

1. MARIJUANA, CBD, AND HEMP REGULATION

a. Basics

- i. Marijuana, CBD oil, and hemp advertising and promotion is a very complex area of the law. There are a number of permutations to the rules depending on whether the program is for medical marijuana, recreational marijuana, CBD oil, or hemp and where the program takes place. Not surprisingly, rules vary from state to state.

b. General Sales Restrictions

i. Federal Restrictions

1. Marijuana

- a. It is illegal under Federal law to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense marijuana. Simple possession of marijuana is also illegal. It is also illegal under Federal law to import marijuana from any other country.

2. CBD Oil

- a. In 2018 the Federal Agriculture Improvement Act of 2018 made it legal to possess CBD products that contain less than 0.3% THC. However the FDA has prohibited the sale of CBD in any unapproved health products, dietary supplements, or food. With the exception of one prescription drug used to treat epilepsy, the FDA has not approved any CBD products.

3. Hemp

- a. Hemp is legal under Federal law, as long as it contains less than 0.3% THC.

ii. State Restrictions

1. Marijuana

- a. Some states have legalized marijuana entirely. These states include Washington, Oregon, California, Nevada, Colorado, Michigan, Alaska, District of Columbia, Massachusetts, Vermont, and Maine.
- b. Other states have legalized medical marijuana, including Hawaii, Montana, Utah, Arizona, New Mexico, Texas, Oklahoma, North Dakota, Nebraska, Arkansas, Missouri, Iowa, Minnesota, Illinois, Indiana, Ohio, West Virginia, Florida, Georgia, Virginia, Maryland, Delaware, New Jersey, Pennsylvania, New York, Connecticut, Rhode Island, and New Hampshire.
- c. Other states have at least partly decriminalized marijuana, including North Dakota, Minnesota, Ohio, New York, Maryland, Delaware, Connecticut, Rhode Island, New Hampshire, New Mexico, Nebraska, Mississippi, and North Carolina.
- d. In some states marijuana remains fully illegal, including, Idaho, Wyoming, South Dakota, Kansas, Louisiana, Wisconsin, Kentucky, Tennessee, Alabama, and South Carolina.

- e. Some states have legalized marijuana through ballot initiative. For example, in November 2018, Michigan legalized the possession and sale of marijuana through a ballot initiative. The legal sale of marijuana is expected to start in early 2020, once businesses are licensed to do so. Marijuana will be sold to adults over the age of 21. People will be able to travel with up to 2.5 ounces of marijuana anywhere except schools and prisons. At home, people will be allowed to possess up to 10 ounces, as long as at least 7.5 of those ounces are locked up. People will also be allowed to grow up to 12 marijuana plants per household, and for people who grow their own, there is no possession limit. This is in addition to Michigan's medical marijuana laws, which already allowed people with certain medical conditions to possess and consume marijuana.

2. CBD Oil

- a. As of 2018, hemp-derived CBD is legal in all 50 states. However, the legality of marijuana-derived CBD varies by state.
- b. In 14 states, CBD is legal for certain purposes, mainly medical. Those states are Alabama, Georgia, Indiana, Iowa, Kansas, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, Wisconsin, and Wyoming.
- c. Some states have explicit laws allowing retailers to sale industrial hemp-derived products, including CBD products. These states include Alaska, Colorado, Illinois, Indiana, Oklahoma, Kentucky, Maryland, Missouri, New York, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Texas, Vermont, and Wisconsin.
- d. Some states fall into a gray area. They don't have explicit prohibitions against the retail sale of industrial hemp-derived CBD products, but have exemptions in the law for the argument that hemp-derived CBD products are legal. These states include Arkansas, Delaware, Florida, Connecticut, Georgia, Idaho, Iowa, Louisiana, Maine, Massachusetts, Nebraska, Minnesota, Mississippi, New Hampshire, New Jersey, Pennsylvania, Virginia, and Washington.
- e. In some states there is no explicit prohibition on the sale of industrial hemp-derived CBD products, but recent law enforcement actions raise the risk of sale. These states include Alabama, Arizona, California, Michigan, Nevada, Ohio, South Dakota, West Virginia, and Wyoming.
- f. Some states, such as Michigan, allow the sale of CBD oil as long as it has less than 0.3% THC.

