

Four More States Give the Green Light to Legalize Recreational Marijuana

The Bottom Line

- The growing number of states that have legalized recreational marijuana has created opportunities for new businesses, and as a result, advertising agencies, media agencies and publishers. The expansion of legalized recreational marijuana to four additional states will only serve to grow the available media and advertising landscape and increase opportunity for revenue.
- However, in addition to being illegal on the federal level, advertising is highly regulated in states where marijuana has been legalized (and may be illegal in states where it has not been legalized), so it is important to consult with legal counsel before moving forward with any marijuana-related advertising.

Recreational marijuana has been legalized in Arizona, Montana, New Jersey and South Dakota, as ballot initiatives legalizing marijuana have passed in all four states. This brings the tally up to 15 states plus Washington, D.C. that permit recreational marijuana, and 1/3 of Americans now live in states where recreational marijuana will be legal for anyone 21 years of age or older.

Marijuana Regulations in the USA

The legality of marijuana is a complicated issue in the United States. Marijuana remains a Schedule 1 controlled substance under the federal Controlled Substance Act (CSA), and it is therefore a federal crime to grow, sell or possess marijuana. Nonetheless, the Obama administration maintained a policy of non-enforcement in states where marijuana was legal, primarily via two documents—the Joyce Amendment and the Cole Memo.

The Joyce Amendment is a federal budget rider that prohibits the use of funds allocated to the Department of Justice for purposes of preventing states from “implementing their state laws that authorize the use, distribution, possession or cultivation of medical marijuana.” In essence, this Amendment means that federal enforcement of the CSA in connection with medical marijuana is unlikely in states where medical (not recreational) marijuana is legal. Importantly, this only prohibits the federal government from interfering with legal medical marijuana businesses, not recreational marijuana business.

The Cole Memo was a Department of Justice-issued memorandum stating that the federal government would not enforce federal marijuana laws in states that legalized marijuana in some form, including recreational marijuana, except if such non-enforcement would undermine federal priorities (e.g. preventing violence in marijuana cultivation, preventing distribution to minors, etc.). And although then-Attorney General Jeff Sessions rescinded the Cole Memo in 2018, reversing the previously established non-enforcement policy on paper, the federal government under the Trump administration has otherwise largely left recreational marijuana alone when sold in accordance with state law.

What happens next likely depends on the composition of the incoming government, both on the Executive and Legislative levels.

Newly Legalized States

The legalization of marijuana in New Jersey is particularly noteworthy, as it may be a harbinger of things to come for legalization efforts in the tri-state area. With ballooning budget deficits due to the COVID-19 pandemic and the tax revenue from marijuana sales a tempting option, New York Governor Andrew Cuomo has indicated that legislation may be introduced as soon as early 2021 to legalize recreational marijuana in New York.

In addition, New Jersey is the third state bordering New York—along with Massachusetts and Vermont—to have legalized recreational marijuana, and its proximity makes it far more easily accessible to residents of New York City via mass transit. With recreational marijuana now located just over the bridge (or tunnel) to residents of New York City (albeit illegally), New York legislators have an added incentive to capture tax revenue otherwise paid to another state. The governors of Pennsylvania and Connecticut have also recently called for legalization in their states.

Keep in mind that the marijuana industries will not pop up overnight in the newly legalized states. These ballot initiatives amend each state's constitutions, but their legislatures will need to create a regulatory regime governing the licensing of dispensaries and sale of marijuana before the industry can open up, including addressing issues related to, among others, taxation, location of these businesses, advertising of the products, and tackling issues related to prior drug enforcement and other concerns of social justice.

Many states that have already legalized marijuana have implemented detailed regulations regarding the advertising and promotion of the products. The foregoing issues take time and often continue to evolve, encourage debate, and inspire the passage of new limitations and laws — just this past year saw potential changes to marijuana billboard advertising in both Oklahoma (which legalized medical marijuana in 2018) and Washington state (which legalized medical marijuana in 1998 and was one of the first states to legalize recreational marijuana in 2012) several years after legalization in each state.

What is clear is that recreational marijuana is rapidly becoming the norm across the United States. This trend, together with a change to the new administration, will mean that the recreational marijuana business will continue to rapidly evolve.

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