

We Call it "Cannabis" Now

AN INSURANCE CONTINUING EDUCATION SEMINAR

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Agenda

1. Introduction
2. What is the Legal and Regulatory Climate?
 - Federal
 - State
3. Commercial Property and Liability Considerations

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Agenda

4. Workers Compensation and Cannabis
5. Employment Practices Considerations Generally and Issues in Professional Liability
6. Products Liability and Products Recall

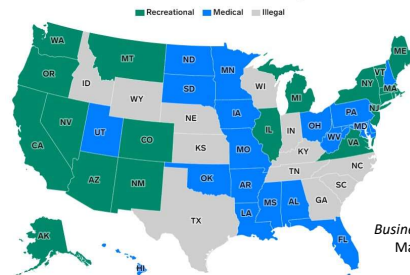
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Introduction

JUST HOW BIG IS THIS? HOW MUCH IS OUT THERE?

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States where cannabis is legal



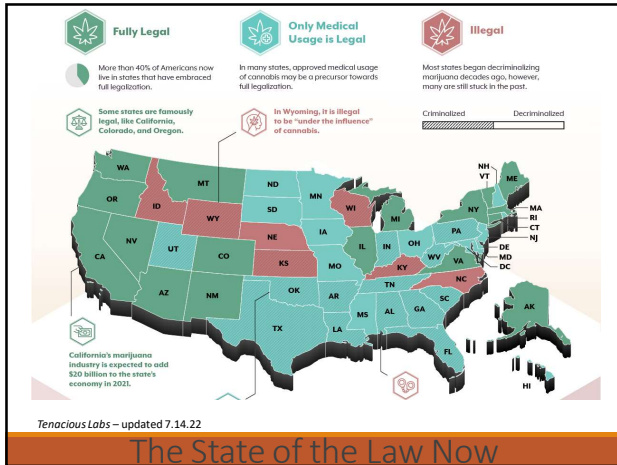
Business Insider, May 2022

Note: Updated as of May 27, 2022. Map: Shayenne Gal/Insider

INSIDER

The State of the Law Now

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Wait...why the discrepancy?

Dr. Wells explains:

"Marijuana consists of the dried flowers and leaves from the Cannabis sativa plant. The cannabis plant contains over 500 chemicals, including over 100 different cannabinoids, one of which is a psychoactive substance known as delta-9-tetrahydro-cannabinol (THC)."

- Dr. Brenda Wells, *Legalizing Marijuana: Risk Management And Insurance Implications*, The Risk Report (Jan. 2018)

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Wait...why the discrepancy?

Dr. Wells explains:

THC binds to brain receptors and produces a number of physiological effects, including pleasure, relaxation, pain relief, decreased muscle spasticity, and even reduction of glaucoma eye pressure. **THC is the primary cause of the "high" that results from ingesting marijuana.**

Marijuana as most commonly ingested via smoking, but it **can also be consumed via food items** (e.g., candy, brownies, cookies, etc.), as well as by vaporization and tinctures.

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Wait...why the discrepancy?

Dr. Wells explains:

- "The cannabis plant is also sometimes referred to as hemp; however, they are not the same. Cannabis and hemp have certain genetic differences, and the two are different primarily in terms of their THC content.
- "Marijuana is used for medicinal and recreational purposes, whereas hemp is largely used for industrial products, such as housing construction materials, clothing, and paper.
- "[Typically] the terms 'marijuana' and 'cannabis' ... refer to the plants and products that contain THC. When the term 'hemp' is used, that refers to the plants that are considered to have little or no THC in them."

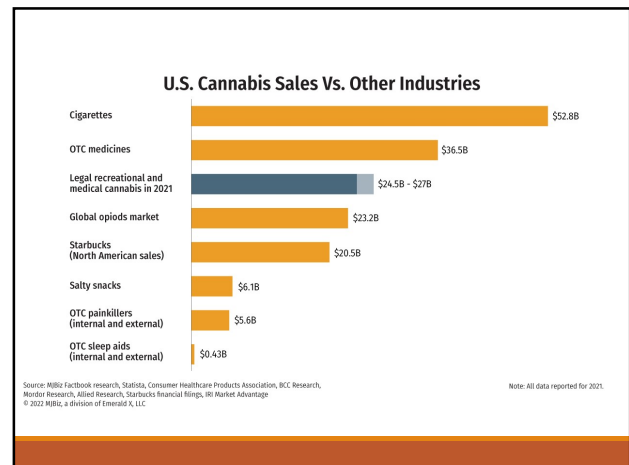
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The Size of the Market: Grandview Research