3. Hemp

- a. Most states, with the exception of West Virginia, define industrial hemp as a variety of cannabis with a THC concentration of not more than 0.3%.
- b. Most states allow the cultivation of hemp for commercial, research, or pilot programs. The only states that do not are Idaho, South Dakota, Mississippi, and the District of Columbia.

- i. For example, Kentucky has a research program which studies the environmental benefit or impact of hemp, the potential use of hemp as an energy source or biofuel, and the agronomy research being conducted worldwide related to hemp.
 - c. Some states have explicit laws allowing retailers to sell industrial hemp-derived products. These states include Alaska, Colorado, Illinois, Indiana, Oklahoma, Kentucky, Maryland, Missouri, New York, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Texas, Vermont, and Wisconsin.
- c. Advertising and Promotions Restrictions
 - i. Marijuana
 - 1. Federal law does not allow any advertisement of marijuana as it is classified as a controlled substance. It is unlawful for any person to place in a newspaper, magazine, handbill, or other publications, any written advertisement knowing that it has the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule 1 controlled substance. There is an exception which is the Rohrabacher-Blumenauer amendment which must be renewed each fiscal year which prohibits the US Department of Justice from using federal funds to interfere with state-legal medical marijuana programs only –no protection for recreational programs. Caution with advertisement in recreational states.
 - a. Federal Trade Commission- a handful of states do not allow advertising with false or misleading statements and prohibit prizes of marijuana.
 - 2. State
 - ii. CBD Oil
 - 1. Federal
 - a. Federal Trade Commission
 - b. Each state regulates their recreational or medical marijuana with marketing of these products.
 - i. California’s advertising is regulated by the Bureau of Cannabis Control that in broadcast, print, radio, cable and digital communications must by displayed 21 year olds that make of an audience of 71.6%; no images of minors or anyone less than 21 years old; no image that would appeal to minors or anyone less than 21 years old and no free products in raffles, sweepstakes or contests; no labeling that would confuse the product with alcohol and that no billboards can be located within a 15 mile radius on an interstate highway of a California border or a state highway that crosses a California border. California’s Department of Public Health prohibit packaging that would be designed to minors or anyone less than 21 years of age.
 - ii. Georgia does not allow any advertising.

- iii. Colorado allows no deceptive, false or misleading statements; television, print, the internet or radio advertising is only allowed if the retail marijuana establishment has reliable evidence that no more than 30% of the audience is under the age of 21 years old
- iv. Alaska advertising of marijuana and marijuana products cannot be false, misleading, promote excessive consumption, represent therapeutic effects; and like California cannot depict anyone under the age of 21 years old using marijuana or any likeness to appeal to anyone under 21 years of age
- v. Arizona does not have any rules or regulations for advertising medical marijuana dispensaries;
- vi. Connecticut prohibits advertising between or among two or more of the following: a producer, dispensary facility personnel, or physician where such advertising has the purpose or effect of steering or influencing patient or caregiver choice with regard to their selection of a physician, dispensary or marijuana product. All products shall not contain false or misleading statements; not disparage a competitors product; no statement or illustration that is obscene or indecent; any statement that encourages or represents the recreational use of marijuana; any statement or illustration related to the safety or efficacy of marijuana unless supported by substantial evidence or clinical data; any statement or illustration depicting anyone under the age of 18 years old or contain the likeness of anyone under 18 years old; prohibits any offer of a prize or award related to the purchase or use of the marijuana; prohibits the product containing an endorsement from the state of Connecticut; This state goes further into their advertising requirement that any advertisement must provide a cover letter, brief description of the format and expected distribution of the advertisement; ;the cover letter must state in the subject line: Medical Marijuana advertisement review package for a proposed advertisement (Brand), a summary of the proposed advertisement showing claim being made and support of said claim, verification that the person in the advertisement is an actual patient or health care provider (not a model or actor), verification that a spokesperson who is represented as a real patient is really a patient, verification that the official translation of a foreign language is accurate; annotated references to support disease or epidemiology information, cross-referenced to the advertisement summary and a final copy of the advertisement, including any video in an acceptable format;
- vii. Delaware requires that no person may advertise medical marijuana in print, broadcast or by paid in person politician of customers. Listing in phone books, trade or medical publications or sponsorship of health or not for profit charity or advocacy events are allowed.
- viii. District of Columbia is silent on advertising other than signage.
- ix. Florida allows treatment centers to advertise on the internet if they are approved by the department, may not target anyone under the age of 18

