Navigating the Cannabis Conundrum

Lynne Eckles
John Lewis
Stephanie McGraw
Shook, Hardy & Bacon L.L.P.
Overview

Overview of Federal Laws

Cannabis in Texas

Employment Law and Cannabis

Cannabis Products

What’s Next?

Questions
Cannabis Sativa L.

An annual herbaceous flowering plant cultivated throughout history as a source of fiber, paper, seed oil, food, recreation and medicine.

AKA: Bud, Chronic, Dope, Ganja, Grass, Indo, Kush, Mary Jane, Nugs, Pot, Reefer, Weed, etc.
Cannabis Sativa

Marijuana
- High 5-30%
- Yes
- Yes
- Illegal
- Legal Medical (10 states) (33 states)

Hemp
- Low <0.3%
- No
- Yes
- Farm Bill
- Evolving
What is a Cannabinoid?

A cannabinoid is a chemical compound that acts on cannabinoid receptors in cells in the brain and the body.

100+ KNOWN CANNABINOIDS IN CANNABIS

Tetrahydrocannabinol (THC)  
Cannabidiol (CBD)
What about marijuana?

- Remains illegal under federal law—Schedule I Controlled Substance
- Rohrabacher-Farr Amendment/ Cole Memorandum

10 states
Have legalized marijuana for adult recreational use

33 states
Have legalized medical marijuana
Overview of Federal Laws

01 | Reflection of National Trends
...

02 | History
...

03 | Important Players
...
The 86th Texas Legislature

• Bills filed covering the topics of:
  • Criminal penalties;
  • Medical cannabis use;
  • Hemp and CBD oil;
  • Drug testing;
  • Joint resolutions calling for a constitutional amendment legalizing cannabis use; and
  • Reforming drug courts and juvenile punishment programs

• Bills passed:
  • HB 3703 (medical cannabis)
  • HB 1325 (agricultural hemp)
HB 3703: Medical Cannabis

- Relating to the prescription of low-THC cannabis for medical use by certain qualified physicians to patients with certain medical conditions.

- **Author:** Rep. Stephanie Klick (R, Fort Worth)

- **Contents**
  - Expansion of Compassionate Use Program to include all forms of epilepsy, seizure disorders, multiple sclerosis, spasticity, amyotrophic lateral sclerosis (ALS), terminal cancer, autism, and incurable neurodegenerative diseases.
HB 3703: Medical Cannabis

• House Vote: 133 Ayes, 10 Nays.
• Senate Vote: 31 Ayes, unanimous.

Supporters:
• Bill did not go far enough, should have included PTSD.
• Lost establishment of research program to assess effectiveness of cannabis as a treatment option.

Opponents:
• Gateway to recreational legalization
HB 1325: Agricultural Hemp

- Relating to the production and regulation of hemp; requiring occupational licenses; authorizing fees; creating criminal offenses; providing civil and administrative penalties.
- Author: Rep. Tracy King (D, Laredo)
- Contents
  - Legalizes in-state cultivation of hemp and regulates retail hemp products
  - Relation to Federal Government’s 2018 Farm Bill hemp regulatory scheme
- Texas Dept. of Agriculture to regulate.
- Estimated that cultivation licenses will be granted by the end of 2019, crops planted by 2020.
- Drought resistant plant, strong fit for Texas.
- Growing market: US is largest consumer market for industrial hemp products in the world.
HB 1325: Agricultural Hemp

- House Vote: 133 Ayes, 10 Nays.
- Senate Vote: 31 Ayes, unanimous.
- Promoted as a “Right to Farm” bill, received strong support from the Texas Farm Bureau and Agriculture Commissioner Sid Miller.
HB 63: Sentencing Reform

- Relating to the criminal and licensing consequences of certain marijuana possession and drug paraphernalia possession offenses; imposing a fee.
- Author: Rep. Joe Moody (D, El Paso)
- Contents
  - Proposed lesser penalties for low levels of possession offenses.
  - Offense would not generate a criminal record.
  - After two civil penalties (fines) subsequent offenses would be Class C misdemeanors.
  - Did not legalize marijuana, simply changed the penalty.
- House Vote: 103 Ayes, 42 Nays.
- Senate Vote: Never came out of committee.
Criminal Justice and Sentencing Reform

01 | HB 335

Relating to the criminal penalties for possession of two grams or less of marijuana.

• Voted out of House Committee

02 | HB 1206

Relating to the prosecution of and penalties for possession of marijuana.

• Voted out of House Committee

03 | HB 2518

Relating to the possession of two ounces or less of marijuana.