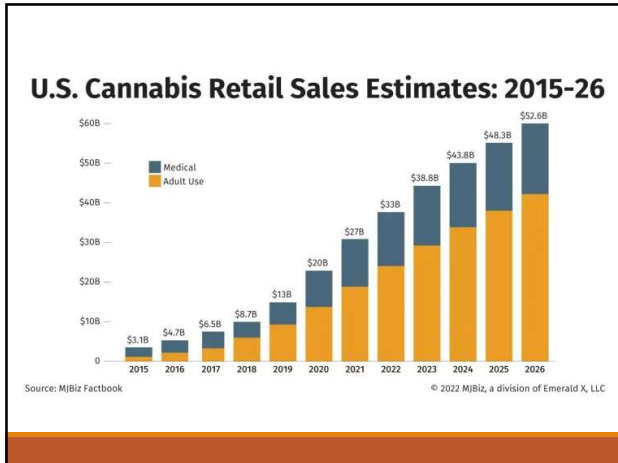
- "The global legal marijuana market size is expected to reach USD 102.2 billion by 2030 and is expected to grow at a CAGR of 25.5% from 2022 to 2030."
- "The medical segment accounted for the largest revenue share of over 80.0% in 2021 owing to the high demand among millennials and patients for medicinal marijuana"
- "The oil and tinctures product type segment accounted for the largest revenue share of over 50.0% owing to the low price and ease of accessibility of flowers compared to other products"

<https://www.grandviewresearch.com/press-release/global-legal-marijuana-market>

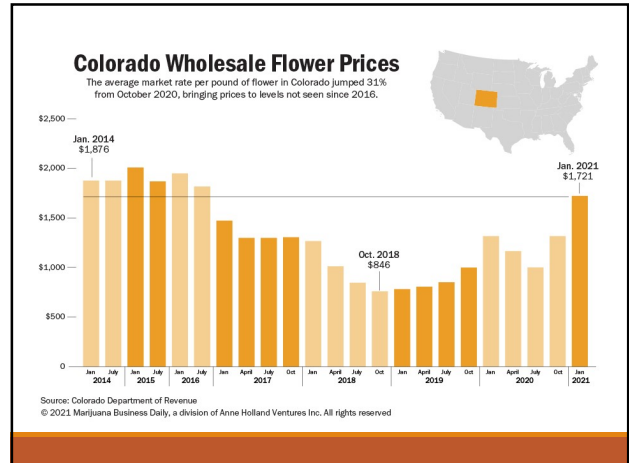
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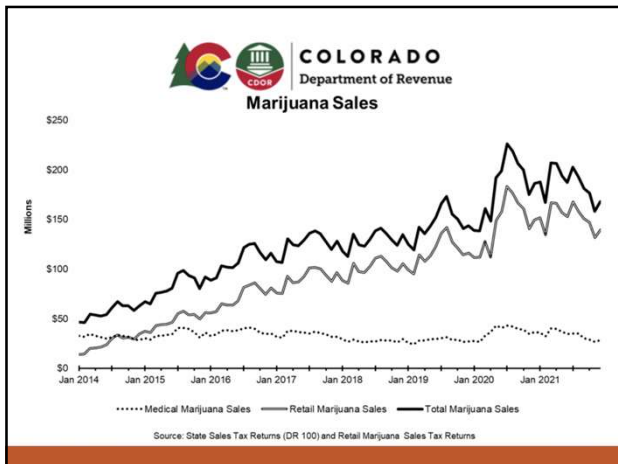
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Legal and Regulatory Climate – Federal

WHERE IS THE STATE OF THE LAW NOW?

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A Little History

According to History Channel,

- ✓ Hemp growing dates back to the Virginia colony
 - Considered a "proper form of currency"
 - Mandated to be grown on all farms
- ✓ "The drug started gaining traction in the U.S. in the 1910s after Mexican refugees brought marijuana with them as they fled the violence of the Mexican Revolution. In the 1930s, it became popular among the hepsters, the black jazz community made up of 'hep cats' like jazz singer Cab Calloway, who had a hit with his song 'Reefer Man.'"

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A Little History

FROM THIS:  *Biography.com*

TO THIS:  *Wikipedia images*

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A Little History

"Hemp cultivation became illegal in the U.S. in 1937, under provisions in the Marihuana Tax Act, which was drafted by prohibitionist Harry Anslinger. In the intervening eight decades, American culture has steadily warmed to the idea of reviving the agricultural commodity and its many commercial uses."

Eric Sandy and Melissa Schiller, "Congress Passed the 2018 Farm Bill, Legalizing Hemp. What's Next for Cannabis Businesses?" Cannabisness Times

December 13, 2018

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The 2018 Farm Bill

Sandy and Schiller

"The Farm Bill removes hemp from the Controlled Substances Act and allows farmers to pursue federal hemp cultivation permits, while individual states can regulate the industry within their borders as they see fit. Already, 40 states have established hemp cultivation 'pilot programs' for industrial and commercial purposes, although the plant has been strictly regulated."