years old including cartoon characters, may not be an unsolicited pop up advertisement, and any opt-in marketing must include an easy and permanent opt out feature. Medical marijuana treatment centers can use their websites for product to purchase, price for the product and delivery price and any discount policies and eligibility criteria for discounts.

- x. Hawaii does not have any advertisement restrictions other than signage and window displays.
- xi. Illinois dispensary advertisements have signage restrictions.
- xii. Maine prohibits the use of misleading, deceptive or false advertising, marketing and signage and the use of mass-marketing advertisements or marketing campaigns that do not target anyone under 21 years old or designed to appeal to anyone under 21 years old but are not limited to: a prohibition on health or physical benefit claims in advertising, marketing or packaging; a prohibition on unsolicited advertising or marketing on the internet, including but not limited to banner advertisements on mass-market websites; a prohibition on opt-in advertising or marketing that does not permit an easy and permanent opt-out feature; a prohibition on advertising or marketing directed toward location-based devices including but not limited to cellular phones, unless the marketing is a mobile device application installed on the device by the owner of the device who is over the age of 21 years old and includes an easy and permanent opt-out feature; a prohibition on signage that is inconsistent with local ordinances, laws and regulations.
- xiii. Maryland has no advertising regulations for their registered dispensaries, processors or producers.
- xiv. Massachusetts has restrictions on logos, signage and displays for Registered Marijuana Dispensary. All advertising materials are prohibited from including: any statement, design, representation, picture or illustration that encourages or represents the use of marijuana for any purpose other than to treat a debilitating medical condition or related symptoms; encourages or represents the recreational use of marijuana; related to the safety or efficacy of marijuana unless supported by substantial evidence or substantial clinical data with reasonable scientific rigor, which shall be made available upon the request of a registrant or the Department; or portraying anyone under the age of 18 years old.
- xv. Michigan has signage restrictions and all other advertising restrictions are silent.
- xvi. Minnesota no restrictions on advertising for their medical marijuana manufactures and distribution centers.
- xvii. Montana prohibits anyone that has a license or valid registry patient identification card to advertise marijuana or marijuana related products in any medium, including electronic means.

- xviii. Nevada requires approval of the Administrator of the Division of Public and Behavioral Health or any medical marijuana establishment (MME) name, logo, sign or advertisement before it can be used by the MME.
- xix. New Hampshire states that advertising restrictions prohibiting misrepresentation and unfair practices shall be adopted.
- xx. New Jersey does not have advertising restrictions adopted.
- xxi. New Mexico does not have advertising regulations for medical marijuana dispensaries.
- xxii. New York shall not have false or misleading information in any part of the advertisement, disparage a competitors products, that is obscene or indecent, encourage or represents that the use of marijuana for a condition other than a serious condition as defined by the public health law; encourage or represent the recreational use of marijuana, related to the safety or efficacy of marijuana unless supported by substantial evidence or substantial clinical data; portray anyone under the age of 18 years old, contain the use or figure, symbol or language that is customarily associated with anyone under the age of 18 years old; offer a prize, award or inducement to a certified patient, designed caregiver or practitioner related to the purchase of marijuana or a certification for the use of marijuana; or any statement that indicates or implies that the product or entity in the advertisement has been approved or endorsed by the commissioner, department, New York State or any person or entity associated with New York State provided that this shall not preclude a factual statement that an entity is a registered organization; any advertisement for an approved medical marijuana product shall be submitted to the department at least 30 days prior to the public dissemination of the advertisement;
- xxiii. Oregon has restrictions on signage.
- xxiv. Rhode Island has no advertising regulations for medical marijuana dispensaries.
- xxv. Texas does not have regulations for marijuana and their CBD distribution centers are to be determined.
- xxvi. Vermont has no advertising regulations for dispensaries.
- xxvii. Washington has signage requirements including billboards and transit advertising. All print advertising must contain text that marijuana products may be purchased or possessed only by persons 21 years of age or older, no target for advertising anyone out of the state of Washington. Give away and coupons are banned.