• Voted out of House Committee
Medical Cannabis

**HB 1365**
Relating to authorizing the possession, use, cultivation, processing, distribution, transportation, research, testing, and delivery of low-THC cannabis for medical use by patients with certain debilitating medical conditions and the licensing of cannabis dispensing organizations, cannabis research organizations, and cannabis testing facilities; establishing the cannabis therapeutic research review board; authorizing fees.

- Voted out of the House.

**HB 4097**
Relating to the use of medical cannabis by veterans for post-traumatic stress disorder (PTSD) and the licensing of associated cultivating or dispensing organizations; authorizing fees.

- Voted out of House Committee
Hemp / CBD

HB 4508. Relating to exempting CBD oil from the Texas Controlled Substances Act.

• Voted out of House Committee.
Other (Licenses, Juvenile Justice, Resolutions)

**SB 691**
Relating to suspension of a driver's license for persons convicted of certain misdemeanor drug possession offenses.
- Voted out of Senate Committee

**HB 4606**
Relating to youth diversion programs for children accused of certain fine-only offenses and related criminal justice matters; authorizing and imposing a fee.
- Voted out of House

Additionally, Six Resolutions for constitutional amendments legalizing cannabis use were filed in the House and in the Senate.
• Possession of marijuana
• Sale of marijuana
• Cultivation of marijuana
• Medical cannabis
  • Compassionate Use Act expanded by HB 3703
• Hemp
  • Cultivation and sale legalized by HB 1325
• CBD
  • Some possession and sale legalized by HB 1325, but CBD contains the most legal “grey space”

Summary of the Law on 7/26/2019
Problem: Enforcing Marijuana Laws with Legal Hemp & CBD

- HB 1325 changed the definition of “marijuana”
  - Cannabis to cannabis with > .3% THC

- Local law enforcement claims this makes prosecuting marijuana charges difficult
  - Local law enforcement (as well as state-wide law enforcement) lacks the technology to test THC percentages
  - “Practical obstacle to law enforcement”
  - Statewide leaders strongly protest local law enforcement’s opinion
  - Sentencing reform without passing legislation?
Cannabis Usage in Texas

Cannabis Polling Date (03/2019 UT/TT Poll)

- Rural
  - Any Amount
  - Small Amounts
  - Medical Only
  - Never

- Suburban
  - Any Amount
  - Small Amounts
  - Medical Only
  - Never

- Urban
  - Any Amount
  - Small Amounts
  - Medical Only
  - Never

- Overall
  - Any Amount
  - Small Amounts
  - Medical Only
  - Never

- 33% for Rural
- 34% for Suburban
- 32% for Urban
- 32% for Overall

- Any Amount
- Small Amounts
- Medical Only
- Never
Overview of Current Marijuana Usage Laws (Federal)

01 | Federal Controlled Substances Act (CSA)
Schedule I Substance

02 | Push to Reschedule/ Deschedule Marijuana
Washington v. Barr (2nd Circuit May 20, 2019)

03 | Other Cannabis Components
Industrial Hemp – Agricultural Improvement Act of 2018
Cannabidiol (CBD)
Overview of Current Marijuana Usage Laws (State)

01 | 11 States & District of Columbia – Medical & Recreational
Illinois law in effect Jan 2020

02 | 31 States – Medical only
...

03 | Lawful Activity Statutes

Coats v. Dish Network (Colo. 2015)

- It shall be “discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in the any lawful activity off the premises of the employer during nonworking hours” – Colo. Rev. Stat. Ann. § 24-34-402.5 (West 2019).
Federal Preemption

- Controlled Substances Act
- Bourgoin v. Twin Rivers Paper Co. (Me. 2018)
  - Compensation for medical marijuana
- Emerald Steel Fabricators v. Bureau of Labor and Indus. (Or. 2010)
  - To the extent that the state statute affirmatively authorized the use of medical marijuana, federal law preempted that state law, leaving the state law without effect.
Privacy and Employment Drug Testing

- Private vs. Public Sector
  - 4th Amendment
  - State laws
- Transportation, Nuclear Energy, Etc.
Rescinding Employment Offers Based on Pre-Employment Drug Tests

• No Legal Right to At-Will Employment
  • *Roe v. TeleTech Customer Care Mgmt.* (Wash. 2011)

• Future Shifts in Pre-Employment Marijuana Drug Testing
  • *Noffsinger v. SSC Niantic Operating Co.* (D. Conn. 2018)
    • Hiring people who use medical marijuana outside of work vs. possessing/using marijuana
  • *Barbuto v. Advantage Sales and Marketing* (Mass. 2017)
    • State handicap discrimination claim but no implied private right of action under medical marijuana law
Rescinding Employment Offers Based on Pre-Employment Drug Tests