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The 2018 Farm Bill

The Farm Bill, hemp legalization and the status of CBD: An explainer

John Hudak of the

Brookings Institute, Friday, December 14, 2018

"It's true that hemp policy in the United States has been **drastically transformed** by this new legislation. However, **there remain some misconceptions** about what, exactly, this policy change does."

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The 2018 Farm Bill

Hudak:

- "First...hemp cannot contain more than 0.3 percent THC, per section 10113 of the Farm Bill."
- "Second, there will be significant, shared state-federal regulatory power over hemp cultivation and production." This means...

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The 2018 Farm Bill

Hudak:

"[S]tate departments of agriculture must consult with the state's governor and chief law enforcement officer to devise a plan that must be submitted to the Secretary of USDA."

- "Third, the law outlines actions that are considered violations of federal hemp law (including such activities as cultivating without a license or producing cannabis with more than 0.3 percent THC).

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The 2018 Farm Bill

Hudak:

"One big myth that exists about the Farm Bill is that cannabidiol (CBD)—a non-intoxicating compound found in cannabis—is legalized. It is true that section 12619 of the Farm Bill removes hemp-derived products from its Schedule I status under the Controlled Substances Act, **but the legislation does not legalize CBD generally.**"

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So, there is STILL Federal Law to Consider...

"[C]annabis is classified as a Schedule I substance under the CSA of 1970 (see Title 21-Food and Drugs, Chapter II-Drug Enforcement Administration, Part 1308)..."

"Schedule I drugs are defined as '...substances that have a high potential for abuse, have no currently accepted medical use in treatment in the United States, and there is a lack of accepted safety for use of the drug or other substance under medical supervision.'"

"*Other Schedule I substances include heroin, peyote, and lysergic acid diethylamide (LSD).*"

Dr. Brenda Wells, *Legalizing Marijuana: Risk Management And Insurance Implications*, The Risk Report (Jan. 2018)

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The Eight Priorities of Cole Memo One

Preventing

1. Sales to Minors
2. Revenue to Cartels and Gangs
3. State-to-state transport
4. Marijuana as a "pretext or cover" for other trafficking

Preventing

5. Violence and firearms use
6. Drugged driving and other health issues
7. Growing marijuana on public lands
8. Marijuana possession or use on federal property

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Cole Memo Two (2/14/2014)

[I]f a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals...

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Cole Memo Two (2/14/2014)

...such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of 18 U.S.C. §§ 1956, 1957, 1960 or the BSA might be appropriate....

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The Specter of BSA Enforcement

"The state-legal marijuana sector operates in a largely cash-based economy—only about 400 banks and credit unions in the U.S. actively provide financial services to this sector—because marijuana remains illegal under federal law, despite the increasing number of states acting to legalize medical and/or recreational use. **There is no carveout for state-legal activity and no safe harbor for financial institutions to serve customers engaged in such activity.**"

Elizabeth A. Khalil of Dykema Gossett PLLC

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Atty. Gen. Sessions 1/4/18:

In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions.... Given the Department's well-established general principles, **previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded**, effective immediately.

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Cannabis: Congressman Urges Transportation Department To Reform Marijuana Testing Policies For Drivers

(*Marijuana Moment*, May 16, 2022)

USDOT policies on drug testing CDL drivers for marijuana are unnecessarily costing people their jobs and contributing to supply chain issues

Rep. Earl Blumenauer (D-OR) has called for changes to the DOT policy, which penalizes people for using cannabis while off duty, days or weeks before they're tested

He believes the drug testing requirements will also keep people from seeking employment in the profession

The federal government needs to "put resources behind coming up with alternative methods of determining impairment

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US House of Representatives Again Passes Marijuana Reform Bill

(*Human Rights Watch*, May 23, 2022)

Narrowly approved the Marijuana Opportunity Reinvestment and Expungement (MORE) Act that would end marijuana prohibition by removing it from the federal list of controlled substances, expunge the record of those convicted of certain offenses, and reduce sentences for others.

Through tax on sales, it would fund services in communities most affected by prohibition and provide support for a more diverse and inclusive market

Bans at state level would not be changed

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Cannabis banking included in U.S. House-approved defense bill

(*financialregnews.com*, July 14, 2022)

- **Secure and Fair Enforcement (SAFE) Banking Act** would provide a safe harbor for financial institutions serving legal, cannabis-based businesses
- Has passed House as a standalone bill or part of a package **seven** times, most recently on July 14, 2022 as part of the National Defense Authorization Act (Senate has previously refused to allow a vote)
- SAFE Banking Act has bipartisan support and is endorsed by the American Bankers Association and the Credit Union National Association

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Legal and Regulatory Environment - State

USING OREGON AS AN EXAMPLE...

