



Is Marijuana "Legal" Now? The Cannabis Industry and Your Risk

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As more states join the majority, regulating some form of medical or recreational marijuana, the federal government's position remains unchanged. Under federal law, it remains illegal to cultivate, process, distribute or possess marijuana. This has placed entrepreneurs, investors and service providers in a quandary. This alert provides a legal analysis and a risk assessment for participants in a new, evolving and uncharted industry.

Federal Regulation of Marijuana

All drugs must be approved by the Food and Drug Administration (FDA) if they are sold legally in the United States. The FDA will only approve a drug after the FDA's Center for Drug Evaluation and Research (CDER) determines that it provides benefits that outweigh its known and potential risks for the intended population. Certain drugs are further deemed "controlled substances" and regulated by the Drug Enforcement Administration (DEA) pursuant to the Controlled Substances Act of 1970 (CSA). The CSA divides controlled substance into five "schedules" based on the drug's abuse potential, medical applications, and safety.

Marijuana, cannabinoids and their analogues, in whatever form and by whatever name, are Schedule I drugs, like heroin, LSD or Psilocybin, due to their high potential for abuse, lack of any currently accepted medical use in treatment in the United States, and lack of accepted safety for use of the drug or other substance under medical supervision. (21 U.S.C. § 812(b)(1)). Medical marijuana cannot be legal, under federal law, unless and until the FDA reclassifies it as a Schedule II drug, something the current administration is unlikely to pursue after considering the factors listed in Section 201 (c), [21 U.S.C. § 811 (c)] of the CSA:

1. Its actual or relative potential for abuse.
2. Scientific evidence of its pharmacological effect, if known.
3. The state of current scientific knowledge regarding the drug or other substance.
4. Its history and current pattern of abuse.
5. The scope, duration, and significance of abuse.
6. What, if any, risk there is to the public health.
7. Its psychic or physiological dependence liability.
8. Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

Manufacturing and distributing marijuana remain illegal under federal law, and it is punishable by up to life imprisonment to “knowingly or intentionally. . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.” (21 U.S.C. § 841(a)). Even a licensed doctor or pharmacist may not legally prescribe marijuana as it does not have the legitimate medical purpose required by 21 C.F.R. § 1306.04.

Federal statutes also make it illegal to conspire to traffic drugs (21 U.S.C. § 846) or to aid and abet an offense against the United States (18 U.S.C. § 2). Further, it is unlawful to knowingly conduct or attempt to conduct a financial transaction that in fact involves the proceeds of specified unlawful activity or with the intent to promote the carrying on of specified unlawful activity (18 U.S. Code §§ 1956 and 1957). These charges are commonly referred to as “money laundering” and often are used interchangeably, though § 1957 removes the intent requirement and adds a requirement that the transaction be for greater than \$10,000.

State Law Trends

The clear political trend is that states are moving toward some form of legalized medical marijuana and a smaller number have decriminalized possession of small amounts for personal use. Per the National Council of State Legislatures, Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington and the District of Columbia have legalized small amounts of marijuana for adult use. As of Jan. 22, 2018, the Vermont legislature passed adult-use legalization legislation, and the governor signed the bill. The measure does not set up a regulatory system for sales or production.

Some 28 states, the District of Columbia, Guam and Puerto Rico have comprehensive medical marijuana programs, and at least another 17 states allow the use of products with low-THC (the active ingredient in marijuana) for medical purposes.

Most political observers believe that additional states will legalize medical marijuana in the coming years and that the revenue recognized by businesses, and the resultant tax receipts, will incentivize legislators looking to close budget gaps, specifically states like Virginia that are likely to expand Medicaid under the Affordable Care Act soon.