• Nevada Assembly Bill No. 132
  • Prohibits pre-employment drug testing for marijuana
  • Employer may not deny employment to prospective employees based on drug screening results that indicate presence of marijuana
• Exceptions
  • To the extent that any provisions are inconsistent or conflict with federal law, those state provisions will not apply
  • Safety-related position
  • No valid medical marijuana registry identification card
  • Additional screening tests if positive within first 30 days of employment
Terminating Employees Based on Drug Tests During Employment

• Most states: Employer can terminate employee based on positive drug test results
  • Drug-free Workplace Policy & Federal law
• States’ Drug Testing Policies for Drug-Free Workplace
  • Unusual drug testing policies: Maine & Vermont
• States’ Anti-Discrimination Laws and Medical Marijuana Use
  • “Meaningful interactive Process” – Emerald Steel (Or. 2010)
• States’ Lawful Activity Statutes and Recreational Marijuana Use
Disability Discrimination

- Only Registered Medical Marijuana Patients
- Americans with Disabilities Act
  - Excludes protection for individuals “currently engaging in the illegal use of drugs”
- State Anti-Discrimination Statutes
  - 2 recent cases held implied private cause of action for employees terminated based on drug test results
Employers may have a “written zero tolerance policy prohibiting the on-duty, and off-duty, use of marijuana, or prohibiting any employee from having a detectable amount of marijuana in such employee’s system while at work.”

GA. CODE. ANN. § 16-12-191 (WEST 2019)
Texas Employers’ Options to Enforce Drug-Free Workplace

• If marijuana remains illegal under federal law...
  • No state restrictions on private employers to drug test employees or applicants
  • No state restrictions on private employers to rescind offers or terminate employment based on positive drug tests
• Federal Funding
• Potential Future Accommodations of debilitating conditions
Cannabis Products
Why is Everything Going to Pot?

The 2018 Farm Bill | Agriculture Improvement Act of 2018

- Redefined “Industrial Hemp” under federal law
- Previously, all forms of cannabis—both marijuana and hemp—were controlled substances
- The 2018 bill removed hemp (defined as cannabis with less than .3% THC) from the Controlled Substances Act
Cannabis: Marijuana, Hemp, & CBD

• Cannabis:
  • Most commonly referring to *Cannabis sativa*
  • Active chemical in cannabis is THC (delta-9 tetrahydrocannabinol)
    • THC is the psychoactive compound in Cannabis
    • Amount of THC determines Marijuana or Hemp
Cannabis: Marijuana, Hemp, & CBD

- **Marijuana:**
  - Contains > .3% THC
  - State specific legality
    - Recreational
    - Medical Use
  - Illegal under federal law
  - Remains Class I Schedule Drug
Cannabis: Marijuana, Hemp, & CBD

- **Hemp**
  - Contains < .3% THC
  - State specific restrictions on use and cultivation
  - Legal under federal law
    - 2018 Farm Bill de-scheduled Hemp
Cannabis: Marijuana, Hemp, & CBD

- CBD (cannabidiol)
  - Mostly derived from hemp plants
  - Not psychoactive
  - Typically used in lotions, oils, edibles, supplements, and other consumer products
- Therapeutic and Medicinal Claims
  - Epidiolex, approved in June 2018 by the FDA for the treatment of seizures
  - May be detected in some drug tests
  - Consumer and consumable products containing CBD are not legal
The FDA regulates all CBD products

Federal Food, Drug, and Cosmetic Act | FD&C Act

- Any products marketed with therapeutic benefit must be approved;
- Any CBD product marketed for use in the diagnosis, cure, mitigation, treatment or prevention of disease must be approved by FDA; and
- Unlawful to introduce food or dietary supplements containing CBD into interstate commerce.
CBD’s Legality

- FDA retains authority to regulate products containing CBD under the FDCA and PHS
- Food and dietary supplements are still subject to FDA oversight
  - Risks of federal enforcement actions against retailers and manufacturers
  - Risk increase where products make therapeutic claims
- Generally speaking, enforcement has been scant leading to a proliferation of these documents in the marketplace
CBD’s Legality

- What Enforcement Have We Seen to Date?
  - FDA Warning Letters
    - “making unsubstantiated claims related to more than a dozen different products and spanning multiple product webpages, online stores and social media websites.”
  - Seizure of retail products
  - Financial penalties
Consumer Products: Topical Products

- CBD Products in CVS and Walgreens
- Kiehls launched a high-end line of CBD
- “What is FDA’s position on cannabis and cannabis-derived ingredients in cosmetics?” – FDA FAQs
“Certain cosmetic ingredients are prohibited or restricted by regulation, but currently that is not the case for any cannabis or cannabis-derived ingredients. Ingredients not specifically addressed by regulation must nonetheless comply with all applicable requirements, and no ingredient – including a cannabis or cannabis-derived ingredient – can be used in a cosmetic if it causes the product to be adulterated or misbranded in any way.”