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The History

IN NOVEMBER, 2014:

Measure 91 – Grants Oregon Liquor Control Commission authority to:

- Regulate the purchase, sale, production, processing, transportation, and delivery of marijuana items in accordance with the provisions of this Act.
- Grant, refuse, suspend or cancel licenses for the sale, processing, or production of marijuana items, or other licenses in regard to marijuana items, and to permit, in its discretion, the transfer of a license of any person.

House Bill 3400 – Tracks Measure 91

Division 25 Rules – Effective September 1, 2016, putting in place rules on licensure

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Oregon Liquor Control Commission

GRANTS LICENSES TO / FOR:

- Producers
- Labs
- Processors
- Wholesalers
- Research (Certificate)
- Retail

ALSO REGULATES:

- Inventory Transfer Requests
- Change Forms
- Marijuana Worker Permits

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Oregon Liquor Control Commission

There are five types of recreational marijuana licenses:

Producer: A producer is also known as the grower.

Processor: A processor is a business that will transform the raw marijuana into another product (topicals, edibles, concentrates, or extracts).

Wholesaler: A wholesaler is a business that buys in bulk and sells to licensees rather than to consumers.

Retail: A retailer is a business that sells directly to consumers.

Laboratory / Certificate for Research: A laboratory will test marijuana based on rules established by the Oregon Health Authority. To receive a Laboratory license a Lab must be accredited by the Oregon Environmental Laboratory Accreditation program (ORELAP).

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Oregon Liquor Control Commission

Number of applicants through October 19, 2016:

Producer: 870

Processor: 161

Wholesaler: 92

Retail: 373

Laboratory / Certificate for Research: 23

Grand Total: 1,519

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Oregon Liquor Control Commission

January, 2016

TEMPORARY RULES EFFECTIVE

April, 2016

FIRST PRODUCER LICENSES

Spring, 2016

PROCESSOR, LAB, WHOLESALER LICENSING BEGINS

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Oregon Liquor Control Commission

July 1, 2016

WORKER'S PERMITS BEGIN

August, 2016

LABELING AND PACKAGING REGULATION BEGINS

October 1, 2016

RETAIL STORE LICENSING BEGINS; REC. SALES AT MEDICAL TO END 12/31/16

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Commercial Property and Liability Considerations

Widmer, "High Times," *Rough Notes Magazine*, February 1, 2016

Big carriers aren't moving in to the market quickly

- Most still want to follow federal law.
- Most are afraid of losing Medicare and Medicaid contracts

Some insurers are declining renewals when the dispensaries come to the insured's area

Small insurers are having trouble meeting financial requirements.

- Oregon is seen as most lenient on this

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Widmer, "High Times," *Rough Notes Magazine*,
February 1, 2016

Financing is an underwriting problem.

- Banks are as shy as the major carriers.
- Credit unions aren't so much so.
- Dispensaries may have to use state-chartered banks.

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Widmer, "High Times," *Rough Notes Magazine*,
February 1, 2016

"For agents trying to open up a new sales channel, the marijuana industry represents a *yin-yang style of opposing forces*. [Pamela Adams, Chair and CEO of ISU Insurance Services of Colorado] says agents wanting to take on the marijuana insurance business have their work cut out for them."

"'You're going to have to go to the specialty market,' she says. 'It's causing more work. It may take you a while to find the right E&S market that will provide that coverage. When you do, the premium is likely higher.'"

'With higher premiums come higher commissions, she points out. However, she adds, 'Once you get to the excess and surplus lines carriers, they're paying less commission.'"

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The Commercial Property Form

The Commercial Property Form

CP 00 10 10 12

A. Coverage

"We will pay for direct physical loss of or damage to **Covered Property** at the premises described in the Declarations caused by or resulting from any **Covered Cause of Loss**."

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The Commercial Property Form

2. Property Not Covered "Covered Property does not include:"

a. Accounts, bills, currency, food stamps or other evidences of debt, **money**, notes or securities. Lottery tickets held for sale are not securities;

b. Animals, unless owned by others and boarded by you, or if owned by you, only as 'stock' while inside of buildings;

c. Automobiles held for sale;

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The Commercial Property Form

2. Property Not Covered "Covered Property does not include:"

d. Bridges, roadways, walks, patios or other paved surfaces;

e. Contraband, or property in the course of illegal transportation or trade;

f. The cost of excavations, grading, backfilling or filling;

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The Commercial Property Form

2. Property Not Covered "Covered Property does not include:"

g. Foundations of buildings, structures, machinery or boilers...

h. Land (including land on which the property is located), water, **growing crops** or lawns (other than lawns which are part of a vegetated roof);

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The Commercial Property Form