Federal Enforcement Under Presidents Obama and Trump

On August 29, 2013 Deputy Attorney General Cole issued a policy memorandum on behalf of the Obama Administration. (Memorandum from James M. Cole, Deputy Attorney General, United States Department of Justice, to United States Attorneys, Guidance Regarding Marijuana Enforcement, see [here](#)). Contrary to the wishful thinking of some at the time, the Cole Memorandum did not provide “immunity” or otherwise insulate individuals or corporations from prosecution. The policy simply stated that federal prosecutors should not charge cases against businesses that are complying with state laws. Notably, Cole did not address civil monetary penalties, regulatory action or civil forfeiture. Civil forfeiture allows the federal government to seize any assets involved in or traceable to a marijuana business. (18 U.S.C. §§ 981, 983)

In January 2018, Attorney General Jeff Sessions, citing a “return to the rule of law,” issued a Department of Justice (DOJ) Memorandum For All United States Attorneys in which he stated that “previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded,” see [here](#). This was an explicit repudiation of the Cole guidance and signaled Sessions’ long-standing policy regarding any form of legalized marijuana.

Though several United States Senators, Governors and Attorneys General in states with medical or recreational marijuana laws objected, the potential for federal prosecutions of marijuana possession,

manufacturing and distribution remains. Several current United States Attorneys, including those in states like California, Colorado, Oregon, Vermont and Washington, and in the District of Columbia, have issued statements expressing tepid support for the Sessions Memo while noting that each will continue to focus on “hard drugs” per Maine’s United States Attorney, Halsey B. Frank. Bob Troyer, U.S. Attorney for the District of Colorado, the first state to have legal, regulated sales of recreational marijuana, issued the following statement:

“Today the Attorney General rescinded the Cole Memo on marijuana prosecutions, and directed that federal marijuana prosecution decisions be governed by the same principles that have long governed all of our prosecution decisions. The United States Attorney’s Office in Colorado has already been guided by these principles in marijuana prosecutions — focusing in particular on identifying and prosecuting those who create the greatest safety threats to our communities around the state. We will, consistent with the Attorney General’s latest guidance, continue to take this approach in all of our work with our law enforcement partners throughout Colorado.”

Washington, DC is a jurisdiction with a growing “gift economy” whereby vendors sell overpriced consumer goods and include “free” or “souvenir” marijuana, exploiting an alleged grey area in the District’s laws. Jesse K. Liu, the United States Attorney for the District of Columbia, said in a statement:

“The U.S. Attorney’s Office for the District of Columbia is committed to reducing violent crime and dismantling criminal gangs and large-scale drug distribution networks that pose a threat to public safety. In accordance with the Attorney General’s memo, we will utilize long-established principles of prosecutorial discretion in pursuing cases and fulfilling that commitment.”

These statements, from federal prosecutors appointed by President Trump, are representative of those from other prosecutors. These statements provide individuals and companies engaged in marijuana cultivation and sale with cold comfort. Each prosecutor seemingly acknowledges that federal marijuana prosecutions are not public safety priorities, without declining to bring marijuana cases in the future, particularly where accompanied by violent crime, organized crime or other aggravating factors.

Support and Ancillary Services and Products

Lawyers, financial institutions, landlords, vendors, payment processors, investors and others may not be directly involved in cultivating or distributing marijuana, but may be prosecuted as co-conspirators, aiders or abettors or under 21 USC § 856, which makes it a separate crime to “manage or control any place. . . for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.” One of the authors of this memorandum has personally prosecuted large scale “grow houses” in the Eastern District of Virginia pursuant to this statute.

Industry observers and participants are rightly concerned that the Department of Justice may choose to forgo a criminal prosecution in favor of a civil action against a marijuana industry participant, even without a criminal charge. Given the hundreds, if not thousands, of potential defendants, it is most likely that any such action would be initiated against an individual or entity with prior convictions, accompanying impact on public safety or some other aggravating factor.

A review of news articles, federal prosecutions, industry trade publications and other research does not reveal an uptick in federal prosecutions of those involved in medical or recreational marijuana, whether in a state where “legal” or not. Given the limited investigative and prosecutorial resources available, the finances involved and the political climate, a prosecution of a support or ancillary service provider is unlikely now. Should the Department of Justice charge a participant in a state that has some form of legalized marijuana, it would be in an exceptional case. Recognizing that federal law is not affected by states’ actions regarding medical or recreational marijuana, the exposure for a market participant that operates within the confines of the laws and regulations of the state or states in which it operates are

greatly reduced. But, exposure for violations of federal law is not eliminated.

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