- FDA FAQs Answers
CBD’s Legality: Anticipated Developments

“Currently, states are struggling with the lack of sound scientific research available in CBD and long-term health impacts, including those to children .... [my department] is hopeful that FDA will begin to supply significant leadership as it related to CBD, including research related to its health impacts.”

- Representative of the Virginia Department of Agriculture
Are the states cool with CBD?

Some states have expressly permitted the sale of hemp-derived CBD sales to the public.
Are the states cool with CBD?

States are taking different approaches

Some states have decriminalized hemp-derived CBD, but lack regulatory guidance for the sale of products.
Are the states cool with CBD?
States are taking different approaches
Some states have restricted sales of CBD products to the public
Are the states cool with CBD?

States are taking different approaches

Some states legalized CBD but maintain strict control over the market.
Are the states cool with CBD?

States are taking different approaches

It remains illegal in three states
Hemp: Farm Bill and New Legislation

• The 2018 Farm Bill gives the US Department of Agriculture (“USDA”) regulatory authority over hemp cultivation at the federal level.

• States have the option to maintain primary regulatory authority over the crop cultivated within their borders by submitting a plan to the USDA.

• Most states have introduced (and adopted) bills that would authorize the commercial production of hemp within their borders.
Does this mean hemp-derived CBD products are legal now?

No, far from it. But it’s confusing.
Why Hemp?

- Drought resistant
- Frost resistant
- Harvestable in 120 days
- 1 acre of hemp will produce as much fiber as 2 to 3 acres of cotton
- 1 acre of hemp will produce as much paper as 2 to 4 acres of trees
Hemp Products

• Consumable products and/or cosmetics
  • FDA Regulated Products
    • GRAS status for seed derived products: hulled hemp seed, hemp seed protein powder, and hemp seed oil

• Industrial Applications
  • Paper
  • Animal Feed & Animal Bedding
  • Biodegradable “plastics”
  • Textiles
  • Construction quality fiberboard, plaster board
  • Biodegradable fuels and oil applications
Risks Associated with Hemp Production

- THC Concentrations
- Testing and documentation
- Licensing and regulations
- Transportation
What Comes Next?
Ancillary Industries and Legal Impacts
TRANSPORTATION OF HEMP AND HEMP PRODUCTS — No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.”

- Section 10114(b) of the 2019 Farm Bill
Zoning Restrictions & Land Use

- Retail Space limited to districts that currently zoned to allow medical marijuana dispensaries
- Restrictions on proximity to schools and youth centers
- Limitations on the number of retail outlets
- Outdoor cultivation restrictions within city limits
- Testing, manufacturing, distribution, warehousing locations within city limits
- Restrictions on capacity of indoor cultivation (size and volume)
Banking – SAFE Banking Act

“At its heart, cannabis banking is a public safety issue. It’s an $8.3 billion industry that’s currently being forced to operate almost entirely in cash. … While 33 states, territories and DC have legalized cannabis, it’s been overwhelmingly difficult to provide these businesses financial services because handling transactions are currently considered money laundering.”

- Jim Nussle
  - Credit Union National Association, CEO & President
IP protections

“There has been a growing trend among makers of cannabis products, including edible products infused with tetrahydrocannabinol ("THC"), to market their products by copying and misappropriating the colors, flavors, names and packaging of popular snacks and candies.”

– Mondelez Canda Inc.
IP Protections
IP Protections
“Takeaways” for Texas Companies

- Significant market for CBD and Hemp products
- Risks and uncertainty in the market
- Hemp has the least number of risks?
- Profit in ancillary industries, arguably less risk
- Prepare for the future now, plan ahead
What kinds of work has Shook done?

- Regulatory Counseling
- Risk Assessment for Manufacture or Retail Sale of CBD Products
  - Model Contractual Provisions to Mitigate Risk of Manufacture and Sale
- Provide Guidance Regarding Ability to Move Hemp Through Interstate Commerce
  - Analysis of State and Local Laws for Risk Assessments
Questions
T. Lynne Eckels  
Partner - Houston  
teckels@shb.com

John Lewis, Jr.  
Partner – Houston - Atlanta  
jolewis@shb.com

Stephanie McGraw  
Associate - Houston  
smcgrew@shb.com