2. Property Not Covered "Covered Property does not include:"

- i. Personal property while airborne or waterborne;
- j. Bulkheads, pilings, piers, wharves or docks;
- k. **Property that is covered under another coverage form of this or any other policy in which it is more specifically described**, except for the excess of the amount due (whether you can collect on it or not) from that other insurance;

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The Commercial Property Form – Covered Causes of Loss

The CP 10 10 10 12:

When Basic is shown in the Declarations, Covered Causes of Loss means the following:

1. Fire.
2. Lightning.
3. Explosion...

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The Commercial Property Form – Covered Causes of Loss

Covered Causes of Loss means the following:

4. Windstorm or Hail...
5. **Smoke causing sudden and accidental loss or damage**. This cause of loss does not include smoke from agricultural smudging or industrial operations.
6. Aircraft or Vehicles...
7. Riot or Civil Commotion...
8. Vandalism...

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The Commercial Property Form – Covered Causes of Loss - Exclusion

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss

...

c. Governmental Action

Seizure or destruction of property by order of governmental authority. But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part

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So, why belabor the point?

The issue really is which exclusions or which causes of loss will be applicable given the uncertainty regarding the legality of the product.

Simply put, will the policy language be tested in new and unpredictable way?

Two possible answers...

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One: ISO's Oregon Response

Commercial Lines Manual Oregon

Division Six

General Liability

Exception Pages

Rule A3. Oregon - Marijuana Exclusion Endorsements

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One: ISO's Oregon Response

Oregon Bulletin 2017-04 provides, in part, the following stated "guidance":

1. "Insurers issuing property and casualty policies that could potentially cover loss, damage, or liability associated with marijuana items and marijuana activities *should explicitly state in the policy whether, and to what extent, these interests are covered or excluded.*"

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One: ISO's Oregon Response

(Still quoting Oregon Bulletin 2017-04)

2. "If the terms of the policy would otherwise cover marijuana items or marijuana activities, **general language excluding 'illegal activity', 'contraband', or 'coverage inconsistent with public policy' is not sufficient to describe the coverage provided.** Similarly, language that refers to 'illegal' or 'criminal acts under federal law' provides insufficient guidance to policyholders as to their rights under an insurance policy."

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One: ISO's Oregon Response

Commercial Property Endorsement CP 99 01 10 17

OREGON - MARIJUANA EXCLUSION

...

B. "Marijuana" is added to Property Not Covered.

C. The Business Income (With Extra Expense) Coverage Form CP 00 30, Business Income (Without Extra Expense) Coverage Form CP 00 32 and Extra Expense Coverage Form CP 00 50 do not apply to that part of Business Income loss or Extra Expense incurred due to a "suspension" of your "operations" which involve the design, manufacture, distribution, sale, serving, furnishing, use or possession of "marijuana".

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One: ISO's Oregon Response

Commercial Property Endorsement CP 99 01 10 17

D. Paragraphs B. and C. above do not apply to any "marijuana" that is not designed, manufactured, distributed, sold, served or furnished for bodily:

- a. Ingestion;
- b. Inhalation;
- c. Absorption; or
- d. Consumption.

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One: ISO's Oregon Response

Commercial Property Endorsement CP 99 01 10 17

E. For the purpose of this endorsement, the following definition is added:

"Marijuana":

- 1. Means... **Any** good or product that consists of or contains **any amount** of Tetrahydrocannabinol (THC) or any other cannabinoid, regardless of whether any such **THC or cannabinoid** is natural or synthetic.

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One: ISO's Oregon Response

Commercial Property Endorsement CP 99 01 10 17

[Marijuana] includes, but is not limited to, any of the following containing such THC or cannabinoid:

- a. **Any** plant of the genus Cannabis L., or any part thereof, such as seeds, stems, flowers, stalks and roots; or
- b. **Any** compound, byproduct, extract, derivative, mixture or combination, such as, but not limited to:
 - (1) Resin, oil or wax;
 - (2) Hash or hemp; or
 - (3) Infused liquid or edible marijuana;

whether derived from any plant or part of any plant set forth in Paragraph E.2.a. above or not.

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Two: Green Earth v. Atain Spec.

United States District Court for the District of Colorado

February 17, 2016

Order Granting Partial Summary Judgment

Subsequently Settled

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Green Earth v. Atain Spec.



"Green Earth operates a retail medical marijuana business and an adjacent growing facility in Colorado Springs, Colorado."

On June 29, 2012, Green Earth obtains a commercial property and general liability policy from Atain.

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Green Earth v. Atain Spec.

"[O]n June 23, 2012, a wildfire started in Waldo Canyon outside of Colorado Springs. Over the course of several days, the fire advanced towards the city.

"The fire did not directly affect Green Earth's business, but Green Earth contends that smoke and ash from the fire overwhelmed its ventilation system, eventually intruding into the growing operation and causing damage to Green Earth's marijuana plants.

