under federal law, employees must meet both:

- The applicable exempt duties test, meaning the employee must spend a sufficient amount of time performing duties that qualify as exempt from the FLSA’s overtime provisions. Each exemption classification requires certain types of exempt duties.
- The salary basis requirement or, for certain exemptions, the fee basis requirement, unless the employee is:
• a business owner (see Can Startup Founders Agree to Work for Free?);
• a teacher;
• practicing law or medicine; or
• a computer professional earning at least $27.63 per hour for every hour worked.

An employer pays an employee on a salary basis if:

• The employee receives a predetermined salary each pay period that is not subject to reduction based on the quality or quantity of work performed.
• The predetermined salary is at least $455 per week, or $23,660 annually (or $380 per week, if the employee is employed in American Samoa by employers other than the federal government).

The test for determining exempt status may be different under state law. For example, the highly compensated employee exemption does not apply in California or Pennsylvania.

A common misconception is that a “salaried” employee does not get overtime and therefore is properly classified as exempt. However, merely paying an employee on a salary basis is not sufficient to qualify for an exemption. Proper classification requires a factual analysis of the duties and responsibilities actually performed by the employee and not just those listed on a job description. This is especially challenging for startups where employees may serve multiple functions without clearly defined job descriptions or titles.

In addition, employers should be prepared for potential changes to the minimum salary threshold and monitor developments on the status of the DOL’s position on this issue.

2. Complying with Minimum Wage and Overtime Laws

Both federal and state law impose strict requirements on the payment of minimum wage and overtime pay for most employees. Unless the employer can demonstrate that an employee qualifies for an exemption from the overtime requirements under the federal Fair Labor Standards Act (FLSA) and applicable state law, the employer must pay all nonexempt employees at least minimum wage and overtime in accordance with applicable wage and hour. Overtime is generally calculated at a rate of 1.5 times the employee’s regular rate of pay for all hours worked over 40 hours in a workweek under federal law, but may be calculated different under state law, such as in California.

Employers also must keep records of all hours worked by nonexempt employees, or suffer harsh penalties for non-compliance. For example, in 2014, LinkedIn agreed to pay nearly $6 million in settlement of a Department of Labor (DOL) audit (see DOL Press Release (08/05/2014)).

The FLSA applies to all private employers and employees who in any workweek are either:

• Engaged in interstate commerce or in the production of goods for commerce (individual coverage).
• Employed by an enterprise engaged in commerce or the production of goods for commerce with gross annual sales or business of at least $500,000 (enterprise coverage).23

23 29 U.S.C. §§ 203(r), (s), 206(a), and 207(a).
Each of the above tests is interpreted broadly. Most private and public employers, with the exception of family businesses, are covered (for example, see Reich v. Stewart, 121 F.3d 400 (8th Cir. 1997) and 29 U.S.C. § 203(d)).

If a business otherwise meets the test for enterprise or individual coverage, the employer cannot avoid liability for wage and hour violations by citing common industry practice of working more than 40 hours per week with no payment of overtime. Even if not technically covered by the FLSA, an employer forced to defend a claim for wage and hour violations likely will incur significant costs, even if it prevails on the merits. Moreover, business owners and management executives such as CEOs may be held individually liable as an “employer” under the FLSA if they exercise a sufficient level of operational control over the employees.24

Employers must also comply with state wage and hour laws with regard to nonexempt employees because the laws often impose:

- A higher minimum wage.
- More stringent overtime payment requirements.
- Required meal and rest break periods.

For example, in California, nonexempt employees are entitled to overtime pay if they work more than eight hours in one day. In other words, the overtime rate in California is calculated on a daily, rather than weekly, basis.

3. Independent Contractors and the Risks of Misclassification

Many businesses attempt to avoid significant tax and other liabilities every year by classifying certain workers as independent contractors instead of employees. Some business models in the new on-demand economy have been built on using independent contractors as their primary service providers instead of relying on the traditional employer-employee relationship. Simply referring to a worker as an independent contractor in a written agreement or otherwise does not protect a business from a legal challenge to their status. Further, a worker is not properly classified as an independent contractor just because the work is part-time, seasonal, or for a trial period.

Improper classification of workers as independent contractors can result in steep penalties. Recent federal and state enforcement efforts have resulted in a steady increase in agency audits and class and collective action lawsuits.

There are several tests used to determine whether independent contractors are properly classified. Although no one factor is determinative, the IRS test considers several factors grouped into three general categories:

- Behavioral control (the right to control the manner in which work is performed), including factors such as:
  - the type and degree of instructions given (independent contractors generally control how, when, and where the work is performed, while employees generally must follow their employer’s instructions);

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24 See e.g. Irizarry v. Catsimitidis, 722 F.3d 99 (2d Cir. 2013).
requiring the use of company equipment, such as computer and emails (independent contractors generally use their own equipment);

• the evaluation system used (independent contractors are typically evaluated only by the end result of the work, while employees may be evaluated on how the work is actually performed);

• the application of employee policies and procedures (independent contractors are not covered); and

• training (independent contractors generally do not receive training from the company that retains their services).

• Financial control (the right to control economic aspects of a worker’s activities), including factors such as:
  
  • the contractor’s degree of investment (independent contractors often make a significant investment in the tools and equipment they use to perform the work);
  
  • reimbursement of business expenses (independent contractors are typically responsible for their own expenses and overhead);
  
  • the contractor’s opportunity for profit or loss (independent contractors run a greater risk of incurring a loss in connection with a particular engagement);
  
  • the contractor’s ability to service multiple clients at the same time (independent contractors generally do not have exclusivity obligations); and
  
  • method of payment (independent contractors are often paid a flat fee for an engagement, while an employee is generally guaranteed a regular wage for the period of time the employment relationship continues).

