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The Complete Compliance and Ethics Manual 2023
The Changing Landscape of Cannabis Legalization: Compliance and Ethics Program Challenges

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Introduction

The past few years have brought a dizzying flurry of state legislation aimed at decriminalizing and legalizing cannabis, popularly known as marijuana. Across the country, states are legalizing marijuana for medical and/or recreational purposes. At press time for the 2021 edition of this manual, 49 states; the District of Columbia; and the territories of Puerto Rico, Northern Mariana Islands, Virgin Islands, and Guam lawfully permit some form of cannabis for use at least in medical treatment.

However, the production, sale, distribution, and use of marijuana remains illegal under federal law. This creates friction between federal and state laws, including laws on employees' disability and discrimination protections in the workplace. Additional protections beyond the federal employment rights laws have historically been available in some states, but as states legalize marijuana for medicinal or recreational use, they are taking vastly different approaches leading to a substantial challenge for corporations that operate in more than one state.

No two state laws are the same with respect to what constitutes lawful use of marijuana and what protections are afforded to employees who consume cannabis products. For example, while some states explicitly state that an employer is not required to accommodate the use of medical marijuana, others provide affirmative protection for workers who lawfully use medical marijuana. In addition, at the time of this article, 18 states, the District of Columbia, and Guam have legalized adult-use marijuana. It is reasonable to expect this number will continue to increase, creating additional concerns for employers who seek to balance a drug-free work environment with the rights of their employees to receive recommended medical treatment or engage in lawful recreational use.

This article provides a basic overview of the various laws in operation and the dynamic challenge they create for employers and their compliance and ethics programs. Also, it seeks to empower compliance professionals to guide their employers on their obligations to manage risks arising from this area of the law. Given this ever-shifting legal landscape and how rapidly the law is developing, it is important to use this article only as an informative background guide, and before taking any employment action, it is critical to consult the state laws in which your company operates, refer to the applicable federal laws, and/or reach out to in-house or qualified outside counsel.

Cannabis Basics

Marijuana is the term often used to describe the substances made from portions of the *Cannabis sativa L.* plant. The principal psychoactive ingredient of cannabis is tetrahydrocannabinol, which is more commonly referred to as THC. THC is the chemical compound that creates the "high" that is historically associated with marijuana. Cannabis products that are THC-dominant are particularly effective for pain, nausea, depression, anxiety, and insomnia.

Cannabidiol (can-na-buh-DIE-ohl) or CBD is another component of the cannabis plant. It is considered nonpsychoactive. CBD-dominant products have been shown to have medicinal value for a variety of medical

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ailments and diagnoses, such as inflammation, seizures, and anxiety. CBD consumers rarely experience any psychoactive effect.

The passage of the Agricultural Improvement Act of 2018 (the 2018 farm bill) has created much discussion of hemp. Hemp is also the *Cannabis sativa L.* plant; however, hemp has been bred to be a strain that has only trace amounts of THC. Specifically, hemp is cannabis with less than 0.3% THC by dry weight. CBD can be derived from hemp or marijuana plants and may or may not contain THC.

Complicating matters even further, two FDA-approved prescription medications are derived from the cannabis plant. Marinol contains THC and is used for treating nausea. Epidiolex is CBD-dominant and used to treat seizure disorders. Thus, a urinalysis positive for THC metabolite may have been caused by legal consumption of a prescription medication, state-legal consumption of a THC product, legal use of a CBD product containing THC, unknowing consumption of THC through a CBD product believed to be free of THC, or illegal consumption of marijuana. Urinalysis results are not helpful in determining which of these scenarios an employer faces.

It is also helpful to address commonly used terminology surrounding cannabis laws. First, the term "consume" is the industry-preferred term over "use," because an individual is said to use illegal drugs. The term consume distinguishes lawful methods of marijuana consumption from the stigma associated with drug use. In addition to the traditional form of consumption—smoking—an individual can consume cannabis products via edibles (e.g., candy, baked goods, sauces), in liquid form (e.g., oils, tinctures), pills or capsules, and by vaporized delivery (commonly known as vaping). Delivery methods may vary based on the patient's needs and the conditions for which the cannabis product is consumed.

There is also some argument that the word cannabis is preferred to the word marijuana because cannabis products include, but are not limited to, marijuana products. For example, CBD oil is a cannabis product, but if it has no THC, it is not a marijuana product. Because so many state laws refer to "marijuana," this article will use the term "marijuana" when referring to products that include THC and "cannabis" to include marijuana, hemp, and CBD-based products.

There has also been recent discussion regarding the term "recreational marijuana" as opposed to "adult-use marijuana." Obviously, we do not refer to alcohol or tobacco as adult-use alcohol or tobacco. Some states have used the term "adult-use" instead of "recreational," however, this reverts to the word "use" in lieu of "consumption." Although both terms have been referenced in state legislation, the industry-preferred term is "adult-use" over "recreational."