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Green Earth v. Atain Spec.

Green Earth's claim under the Policy relating to the Waldo Canyon fire can be broken into two parts:

- a claim for more than **\$200,000** in damage to Green Earth's grow operation, namely its growing **mother plants and clones**, and
- a claim for approximately **\$40,000** in damage to **buds and flowers** that had already been harvested and were being prepared for sale.

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Green Earth v. Atain Spec.

Atain denies the claim. In part, Atain says:

1. "Stock" does not apply to the growing plants;
2. Any coverage is barred by the "growing crops" exclusion;
3. any coverage of growing or finished marijuana is subject to an exclusion of coverage as "contraband"; and
4. any grant of coverage is void as against public policy.

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Green Earth v. Atain Spec.

The District Court sides with Atain, at least in part, finding:

"...the Policy's exclusion of coverage for 'growing crops' unambiguously encompasses any body of plants tended for their agricultural yield, at least until they are harvested. This term clearly encompasses Green Earth's mother plants and clones."

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Green Earth v. Atain Spec.

While that answers the "crop" question, it doesn't answer the "stock" question, which the Court resolves for Green Earth:

Just as the extrinsic evidence strongly suggested that the parties intended to exclude coverage for growing plants, the same evidence strongly suggests that the parties mutually intended to include coverage for harvested plants constituting Green Earth's inventory.

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Green Earth v. Atain Spec.

...Which leads to the larger discussion of coverage and the state of the law:

More fundamentally, it is undisputed that, before entering into the contract of insurance, Atain knew that Green Earth was operating a medical marijuana business. It is also undisputed that Atain knew – or very well should have known – that federal law nominally prohibited such a business.

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Green Earth v. Atain Spec.

Notwithstanding that knowledge, Atain nevertheless elected to issue a policy to Green Earth, and that policy unambiguously extended coverage for Green Earth's inventory of saleable marijuana. [Atain never told Green Earth] of its position that such inventory was not insurable...**the parties shared a mutual intention that the Policy would insure Green Earths' marijuana inventory and that the 'Contraband' exclusion would not apply to it.**

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Workers' Compensation Issues

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Cannabis Testing

Typically, there are 4 ways to test for marijuana use:

- Urine tests – detect use for about 3-30 days after use
- Oral fluid tests – detect use for about 24 hours after use
- Hair tests – detects TCH for about 90 days after use
- Blood tests – detects THC for 3-4 hours, but is the most invasive

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Cannabis: DOT proposes new drug testing policy (Marijuana Moment, Mar 11, 2022)

Current DOT policy mandates urine testing, which can show up for weeks or months, resulting in false positives for impairment

DOT is now recommending oral saliva testing, which detects use from 1 to 24 hours

Proposal says there would be a "4 nanogram per milliliter screening test cutoff for THC, which would detect use of marijuana while eliminating possibilities of positive tests resulting from passive exposure."

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Cannabis Testing (abq.news, Jan 20, 2022)

Breathalyzers for cannabis are a new technology, analyzing saliva and can evaluate THC levels in minutes, not hours or days

“The fundamental challenge is that THC exists in breath in concentrations that are something like a billion times less than alcohol,” Hound Labs CEO Mike Lynn told reporters. Hound Labs worked to produce one of the first THC breathalyzers available on the market. “That means you need a breathalyzer that’s literally a billion times more sensitive if you’re going to use it for marijuana. It’s like identifying 25 or 30 specific grains of sand on a beach that’s well over a mile long.”

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Cannabis Testing (abq.news, Jan 20, 2022)

Experts have questioned whether THC levels are a good metric to judge impairment since cannabis affects users drastically differently

- Researchers are only beginning to broach the topic of THC tolerance

Breathalyzer technology can only determine the level of cannabinoids concentrated in a person’s system. None of these testing methods can determine how high a person actually is and how the drug is affecting their ability to drive.

Brain imaging research is being done by a group of scientists at Massachusetts General Hospital.

Imaging shows increased neural activity in the prefrontal cortex region in the brain of participants who reported feeling impaired

Even if it ends up being the best technology to test for impairment, no roadside device is being developed at the moment

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Cannabis Testing (Manufacturing.net, May 11, 2022)

The problem isn’t the presence of THC, but the level of impairment

Gaize Cannabis Impairment Test is a video evidence impairment test that uses a VR headset to provide automated sobriety tests

Each substance impacts eye movement differently and the Gaize test takes human error out of the equation to improve accuracy

The VR headset records eye movement through 6 tests that take 5 minutes to complete. It then takes 2 minutes to analyze the data.

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Cannabis Testing (Manufacturing.net, May 11, 2022)

Gaize is focused on cannabis impairment, but will add substances like alcohol and opiates as software updates when they become available

They hope to have it on the market by late summer 2022. Currently undergoing clinical trials and in the regulatory approval process.

