



Through the Thicket:
**ISSUES WHEN
WORKING IN, OR WITH,
THE LEGAL CANNABIS
INDUSTRY**

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INTRODUCTION

The cannabis decriminalization movement continues to flourish. A significant majority of states have legalized medical marijuana, and an increasing number have legalized recreational marijuana. This growth presents tremendous opportunity, both for investors and entrepreneurs who wish to work directly in the cannabis industry, and for existing businesses that wish to work with the cannabis industry. But this opportunity is not without obstacles and risk, not the least of which is that cannabis remains illegal under federal law. This

article will address the broad contours of state marijuana programs, as well as some of the more noteworthy hurdles cannabis businesses face as a result of the continued federal illegality.

STATE LAWS

Each state that has implemented a form of cannabis decriminalization has done it differently. Most significantly, they differ in the uses permitted. Most states have approved medical marijuana, which allows qualifying patients to purchase cannabis products. Some states have approved only

high-CBD/low-THC forms of cannabis for medical purposes (THC is the psychoactive component of cannabis, so this form would not produce the “high” typically associated with the plant). A smaller—but growing—number of states allow adults to use marijuana for recreational purposes, and in many respects treat it just like alcohol. Even among states with similar approaches, there can be significant differences in the fundamental structure of a state’s system. For example, some states allow people to grow their own marijuana, while others permit only licensed commercial cultivators.

Each state has also implemented its own regulatory framework, and these rules can vary significantly by jurisdiction. This patchwork of laws poses difficulties, particularly since regulatory compliance is absolutely key for cannabis businesses, since operating outside the rules is likely to be considered a criminal act even under state law. To be sure, as the cannabis industry has matured, and as lawmakers have learned from other states, certain common regulatory principles have emerged. For example, most states have regulations pertaining to cannabis facility security, labeling and packaging requirements, product tracking, and other safety issues. But the devil is in the details, and the differences that remain are such that nobody should embark on a cannabis industry venture without a thorough understanding of the applicable rules.

FEDERAL POSITION

Polls show a majority of Americans favor legalizing cannabis, and it is impossible to ignore the increasing decriminalization at the state level. Nevertheless, under federal law, cannabis remains a Schedule I drug, meaning that the DEA believes it has a high potential for abuse and no recognized medical use. This categorization puts marijuana in the same class as heroin, LSD, and ecstasy. Efforts to persuade the DEA to re-schedule cannabis have thus far been fruitless. The industry is hopeful that Congress will take action in the near future, but as of this writing, anyone who grows, sells, or possesses cannabis is committing a federal crime, regardless of what a particular state may say. (The law in this area tends to move quickly, and it would not surprise this author at all if the federal government has passed cannabis legislation by the time of publication).

The federal illegality creates all sorts of problems for the cannabis industry. For example, cannabis businesses can struggle to turn a profit because they are not entitled to the same tax deductions that federally legal businesses can take. They have also found it difficult to protect their intellectual property, since the most robust patent and trademark protections are federal. Landlords, equipment lessors, and cannabis business owners worry about criminal prosecutions, RICO lawsuits, and property forfeiture. Many more of the things traditional businesses may take for granted are also hard to come by for the cannabis industry, e.g., adequate legal advice, property and liability insurance, banking services, and bankruptcy protections.

Though the federal government has not yet offered any legislative fixes, it has

recognized and attempted to deal with some of the problems created by the state/federal conflict. Its efforts, though, have largely been unsuccessful. The Department of Treasury attempted to address the cannabis industry's banking problem by issuing guidance to banks on how to comply with money laundering laws when serving cannabis customers. Nevertheless, most large banks remain wary of the compliance costs and regulatory risks. In 2013, the Department of Justice issued what has come to be known as the "Cole Memo." The Cole Memo sets out the priorities federal prosecutors should consider when deciding whether to prosecute a cannabis business. These priorities included things such as preventing the distribution of marijuana to minors. While the Cole Memo did not change the law in any respect, it provided comfort to state-licensed cannabis businesses who were compliant with state law and otherwise operating responsibly. Attorney General Sessions rescinded the Cole Memo in early 2018, but many have argued that notions of prosecutorial discretion and the prudent use of enforcement funds continue to militate against prosecuting state-legal cannabis businesses.

Perhaps the most important federal measure affecting the cannabis industry is the Rohrabacher-Blumenauer Amendment (previously the Rohrabacher-Farr Amendment), which was first enacted as part of the 2014 omnibus spending bill. The R-B Amendment essentially prohibits the Department of Justice from using federal funds to prosecute state-legal medical marijuana businesses. There are some important caveats. First, the R-B Amendment does not apply to recreational cannabis businesses. Second, the R-B Amendment only protects those businesses that are strictly compliant with a state's regulatory scheme. And third, the R-B Amendment has served as a temporary stop-gap, and it is possible that it may not be renewed in a future budgetary bill.

The long and short of it is this: marijuana remains illegal under federal law, but there are obstacles to enforcement and protections against enforcement that have thus far prevented a draconian crackdown on state-legal businesses. This situation remains fluid, as more states come online with new or broadened programs, and the federal government decides how to deal with this trend.

WORKING IN OR WITH THE CANNABIS INDUSTRY

Despite the murky state of the law and the associated risks, people are flocking to

the cannabis industry in droves. It's easy to see why. While projections vary, there seems to be general agreement that the cannabis industry in the U.S. will continue to thrive, and see revenues in the tens of billions of dollars over the next several years. So of course entrepreneurs want to build cannabis businesses and investors want to invest in cannabis businesses. Other industries want in, too. Equipment manufacturers, software designers, app developers, testing facilities, commercial property owners, lawyers, accountants, and more, all want to serve this booming market. What's more, optimism abounds that the federal government will take the necessary steps to legitimize the cannabis industry.

Until then, though, those in or around the cannabis industry must be comfortable with ambiguity and understand the risks. Any state license holder must adopt an attitude of vigilant compliance with applicable regulations. They should assemble a team of trusted employees and advisors, know the law inside and out, and implement foolproof policies and procedures. Even ancillary businesses that do not "touch the plant" should assume a similar mindset. For one, a state's cannabis regulations may apply with equal force to the ancillary business, particularly as it pertains to things like entering a cannabis facility. Moreover, ancillary businesses should perform some due diligence with respect to their marijuana industry clients, and ensure that the cannabis business is properly licensed, compliant, and responsible.

CONCLUSION

The growth of the medical and recreational cannabis industry has been nothing short of remarkable. The industry has overcome or sidestepped many obstacles—often in innovative and creative fashion—and there is no reason to believe this growth will stop anytime soon. It remains a risky field, though, and people interested in working in or with the cannabis industry must appreciate that risk, understand the law, and plan their operations in a way that reduces the risks as much as possible.



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