• The relationship between the parties, including factors such as:
  
  • written contracts (while written contracts are not sufficient to determine a worker’s status, they can help indicate the parties’ intent);
  
  • employee benefits (independent contractors typically are not entitled to receive retirement, health insurance, and other similar benefits an employer provides to its employees);
  
  • permanency of the relationship (employees are typically engaged for indefinite periods and can be discharged for any or no reason without notice, while independent contractors are typically engaged for specified periods or projects and cannot be discharged except under the terms of their contract);
  
  • whether the services are provided through a corporate entity or through an individual service provider (employees are hired in their individual capacities while independent contractors who provide services to the general market typically form a business entity, such as a limited liability company (LLC) or corporation); and
  
  • whether the services provided are key aspects of the business (where the individual’s services are a key aspect, it is more likely that the worker is actually an employee of the company).

Many states consider similar factors, though the tests may be enumerated differently than the IRS test (see, for example, NYSDOL website). California recently joined other jurisdictions in adopting a strict “ABC” test for determining independent contractor status. Under this test, a worker is deemed an employee unless the business entity can establish each of the following:
• That the worker is free from the control and direction of the hirer regarding performance of the work, both under the contract and in fact.
• That the worker performs work that is outside the usual course of the hiring entity’s business.
• That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.²⁵

Some states, such as California, require employers to report their hiring of independent contractors in certain situations. New York City now requires written agreements for certain independent contractor relationships.

Although the benefits of properly classifying a worker as an independent contractor are significant, the financial costs and penalties of improperly making that classification can be serious. Classification lawsuits are costly to defend and potentially can disrupt or destroy a company’s business built on using independent contractors. Misclassification suits often result in settlement payments in the millions of dollars. Because contractors avoid many of the tax and other employment law requirements of an employment relationship, the IRS, state government agencies, and courts construe independent contractor status narrowly and impose large penalties for improper classification.

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How Lawyers Can Successfully Break Into The Cannabis Industry

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CEO, Green Flower
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“We train people to succeed in the cannabis industry”
Top 10 Areas Where Businesses Struggle In Cannabis Opportunities For Lawyers
Every plant touching business requires BOTH State and Local license to operate.

Licenses are competitive / require strategy & differentiation.

Companies need counsel to prepare, guide, and navigate the licensing process.

Securing State & Local Licenses
The state and local licensing framework in cannabis

All the agencies involved / their needs

How to be competitive and strategic
Because of federal illegality, companies must create different entities for protection.

Structures mitigate risk, optimize deductions, and allow for growth.

Companies need counsel to recommend structures & maintain operational efficiency.
2 Knowledge You Need

- Common business entities in cannabis
- Constitutional provisions on picking the right legal structures
- How multiple business entities and deductions work in the cannabis industry
The cannabis industry is filled with shady characters

Creating rock-solid vendor contracts is imperative

Companies need counsel to protect them
3 Knowledge You Need

- How to select the right vendors in cannabis
- Understanding of the supply chain
- Good contracting practices for mitigating risk of loss
Because of federal illegality, dealing with money is a huge challenge.

280E, bank closures, cash management issues, and more

Companies need counsel to help them operate effectively
Knowledge You Need

- The cash management solutions for the cannabis market
- The financial services that are available to cannabis businesses
- How to navigate the tax codes with respect to cannabis
There’s enormous risk for cannabis companies

Product liability, IP protection, consumer safety, etc.

Companies need to understand where they can get protection and where they can’t
5 Knowledge You Need

- Types of insurance coverage available in cannabis
- How product liability insurance applies to cannabis
- Safety protocols and insurance policy language to protect businesses
Companies are really struggling with their employee cannabis policies.

Medical use vs adult use, drug testing, what constitutes impairment, etc.

Companies need counsel to tell them what’s legal, fair, and balanced.
Knowledge You Need

1. How companies can accommodate recreational and medicinal cannabis in the workplace
2. Constitutional provisions for adult use cannabis
3. Privacy laws and other regulations that affect how employers treat their employees
There are so many restrictions and challenges here.

Infringements can cause fines, blocks, or shut downs.

Companies need very clear guidance on what they can and can’t do.
7 Knowledge You Need

- Understand cannabis packaging and labeling regulations
- Standards for cannabis advertisement, packaging, and labeling
- How the FDA is approaching cannabis products
Cannabis companies have immense challenges with real-estate.

Zoning, licensing, and greed.

Companies need counsel to negotiate real estate contracts that protect the company.
Knowledge You Need

- State and local statutes and legal requirements in cannabis for real estate
- How to negotiate real estate contracts in the cannabis context
- How to handle legal controversies in cannabis real estate
Protecting intellectual property in cannabis is a major key to success.

Securing cannabis IP has been prohibited or very difficult.

Companies need counsel to determine what's possible and the strongest path forward.
9 Knowledge You Need

- Background for IP protection in the cannabis industry
- State vs federal protection strategies
- Licensing IP rights / trade secrets in cannabis
Cannabis is still dealing with a ton of stigma

This makes everything more difficult

Companies need counsel that can bring trust, credibility, and influence
10 Knowledge You Need

- Understand the history of cannabis
- Understand who’s consuming cannabis (and why)
- Understand how big / important cannabis will be
Cannabis companies need a TON of legal support

The more knowledgeable you become, the more opportunity you will have

This industry needs more great lawyers who genuinely want to help
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