Cost: \$1,000/device and \$125/month for the software, videos, and data storage

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The Medical Issue

According to FC&S, “each state that allows [marijuana] medically has a list of allowed conditions such as the following partial list:”

AIDS

Anorexia

Arthritis

Cachexia (condition that causes extreme weight loss and muscle wasting)

Cancer

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The Medical Issue

FC&S:

Chronic pain

Depression

Glaucoma

Migraine

Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis

Seizures, including, but not limited to, seizures associated with epilepsy

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Do we have to cover medical marijuana?

There is no clear trend in the case law

Proponents argue:

- 1) It is a safer and effective treatment for pain;
- 2) A physician authorization makes it a reasonable and necessary treatment option

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St. Pierre v. Workers' Comp. Trust Fund

- Administrative Action
- Department of Industrial Accidents in Massachusetts
- April, 2018.
- Hearing officer orders reimbursement for medical marijuana.
- St. Pierre suffered severe (amputation) injuries in a work accident.
- St. Pierre is a Vermont resident.

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St. Pierre v. Workers' Comp. Trust Fund

Trust Fund says the decision is arbitrary and capricious because:

1. the Massachusetts Act for Humanitarian Medical Use of Marijuana explicitly states that an insurer cannot be required to reimburse for medical marijuana, and
2. the use or distribution of medical marijuana is a federal crime under the Controlled Substances Act

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St. Pierre v. Workers' Comp. Trust Fund

The "dodge":

[T]he parties stipulated that the Employee is a registered patient through the Vermont Medical Marijuana Registry with a valid registration, and that he obtains medical marijuana from an authorized dispensary, all pursuant to the laws of the State of Vermont.

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St. Pierre v. Workers' Comp. Trust Fund

The "dodge":

Accordingly, we agree with the Trust Fund and hold that the Massachusetts Act and its statutorily prescribed regulations are specifically limited to 'qualifying patients' who are Massachusetts residents with registration cards issued by the Massachusetts Department of Public Health, and to physicians and dispensaries located in Massachusetts.

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Do we have to cover medical marijuana?

Opponents argue:

- 1) It is illegal at the federal level;
- 2) It is not an FDA approved treatment option;
- 3) There is no proof of efficacy beyond anecdotal evidence;
- 4) There are no evidence-based guidelines for use;
- 5) It has a negative impact on performance

PLUS CONFERENCE 2015, Growing Insurance Issues with the Rise of Medical and Recreational Marijuana

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Do we have to cover medical marijuana?

According to IA Magazine:

"New Mexico was the first [to do so] in the 2014 case *Vialpando v. Ben's Automotive Services*, when the state's Court of Appeals upheld the validity of a workers compensation award directing an employer and insurer to reimburse a worker for the cost of medical marijuana used to relieve pain."

"And so far, only five states—Connecticut, Maine, Minnesota, New Jersey and New Mexico—officially require insurers to pay workers comp claims involving medical marijuana."

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Is Marijuana use a disqualifier for benefits?

At Owen-Dunn Insurance Services, headquartered in Sacramento, California, a workers comp client's employee was recently completing a painting job when he fell off a ladder. **"He acknowledged he fell out of the ladder because he was pretty high,"** says Owen Taylor, president. "He uses medical marijuana for control of Tourette's syndrome, and the employer was aware that he used medical marijuana because of that. So they had to make accommodations to the kind of work he was doing."

High and Dry: How Will Legal Marijuana Impact Workers Comp?
BY Jacquelyn Connelly, IA Magazine, Oct. 23, 2017

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Is Marijuana use a disqualifier for benefits?

But short of an injured worker coming clean of their own accord, proving marijuana impairment in the event of an injury is a tall order. **"You can't breathalyze for marijuana,"** Ring says. "That's what makes alcohol so easy. 'Are you drunk?' It's a simple yes or no question that we can test for right this second. But the science hasn't gotten there for marijuana or even for prescription pain medications. It may never get there."

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Hopkins v. Unemployed Insurers Fund (Mont. 2011)

Drive-through bear experience called Great Bear Adventures

Kilpatrick owns GBA; hired Hopkins to do work for him

Hopkins got high on his way to work

There was conflicting evidence:

- Whether Kilpatrick approved of weed at work, but he had smoked with Hopkins before
- Whether Kilpatrick told Hopkins NOT to feed the bears

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Hopkins v. Unemployed Insurers Fund

- Hopkins took food to the bears' pen
- "At some point while Hopkins was working, the largest bear, Red, attacked him. The bear knocked Hopkins to the ground, sat on him, and bit his leg, knee and rear-end.
- "...Hopkins escaped by crawling under one of the electrified wires surrounding the pen. Kilpatrick eventually found Hopkins, and he was transported to the hospital by helicopter. He suffered severe injuries."

