Rapid Legalization of Marijuana: Risks, Stakes, and Future Litigation

NAPABA Convention 2018 Panel
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Panelists

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Moderator

Annie Cai Larson
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True or False: Today, possession of a personal amount (< 1 kilograms) of marijuana in Alabama is a felony.

Answer: TRUE

2nd time possession is a Class C felony punishable with imprisonment of 1-to-10 years and $15,000 fine.
True or False: Approximately 1% of all California energy use stems from cannabis cultivation.

Answer: FALSE

Approximately 4% of all California energy use stems from cannabis cultivation
True or False: In Washington, D.C., it is legal to possess and use marijuana, but illegal to sell marijuana.

Answer: TRUE

D.C. and Vermont legalized possession and usage of marijuana, but not commercial distribution.
True or False: Under Federal law, the use and possession of cannabis is illegal for any purpose

Answer: TRUE

Under the Controlled Substance Act of 1970, cannabis is classified as a Schedule I substance
Year 2010: How many of the 50 states legalized recreational marijuana use?

NONE
Year 2018: Rapidly Changing Landscape
Changing Public Views

U.S. Support For Legalizing Marijuana Hits All-Time High
"Should the use of marijuana be made legal or not?"

- Yes, legal
- No, illegal

[Graph showing the percentage of support for legalizing marijuana from 1969 to 2017. The graph indicates a trend where the support for legalizing marijuana has increased over time, reaching a peak of 84% in the year 2017.]

Sources: Pew Research Center, Gallup

Statista Charts
Federal vs. State Conflict: Cole Memo vs. Sessions Rescindment

- **Cole Memorandum**
  - Issued on August 29, 2013 by Deputy Attorney General James M. Cole during Obama Presidency
  - Directed all US Attorneys
  - Stated that given its limited resources, the Justice Department would not enforce federal marijuana prohibition in states that "legalized marijuana in some form and ... implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana," except where a lack of federal enforcement would undermine federal priorities

- **Rescindment**
  - In January 2018, Attorney General Jeff Sessions rescinded the Cole Memorandum during Trump Presidency
  - Governors and United States Senators from several states including Alaska, California, Colorado, Nevada, New Jersey, Oregon, Vermont and Washington expressed concerns regarding the rescindment
Emerging Litigation Risks
Product Liability/Failure to Warn

*Kirk v. Nutritional Elements*
2016-CV-31310

- Wrongful death suit in Colorado state court
- 49-year old Kirk faces first-degree murder charge in shooting death of his wife
- Kirk bought range-ginger flavored Karma Kandy, a cannabis-infused candy labeled as containing 101 milligrams of THC
- Complaint alleges that Kirk experienced strong drug effects, including behavior that caused him to shoot his wife
- Sons argue that defendants should have failed to use reasonable care to warn users and consumers of risk of experiencing strong drug effects, including possible psychotic behavior, alleging violations of Colorado’s consumer production act

*Flores v. LiveWell*
2015-CV-33528

- Class action lawsuit in Colorado state court
- Plaintiffs allege that Defendant cannabis producer LivWell used “chemical cocktails” and pesticides to cultivate the marijuana consumed by Plaintiffs
- Two putative subclasses: all persons in US who used for recreational purpose vs. all persons in US who used for medicinal purpose
- Causes of action include: breach of contract, breach of warranty, intentional misrepresentation, concealment of material facts, civil conspiracy, etc.
- The judge ultimately dismissed the case, finding that plaintiffs were not actually harmed and had used the marijuana without consequence
Emerging Litigation Risks
Consumer Fraud/Mislabeling

- NYT 2015 Article: “Most edibles in a recent study inaccurately described the amount of THC on their labels.”
  https://www.nytimes.com/2015/06/24/health/labels-for-edible-marijuana-often-err-on-potency-study-says.html
  - “Sixty percent of the products had less THC than their packages advertised, and 23 percent of them had more THC than claimed.”
  - “In one case, a product had just three milligrams of THC even though its label claimed 108.”

  https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5260817/
  - “The most prominent difference between ingestion and inhalation of cannabis extracts is the delayed onset of drug effect with ingestion. Consumers often do not understand this aspect of edible use and may consume a greater than intended amount of drug before the drug has taken effect, often resulting in profoundly adverse effects.”
Emerging Litigation Risks
Labor & Employment

- States where recreational marijuana is legal:
  - No employment protections
  - No limitations on employer’s right to enforce zero-tolerance drug policy

- Employer legal issues
  - Safe work place
  - Employer policy autonomy
  - Statutory protections (Americans with Disabilities Act; Family and Medical Leave Act)
Emerging Legislative Efforts
Case Study: Illinois

▶ In 2016, legislators decriminalized possessing small amounts (<10 grams) of marijuana, making it a civil infraction instead.

▶ Pools show that 66% of voters in Illinois support a legalization program that taxes and regulates cannabis for adults similar to alcohol.

▶ In March 2018, voters in Cook County voted 63% to support full marijuana legalization; referendum was nonbinding.

▶ In August 2018, Governor Bruce Rauner signed into law SB 336, allowing anyone who can obtain a prescription for an opioid medication to get regulated access to medical cannabis.

▶ Future legislative initiatives?
The Future
Growing Market, Increasing Risks

U.S. Pot Sales Could Soar as Restrictions Ease
Legal medical and adult use marijuana sales could reach $23 billion by 2020

Source: Arcview Market Research and New Frontier
Bloomberg ©
Questions? Thank you!
Sources

- https://cannabis.ca.gov/
- https://www.law360.com/articles/785089
- https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5260817/
- https://www.mpp.org/states/illinois/