The Status of Federal Law

Controlled Substances Act

It is the federal Controlled Substances Act (CSA) that makes marijuana and its derivatives illegal. More specifically, the CSA classifies marijuana as a Schedule I controlled substance, which means it has been deemed to have a high potential for abuse and dependency, with no recognized medical use or value. Accordingly, the CSA provides that the growth, distribution, use, and possession of marijuana is criminal and can be prosecuted under federal law.

The efforts to deschedule marijuana continue to accelerate. In December 2020, the Marijuana Opportunity Reinvestment and Expungement (MORE) Act originally introduced by Rep. Jerrold Nadler, D-NY, and then-presidential candidate Kamala Harris, D-CA, passed the House in a largely partisan 228-164 vote. The vote marks the first time that Congress has approved legislation aimed at legalizing cannabis and only the second time that federal lawmakers have voted on a stand-alone cannabis bill. As of October 2021, the bill had not

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become law, and the MORE Act of 2021 has been introduced in the U.S. House of Representatives. The MORE Act of 2021 seeks to decriminalize marijuana and replace the term "marijuana" in federal law with "cannabis." It also proposes a few other changes to laws to eradicate the stigma of convictions related to marijuana and make federal resources that are available to other businesses also available to cannabis businesses. So long as these bills remain pending, but not law, the friction between state and federal law will continue to pose challenges for employers.

Despite the CSA, states have kept up a stunning momentum on decriminalization and legalization of cannabis for both medicinal and recreational purposes. On Election Day in November 2020, five states with cannabis initiatives on the ballot voted to approve them. Below is a detailed analysis of the state laws legalizing various forms of cannabis, which are at odds with the CSA. Given that states have been legalizing medical marijuana since the 1990s, the United States Supreme Court has already had the opportunity to put to rest any doubt as to whether federal law reigns supreme on the issue. In 2005, the *Gonzales v. Raich* decision[2] made clear that in accordance with the Commerce Clause and Supremacy Clause, the CSA trumps state law for purposes of federal criminal prosecutions. That is, even if the use of marijuana is legal under state law, an individual cannot be spared from federal prosecution on such grounds.

As such, memoranda issued in October 2009[3] and June 2011[4] by the U.S. Department of Justice (DOJ) represented former administrations' enforcement stance. The initial memorandum was known as the Ogden Memo. First, the Ogden Memo made clear that the DOJ "is committed to the enforcement of the Controlled Substances Act in all States," particularly those that "have enacted laws authorizing the medical use of marijuana." However, DOJ noted it would be "making efficient and rational use of its limited investigative and prosecutorial resources." Accordingly, the memorandum outlined that DOJ's core priorities would be to pursue the prosecution of "significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks" and to leave alone "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." DOJ noted it would rely on local authorities to regulate and enforce state laws authorizing medical marijuana activity.

In August 2013, after Colorado and Washington enacted laws authorizing the recreational use of marijuana, DOJ issued another memorandum to provide guidance concerning marijuana enforcement under the CSA.[5] This was known as the Cole Memo.[6] Once again, it noted that while marijuana remains illegal under federal law, the federal government would continue to rely on state and local law enforcement agencies to address marijuana activity in accordance with their own state laws and it would step "in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the [eight] harms" that it has delineated as enforcement priorities important to the federal government (e.g., preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity).

DOJ warned that its deference to state and local authorities is based upon its expectation that state laws "authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests." Therefore, if it were determined that a state or various states did not live up to such expectations, the DOJ would consider reversing course.

The U.S. House of Representatives boosted the effect of the Ogden and Cole memos by passing the Rohrabacher–Farr amendment in May 2014.[7] That act prohibited DOJ from expending any funds for enforcement of laws in

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states where marijuana was becoming legal for medical purposes. The amendment was renewed on an annual basis. It is now known as the Rohrabacher–Blumenauer amendment. In 2021, President Joe Biden was the first president to include the Rohrabacher-Blumenauer amendment in his proposed budget. That budget has been adopted through December 3, 2021

The Rohrabacher–Blumenauer amendment is now the only federal initiative protecting states in which medical marijuana has been legalized. In January 2018, the attorney general rescinded the Ogden and Cole memoranda, causing alarm across the nation. DOJ did not announce any replacement policy for the rescinded policies; however, DOJ is constrained by the Rohrabacher–Blumenauer amendment and for the time being cannot expend funds to pursue prosecutions related to state-legalized medical marijuana production, sale, or consumption.

Although DOJ has not replaced the Ogden and Cole memos with any announced policy, the Biden administration is likely to take a more liberal approach to legalization efforts and defer to states for enforcement. DOJ has not expressed an intent to abandon enforcement efforts directed at cannabis enterprises not authorized under state laws. While this does not inoculate state-legalized cannabis businesses, this policy approach coupled with the Rohrabacher–Blumenauer amendment brings some comfort to compliant, state-licensed cannabis operations.

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