

Counseling a Cannabis-Related Business: Overview

DAVID S. RUSKIN, HORWOOD MARCUS & BERK CHARTERED WITH PRACTICAL LAW COMMERCIAL TRANSACTIONS

Search the [Resource ID numbers in blue](#) on Westlaw for more.

This document features a few sections of the full resource found on Practical Law. This is one example of the thousands of other up to date, available resources like Practice Notes, Standard Documents, Checklists, Toolkits, and more, that can be accessed as part of a subscription to Practical Law.

A Practice Note providing advice to attorneys on counseling a cannabis-related business. This Note provides a brief overview of the regulation of cannabis and considers the top legal issues faced by a cannabis-related business, focusing on the conflict between federal law and state laws where medical or adult use recreational marijuana is legal.

The emerging industry of cannabis continues to be one of the more intriguing in recent memory. With more states and countries legalizing cannabis in varying forms, the industry is likely to continue to expand. Many companies are moving into the cannabis business or expanding already existing businesses to meet the needs of the quickly growing cannabis industry.

Whether it is the harvesting of hemp for use in health products and clothing, the extraction of cannabidiol (CBD), one of cannabis' non-psychoactive cannabinoids with its proven health and wellness benefits, the cultivation and dispensing of different strains of tetrahydrocannabinol (THC)-containing marijuana for medical or adult recreational use from smoking, vaping, or ingesting edible products, or the multitude of ancillary cannabis-related companies, many of which need an infusion of capital from willing investors, the business opportunities in the cannabis world are vast.

However, cannabis remains an illegal drug at the federal level, presenting numerous challenges for cannabis-related companies and their counsel. This Note examines the top legal issues that

practitioners must consider when counseling either a plant-touching cannabis company or a more indirect cannabis-related business. This Note reviews:

- Federal regulation of cannabis (see Federal Regulation of Cannabis).
- State regulation of cannabis (see State Regulation of Cannabis).
- The challenges arising from the conflict between federal and state laws in the following areas:
 - banking (see Conflict Between Federal and State Laws: Banking);
 - tax (see Conflict Between Federal and State Laws: Tax);
 - employees and workplace considerations (see Conflict Between Federal and State Laws: Employees and Workplace); and
 - bankruptcy (see Conflict Between Federal and State Laws: Bankruptcy).
- Specific challenges in the areas of real estate, intellectual property, and dispute resolution (see Specific Challenges to Consider: Real Estate, Intellectual Property, and Dispute Resolution).
- Business structuring considerations (see Business Structuring Considerations).
- Divergent state and local laws (see Divergent State and Local Laws).

FEDERAL REGULATION OF CANNABIS

Cannabis became illegal in the United States in 1937 with the Marihuana Tax Act. In 1970, Congress enacted the Controlled Substances Act (CSA) (21 U.S.C. § 801) under which cannabis was codified as an illegal substance at the highest level, a Schedule I drug under the CSA.

After years of wrangling with prohibition, some states slowly began to enact their own laws allowing for the growth, sales, and use of marijuana for medical purposes. The first major step toward broader change came in 2013, when Deputy Attorney General James Cole issued a memo (the Cole memo) stating that the US Department of Justice (DOJ) did not intend to seek prosecution against any person or company that remained in compliance with a state legal cannabis program (at that time, no fewer than 17 states had laws allowing

some form of legalized cannabis). The Cole memo further identified the eight most important areas where the DOJ instead intended to focus prosecution:

- Distribution of marijuana to minors.
- Funding of criminal enterprises.
- Interstate transport.
- Growing on public property.
- Possession on federal property.
- Cover for trafficking other illegal drugs.
- Preventing use of firearms with cultivation.
- Preventing drugged driving.

In 2014, Congress approved the Rohrabacher-Farr budget amendment which prevented the use of any DOJ funds for inhibiting states from instituting medical cannabis laws. This budget amendment was another significant step toward legalization and it has been passed in some form each year since then. Despite Attorney General Jeff Sessions' rescission of the Cole memo in January 2018, there were no DOJ prosecutions against cannabis companies in 2018 and the wave of support for the numerous bills in Congress to legalize cannabis federally continued to grow. The recently enacted Agriculture Improvement Act of 2018, Public Law 115-334, commonly referred to as the Farm Bill, in December 2018, making hemp and hemp-derived products federally legal, is another sign of movement toward full cannabis acceptance.

