

As More States Legalize Marijuana, Advertising and Marketing Regulations Come Into Focus

The Bottom Line

- *The advertising opportunities in this evolving industry are hard to ignore. However, with more opportunities comes more confusion, as state advertising regulations differ and the conflicts with the federal government become increasingly complicated.*
- *All participants in the industry, including media providers, marijuana brands, agencies and ad tech companies, need to analyze and evaluate their position and activities in the marketplace and those in California specifically need to comply with the new set of rules.*

The trend of states legalizing marijuana shows no signs of abating. As states continue to permit medicinal or recreational marijuana use, they are grappling with how to regulate the advertising, promotion, and marketing of marijuana products. California has finalized its own rules in these areas.

Marijuana Advertising: A New Frontier

Once a state legalizes medicinal and/or recreational use of marijuana, state regulators must decide how dispensaries and retailers can market their product to consumers. Such regulations can affect everything from store signage, the content of advertisements, permissible locations and platforms for ads, and required disclosures. Some states have broad regulations covering all of these areas, while others have not addressed advertising at all. Further, some states model their advertising regulations on similar products such as alcohol, whereas others have decided to treat marijuana advertising uniquely.

There is not much conformity between states with respect to marijuana advertising regulations. This may be in part due to the continuing conflict between state and federal law relating to legalization. For additional information, please see a previous alert on advertising regulations in Colorado, Oregon and Washington titled, “Colorado’s Retail Marijuana Regulations Cover Advertising, Labeling, and Packaging.” However, California recently finalized its regulations, which may now serve as a template for other states going forward. At the very least, as the state with the largest economy, those in the business of advertising marijuana products should be aware of California’s regulations.

California Regulations

In November 2016, California voters passed the Adult Use of Marijuana Act, legalizing the recreational use of marijuana. Without much precedent, California’s three regulatory agencies focused on cannabis – the Bureau of Cannabis Control (BCC), the Department of Food and Agriculture (DFA), and the Department of Public Health (DPH) – scrambled to regulate the distribution, marketing, sale and use of marijuana products. In December 2017, these entities created emergency regulations, which were adopted in June 2018 while

permanent regulations were drafted. On January 16, 2019, the final and permanent cannabis regulations took effect.

The BCC, DFA and DPH each individually address labeling and packaging requirements for different entities that operate in the cannabis supply chain. However, it is the BCC's regulations that contain the most robust rules regarding advertising. In a nutshell, these regulations primarily address concerns with the marketing and advertising of marijuana products to minors, making them similar to alcohol advertising regulations in that they govern where marijuana advertising may appear, what it can say, and what it depicts, in order to prevent underage consumption.

For example, the BCC states that marijuana advertising or marketing placed in broadcast, cable, radio, print, and digital communications must:

- Only be displayed to an audience verifiably comprised of at least 71.6 percent individuals at the age of 21 or over;
- Not use any depictions or images of minors or anyone under 21 years of age;
- Not depict objects such as toys, inflatables, movie characters, or cartoon characters or include any other image designed to be appealing to minors or anyone under 21 years of age; and
- Not advertise free cannabis goods or marijuana promotions such as contests, sweepstakes or raffles.

Further accentuating California's concern with underage consumption of marijuana, the DPH regulations prohibit packaging or labels that are, or are designed to be, "attractive to individuals under the age of 21," including but not limited to cartoons, images, characters, or phrases that are popularly used to advertise to children, any imitation of candy packaging, or the terms "candy" or "candies" or variants in spelling such as "kandy" or "kandeez."

In another indication that California looked to alcohol when drafting cannabis regulations, the BCC prohibits the sale or marketing of cannabis goods that are labeled as beer, wine, liquor, spirits, or any other term that may create a misleading impression that the product is an alcoholic beverage.

Lastly, the BCC's regulations also appear to reflect a concern with conflicting state and federal laws. For example, the BCC states that outdoor signs advertising marijuana products, including billboards, must not be located within a 15-mile radius of the California border on an interstate highway or on a state highway that crosses the California border.

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may legalize or decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

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