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Hopkins v. Unemployed Insurers Fund

"Non-prescription drug consumption will preclude an injured employee's benefits **if consumption was the leading cause contributing to the result**, when compared to all others."

❖ *Marijuana use was "ill-advised to say the least and mind-bogglingly stupid to say the most."*

❖ *[G]rizzlies are "equal opportunity maulers," without regard to marijuana consumption.*

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Employment Practices Liability and Professional Liability

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EPLI: How are Insurance Carriers Dealing with the Legalization of Marijuana?

- "Presently, there is no impact on coverage for General Liability, Workers Compensation, or Employer Liability insurance."
- "Coverage is dependent upon the employer's policy and procedure."
- "An employer with a zero tolerance drug policy needs to ensure that it complies with the law in their respective jurisdictions."

How will the Legalization of Marijuana Affect Your Employment Policies?, RIMS 2014 Annual Conference

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EPLI: Americans with Disabilities Act Issues Involving Marijuana

- "ADA does not require employers to accommodate the use of marijuana.
 - "However, if an employee enters a substance abuse program, employers have to accommodate the employee's participation."
 - "ADA does not consider drug testing to be a medical examination."

How will the Legalization of Marijuana Affect Your Employment Policies?, RIMS 2014 Annual Conference

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Americans with Disabilities Act (ADA):

Medical examinations (**including drug tests**)

1. After offer of employment
2. Before employment commences
3. If consistently administered
4. A business necessity
5. And information is confidential

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...and from the headlines

"It will be illegal in Colorado for employers to fire workers solely on the basis of a positive test for marijuana if a newly proposed bill is passed at the state house."

"The Marijuana Consumer Employment Discrimination Protection Bill would clarify that a positive drug test for traces of marijuana can't be grounds to fire an employee unless the person 'used, possessed, or was impaired by marijuana during the hours of employment.'"

"New bill would prohibit employers from firing workers based solely on positive marijuana tests"

Boulder Weekly, by Matt Cortina February 15, 2018

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Professional Liability: Oregon Board of Accountancy -Guidance for Licensees Providing Services to the Marijuana Industry

After careful consideration, the Board has determined that Oregon licensees and firms that elect to provide services to the marijuana industry legalized in any state in which the licensee practices, will not face action by the Board for violation of the State of Oregon Board of Accountancy's Code of Professional Conduct, based solely on the fact that the licensee or firm is providing such services. However, **all licensees should be reminded that any and all services provided are subject to the same professional standards, laws and rules applicable to all other services provided by the licensee.**

March, 2015

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Products Liability and Products Recall

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Products Liability and Products Recall:



www.puffpuffpost.com/marijuana-edibles-in-canada-is-a-growing-industry/

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Products Liability and Products Recall:

MedPharm, one of two licensed distributors of medical marijuana products in Iowa, announced Wednesday that it will be producing three products: creams, capsules and tinctures.



The Cedar Rapids Gazette, October 17, 2018

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Products Liability and Products Recall:

According to FC&S

[D]ispensaries will indicate a level of potency of the marijuana they have for sale; if the potency is not what the dispensary claims it is, a claim could be filed.

Also, some dispensaries are getting into baked goods such as brownies, so there are product liability issues for baked goods as well.

Maintaining quality control is extremely important, especially since the customers are often medically fragile.

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Products Liability and Products Recall:

"Canna-Beer – Dad & Dudes Breweria's marijuana-infused beer – may soon be available in more than just Colorado. The adult beverage brand, which officially rolled out the first line of Drew's Brews packaged cannabis-infused beers back in 2015, recently announced plans to sell their General Washington's Secret Stash in stores across the United States."

"Cannabis Beer May Soon Be On US Liquor Store Shelves"
msn.com

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Homeowners and Personal Lines

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What is a moral hazard?

According to IRMI:

[Moral Hazard is] used to describe a subjective hazard that tends to increase the probable frequency or severity of loss due to an insured peril. Moral hazard is measured by the **character of the insured** and the circumstances surrounding the subject of the insurance, especially the extent of potential loss or gain to the insured in case of loss.

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What is a moral hazard?

For example, insurance on a thriving business is not subject to a moral hazard to as great an extent as insurance on an unprofitable business...Moral hazards are considered when underwriting insurance, particularly fire insurance, and are addressed by certain policy exclusions.

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Related Coverage Issues

Insured "Bad Acts"

- Arson
- Criminal Conduct
- Intoxication
- Other "Bad" Behavior

Those can't be covered....can they?

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How it impacts homeowners insurance?

Tracy v. USAA Casualty Insurance Company

2012 Hawaii case

Tracy had an insurable interest in stolen marijuana plants, but...

The "shrubs" weren't covered because it would violate federal law.



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