iii. Hemp

1. Federal

2. State

d. Miscellaneous

- i. Google strictly prohibits the advertising of recreational drugs which includes marijuana or CBD. Facebook allows CBD.
- ii. XXX

SAMPLE OUTLINE

2. ALCOHOLIC BEVERAGES REGULATION

a. Basics

- i. Alcohol promotion is a very complex area of the law. There are a number of permutations to the rules depending on whether the program is for wine, spirits, or beer and where the program takes place. Each state has the ability to regulate alcohol advertising in its jurisdiction, and rules change frequently. Not surprisingly, rules vary from state to state and from county to county.

b. Alcohol Sales Restrictions

i. Control and Open States

1. Control States

- a. “Control states” or “Control jurisdictions” are jurisdictions where the state actively controls the sale of alcoholic beverages within its borders. In control jurisdictions, you will generally find state stores or package agencies operated by the state which are the exclusive retailers of wine, liquor, and “heavy” beer (more than 4 percent by volume). Some states control at the wholesale level, while others control at both the wholesale and retail levels.
- b. The following are control jurisdictions: Alabama, Idaho, Iowa, Maine, Montgomery County, MD, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

2. Open States

- a. “Open states” are jurisdictions where the state regulates the sale of alcoholic beverages, but alcohol is available in a wider variety of stores, such as privately owned liquor stores, grocery stores, and convenience stores.
- ii. Off Premise Sales – “Off Premise” refers to the sale of alcoholic beverages that are taken off the premises. Off Premise retailers include liquor, grocery and convenience stores.
 1. Forms of Advertising/Merchandising Offers – Note that some methods are prohibited in some states. For example, bottlenecks are prohibited in Alabama and Mississippi because they are viewed as an inducement to purchase alcohol.
 - a. Bottlenecks
 - b. Tear pads
 - c. On-pack
 - d. External advertising (newspaper, magazine offers)
 2. Instant Rebate Coupons (IRCs)

- a. IRCs are redeemed immediately at the point of sale.
 - b. Rules governing IRCs vary from state to state.
 - 1. Some states permit IRCs for the purchase of an alcoholic beverage only. *See, e.g., Pennsylvania, Wisconsin.*
 - 2. States such as Alaska permit the purchase of an alcoholic beverage and a non-alcoholic product in order to receive the IRC.
 - 3. States such as Kansas and North Carolina permit an IRC on the purchase price of a non-alcoholic product, provided the purchase of an alcoholic beverage is not required. (For example, a coupon for money off the purchase of a bag of chips hanging on the bottle of a ready-to-drink margarita, where the purchase of the margarita is not required). In such jurisdictions, if a bottleneck offer is on the product, the same offer must be available on a tear-pad. Generally, the manufacturer of the non-alcoholic product must fund the offer.
 - c. Common limits to IRCs (monetary value, products that can/cannot be redeemed based on availability at the point of sale, etc.)
3. Mail-in Rebate Coupons (MIRs)
- a. MIRs are offers that are redeemed by mail.
 - b. Rules governing MIRs vary from state to state.
 - 1. Some states permit MIRs for the purchase of an alcoholic beverage only. *See, e.g., Pennsylvania, Wisconsin.*
 - 2. States such as Missouri and Ohio permit the purchase of an alcoholic beverage and a non-alcoholic product in order to receive the MIR.
 - 3. States such as Alabama and Indiana permit a MIR on the purchase price of a non-alcoholic product, provided the purchase of an alcoholic beverage is not required.
 - c. States generally require a third party redemption, manufacturer or clearinghouse (no involvement with retailer). *See, e.g., Colorado, Louisiana.*
 - d. Requirements for what must accompany MIR requests vary by jurisdiction (for example, whether the request must be accompanied by an original cash register receipt, proof of purchase, etc.).
 - e. States may require certain information to be posted on the rebate form such as an expiration date, maximum cash refund value, and whether the rebate is limited per person or per household. *See, e.g., Illinois, Michigan.*
4. Tie-In Programs
- a. Some states permit a rebate for the purchase of an alcoholic beverage and a non-alcoholic product.
 - b. Some states permit tie-ins between alcoholic beverage manufacturers and non-alcoholic beverage manufacturers. *See, e.g., Indiana (for MIRs only), Oregon*

