

ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

LEGAL MARIJUANA: WHAT YOU NEED TO KNOW TO LEGALLY ADVERTISE TO THIS BUDDING ECONOMY

One underreported outcome of the November elections is that nearly 25 percent of Americans now live in a state where recreational marijuana use is legal. Maine, Massachusetts, Nevada and of course California voted to legalize recreational marijuana, bringing the total to eight states, including Washington, Oregon, Alaska and Colorado, and the District of Columbia, while a similar ballot measure was narrowly defeated in Arizona.

These election outcomes dramatically increased the number of potential customers for legal marijuana, the market for which is expected to reach over \$21 billion in sales by 2020. So, while the potential customers are out there, marketers and their agencies need to know how to reach them without running afoul of state and federal law.

STATE ADVERTISING LAW HIGHLIGHTS

All four states where marijuana was recently legalized are now beginning the process of creating regulatory frameworks for recreational marijuana, including advertising rules and restrictions. These states will likely look to existing frameworks in Colorado, Oregon and Washington for guidance. Those state regimes have similar themes and approaches, so it is reasonable to assume new states will continue adhering to these rules. For instance, all three states currently prohibit marijuana advertising that is false or misleading, or that targets minors. However, the states

THE BOTTOM LINE

Marketers, producers and their agencies should be aware of the variety of state and federal legal issues presented by marijuana advertising, packaging and sale. And of course, any substantial policy changes from the incoming Trump administration could have a dramatic impact on the nascent industry. While seeking to capitalize on a new market opportunity, parsing through these issues on a campaign-by-campaign basis will be critical to minimizing risk in an evolving environment.

are not in lock-step; Oregon and Washington prohibit advertising that promotes over-consumption, and Oregon is the only state that explicitly bans depictions of actual marijuana use. Some states have also enacted restrictions on certain types of media, such as Colorado's prohibition on marijuana advertising using an Internet pop-up, or ads directed towards a location-based device such as a cell phone, unless the advertisement is contained in an application that includes a permanent and easy opt-out feature. Marketers will need to watch the evolution of new state

regulations closely to understand the subtle state-by-state distinctions.

Even the most significant restriction – not advertising in any manner that targets minors – could have state-specific nuances. In both Colorado and Oregon, no advertising is allowed on any program, publication or website unless there is reliable evidence that no more than 30 percent of the audience is under the age of 21. California's Prop 64 limits the underage segment to 28.4 percent. To date, there is no concrete indication of what percentage of an adult audience Massachusetts, Maine or Nevada will require, but it is likely to be in a similar range.

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PACKAGING AND WARNING LABELS

As a consumable product, marijuana is also subject to packaging and labeling laws, much like other food and drugs. It appears likely that new states will continue the requirement that marijuana be packaged in child-proof containers, and that such packaging not include cartoons or other imagery attractive to children (Colorado, for instance, specifically prohibits the word “candy” on marijuana packaging). Some may also follow the Colorado and Washington rule that if marijuana is sold in a packaging containing multiple servings (e.g., a box with six brownies in it) each serving must be individually contained in child-proof packaging. Warning labels will also be developed across the board, although specific wording will likely vary state-by-state – compare Washington’s “Marijuana can impair concentration, coordination, and judgment. Do not operate a vehicle or machinery under the influence of this drug” with Oregon’s “It is illegal to drive a motor vehicle while under the influence of marijuana.” California’s Prop 64 contains more aggressive warning label requirements, including, among other things, a bold, all capital letters statement that “THIS PACKAGE CONTAINS MARIJUANA, A SCHEDULE 1 CONTROLLED SUBSTANCE.”

STATE VS. FEDERAL LAW ISSUES

Regardless of subtle differences between states, the most significant overarching issue facing marijuana

producers, marketers and their agencies is that marijuana is still illegal under federal law. That means it is illegal to transport marijuana across state lines, hampering attempts to build a national brand, and advertisements that target out-of-state individuals could run afoul of federal commerce regulations. It also means that agencies that are working with producers (e.g., a creative or media buying agency) could be held criminally liable for aiding and abetting illegal activity. Finally, advertising for marijuana in any media that is controlled or overseen by federal regulators carries significant risk for that media. A TV or radio station could have its FCC license revoked for advertising an illegal substance. To date, no national broadcaster has been comfortable airing marijuana advertising. Even a local TV affiliate in Colorado that was slated to run an ad for an in-state dispensary in 2015 backed out at the last minute over concerns that it would get in trouble with federal regulators. And print advertisements in the newspaper may be difficult as well, since newspapers are often delivered by the U.S. Postal Service, which issued a policy statement in December 2015 affirming that it is illegal to use the mail to distribute any advertising for illegal substances.

IP RIGHTS STILL RULE

Because its product was illegal for so long, the marijuana industry has long been an outlaw and has acted

accordingly. Now that it’s coming into the mainstream, its practices will have to do the same. One issue, in particular, has been its flagrant abuse of intellectual property rights – including what appears to be unauthorized use of third-party trademarks and personal rights of publicity. Remember that marketers, except in limited circumstances such as comparative advertising, cannot use a third party’s trade name or mark, or a person’s name, for advertising purposes, without getting the third party’s permission. The days of being able to name a particular strain of marijuana *Hebrew National*, *Blue Ivy*, *Girl Scout Cookies* or *Charlie Sheen* without realistic fear of receiving an infringement claim are surely limited.

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