STATE REGULATION OF CANNABIS

States are continuing to legalize cannabis in varying degrees and methods. Some states have legalized marijuana for medical use only, others for both medical and adult recreational use. Some states have begun to create a regulatory scheme for federally legalized hemp and CBD. Some states only allow for a limited use of products containing lower levels of THC, while others have agreed to decriminalize possession of smaller amounts of marijuana. Still others allow for growing and possessing marijuana but prohibit or limit selling it. Differences abound among the states and therefore the need to stay informed about the differing laws and jurisdictions. For more information, see Practice Note, State Medical and Recreational Marijuana Laws Chart: Overview ([7-523-7150](#)).

The key for any cannabis-related business in the current climate is simple: ensure full compliance with state and local laws. Every state's law regarding cannabis is different. For every new state law lifting

a ban on cannabis in some form, the drafting and implementing of new regulations is also necessary for both medical and recreational adult use. These include requirements, just to name a handful, such as licensing and inspection of cultivation facilities, licensing for retail sales, limitations for possession and use, seed-to-sale tracking systems for thorough oversight, collection of sales taxes, and penalties for illegal conduct. With differing and changing state laws in the face of ongoing federal illegality, the margin for error is small. But the opportunities are there for diligent participants to help the industry progress. Effective legal counseling in the cannabis industry is crucial.

CONFLICT BETWEEN FEDERAL AND STATE LAWS

A primary challenge for counseling any cannabis-related business is the ongoing tension between a particular state's law, where cannabis is legal in some form, and federal law, under which cannabis remains a Schedule I illegal drug under the CSA. Until cannabis is de-scheduled from the CSA as federally illegal or a new federal law is enacted that unequivocally defers to individual state laws and protects state-compliant businesses, the conflict between federal and state law is likely to remain a high hurdle for cannabis-related businesses to overcome.

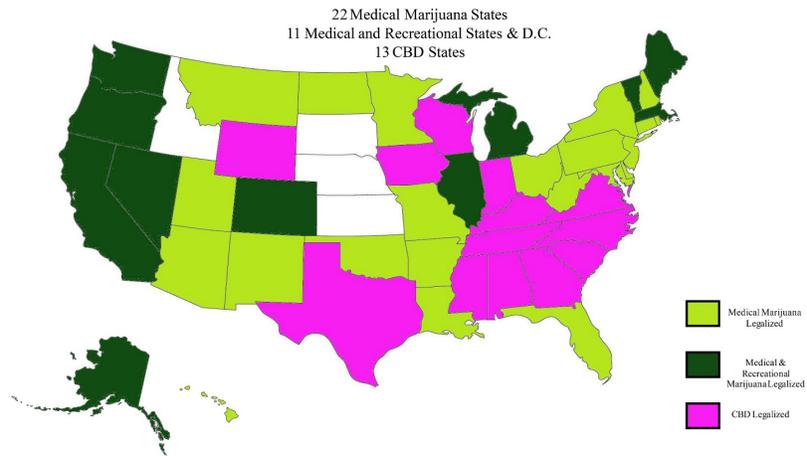
Cannabis-related businesses of all kinds are faced with various concerns and some are forced to test the legal waters for clarity. The current unknown legal scenarios are numerous, with some state courts even having determined that federal law preempts state medical marijuana laws. Navigating the new roads being paved in this industry is likely to be challenging for cannabis-related businesses and their counsel.

Counsel should monitor the status of the pending federal bills regarding cannabis. In the most recent US Congress (115th), there were more than 60 different versions related to some form of cannabis legalization. It is expected that this session (116th Congress) is likely to push further with proposals that:

- Provide deference to state cannabis laws.
- Allow for financial institutions to do business with cannabis-related businesses without fear of criminal prosecution in states where cannabis is legal.
- Prohibit the DOJ from interaction if the cannabis-related business is in compliance with state law.

These changes, if enacted into law, would remove many legal hurdles for cannabis-related businesses, even without a full de-scheduling of cannabis from the CSA.

MAP OF LEGALIZED CANNABIS STATES

**ABOUT PRACTICAL LAW**

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

To see the entire resource, **request a free trial of Practical Law.**