(for MIR, branded products only).

- c. Some states restrict the non-alcoholic products that may be sold. *See, e.g.*, North Carolina (store brand items are not permitted) and Oregon (items prepared by the retailer such as deli trays or ready-to-eat foods are not permitted).

5. Restrictions on Products Available in Stores – Note that some package stores do not sell food items. *See, e.g.*, Colorado, Delaware, Oklahoma.

6. General Rebate Rules

- a. Keep in mind that states may have general rebate rules that are in effect for all products, not just alcoholic beverages.
 - b. Rules may include the amount of the rebate, rebate processing times, where the rebate forms are available, required information for the rebate form and advertising requirements.
 - c. *See, e.g.*, California, Connecticut, Illinois, Maine, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Texas and Washington.
- iii. On Premise Sales - On Premise alcohol sales take place in restaurants, bars, and nightclubs and involve consumption of alcoholic beverages on the premises. Many jurisdictions have Happy Hour laws that govern promotions.

c. Alcohol Promotions Restrictions

i. Pre-Approval Jurisdictions

- 1. The following jurisdictions generally require pre-approval of a promotion involving alcoholic beverages: Alabama, Hawaii, Indiana, Maine, Montgomery County, MD, Michigan, Minnesota, Montana, New Hampshire, New Jersey, North Carolina, Oklahoma, Pennsylvania, Vermont, Virginia, West Virginia and Wyoming.
- 2. Be aware that some states have exceptions. *See, e.g.*, pre-approval required in Georgia and Louisiana for bottlenecks only.
- 3. Advance notice of promotion to the state regulators varies from jurisdiction to jurisdiction.
- 4. Submission requirements vary by jurisdiction.

- ii. Distributors – Attorneys should check with their client to see whether submission to states for pre-approval will be made via wine/spirits/beer distributor or whether the attorney should handle.

d. Alcohol Advertising Restrictions

- i. State – Many states have advertising regulations that set limits regarding the type and value of promotional goods manufacturers may provide to retailers, where signs advertising alcoholic beverages may be located, etc.
- ii. Federal – In lieu of promulgating their own regulations regarding alcohol law, some states follow federal advertising laws. *See 27 U.S.C. Chapter 8* for more information.

e. Tied House Restrictions

- i. Federal Statute, 27 U.S.C. § 205 – Prevents the inducement of a retailer by wholesalers/distributors/manufacturers to purchase products to the exclusion of other products through a variety of methods such as providing items of value to the retailer that are beyond what is permitted, acquiring an interest in property owned by the retailer in connection with their business, requiring the retailer to take and dispose of a certain quota of products, etc.
- ii. Tied-House Statutes – Note that states may limit what the manufacturer/distributor may provide to the retailer. This is to ensure fairness to all similarly situated retailers in the marketplace.

f. Miscellaneous

- i. Product Tastings – States may regulate where product tastings or sampling events may be held. *See, e.g.*, Michigan, which allows sampling at on-premise locations only (not grocery stores).
- ii. Off-site Advertising/Event Marketing – Be aware that some states, such as Indiana, regulate off-site alcohol promotions, such as at concerts and professional sporting events, and may require pre-approval of promotional plans in advance of the event.