



What is the Current Status of Cannabis Regulation at the State Level?

FDLI Conference – Legal and Practical Issues in
the Evolving World of Cannabis Regulation

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Jonathan Havens is the co-chair of the Cannabis Law Practice and chair of the Food and Beverage Practice at Saul Ewing Arnstein & Lehr LLP. He counsels state cannabis license applicants and awardees, ancillary service and product providers, investors, management companies, and various other entities that are affected by federal and state cannabis laws. In addition to his cannabis law practice, Jonathan maintains an active food and beverage practice, particularly with regard to cannabidiol (CBD) products, in which he counsels manufacturers, importers, distributors, and retailers of conventional foods, dietary supplements, and beverages on product development, claim substantiation, labeling, promotion, registration, reporting, and recall issues to ensure compliance with U.S. Food and Drug Administration (FDA), U.S. Department of Agriculture (USDA), and state and local requirements.



Jonathan was named to the *National Law Journal's* Cannabis Law Trailblazers list in 2018 and listed in *Chambers USA 2019: America's Leading Lawyers for Business* for his nationwide cannabis law practice. He is regularly interviewed by mainstream and trade press outlets, alike, and has been quoted by or authored pieces for CNBC, *The New York Times*, *The Los Angeles Times*, *WIRED*, MarketWatch, Engadget, Law360, *High Times Magazine*, *Cannabis Business Times*, and *HEMP Magazine*. Jonathan currently serves on the Food and Drug Law Institute's Cannabis-Derived Products Committee.

Before entering private practice, Jonathan served as a regulatory counsel with FDA, where he focused on compliance and enforcement related to promotion, advertising, and labeling. Prior to law school, Jonathan served as a legislative aide in both the U.S. Senate and U.S. House of Representatives.

Steven N. Levine

Since 2010, Steve's major focus has been on the burgeoning cannabis industry, where he guides clients through the tangle of shifting regulations governing the sale and use of cannabis in both the marijuana and industrial hemp sectors.

Prior to cannabis, Steve honed his skills representing midcap public oil and gas companies and acting as a general corporate transactional attorney for numerous industries, guiding clients through mergers and acquisitions, securities laws, capital markets, regulatory issues and intellectual property issues. He understands that a cannabis business's success hinges not only on high-quality products and service, but also on smart business and legal decisions regarding corporate structure and financing, lease or real property purchase negotiations, permits and licenses, and employment procedures.

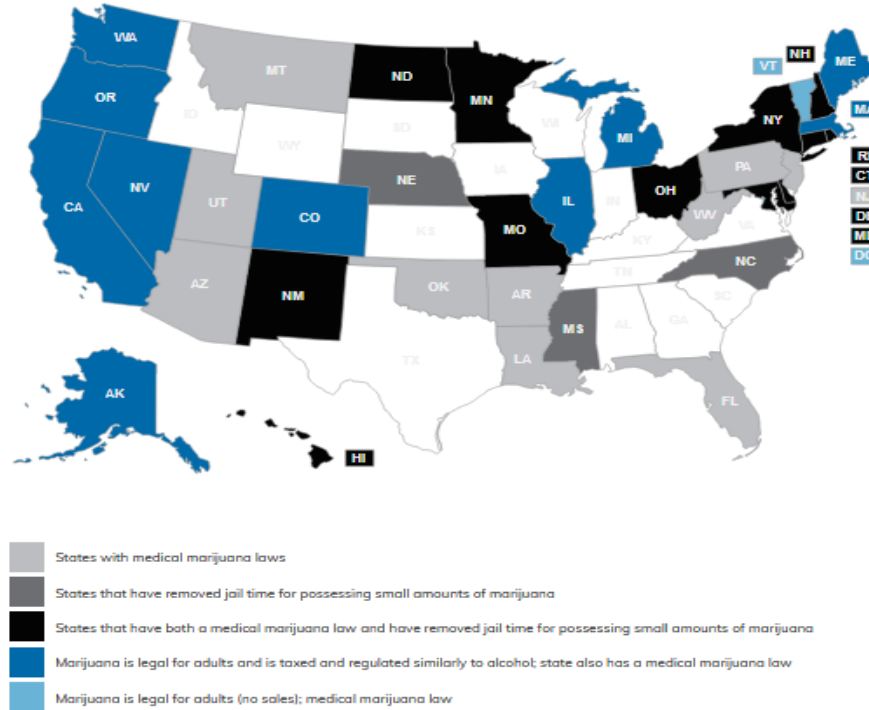
Steve is ranked as a USA Nationwide Tier 1 lawyer in Cannabis Law in the 2019 Chambers USA legal directory. Steve also has been named a 5280 The Denver Magazine, Top Lawyers, Marijuana Law, 2016-2019, Top Cannabis Lawyer, 2017, a National Law Journal Trailblazers: Cannabis Law, 2018, and The Best Lawyers in America, Corporate Law, 2016-2020.



What is the Regulatory Status of Cannabis?

- 33 states have authorized (incorrect to say “legalized”) medical cannabis.
- 11 states with medical cannabis programs have also authorized recreational or “adult use” cannabis.
 - Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington.
 - New York is currently considering authorizing adult-use cannabis. If/when New York goes, New Jersey and Pennsylvania (and others) could quickly follow.
 - Possession of up to two ounces of recreational marijuana is legal in Washington, D.C., but *sales* are not legal (D.C. has a “gifting” program).
- Other states are considering establishing such programs.
- However, marijuana is still illegal under federal law.
 - It is a Schedule I drug under the Controlled Substances Act (CSA) (21 U.S.C. § 812(b)(1)).

State Cannabis Program Breakdown



Source: Marijuana Policy Project

What is the Legal Framework for Cannabis, Hemp, and CBD? Who Regulates What?

- State Cannabis Commissions:
 - These agencies, which are sometimes part of state departments of health, promulgate and enforce regulations on a range of topics, including growing, processing, dispensing, and consuming cannabis (medical, and in some states, also adult use). Some states allow edibles, but many do not.
- State Departments of Agriculture
 - Oversee hemp cultivation and processing.
 - If they have not done so already, these agencies will submit hemp plans to USDA.
- State and Local Departments of Health
 - These agencies could promulgate CBD product regulations, enforce federal requirements (e.g., no CBD in foods and supplements), or do nothing at all.
 - It is not uncommon for other state agencies to get into the mix (e.g., the New Mexico Environment Department regulates hemp extraction in the State).

Other Hemp and CBD Regulators

- **State and Local Law Enforcement**

- There are some well documented cases of state and local law enforcement going after CBD stakeholders (e.g., <https://www.ktvb.com/article/news/crime/truck-drivers-sentenced-for-transporting-hemp-through-ada-county-idaho/277-48d9ec07-b224-4623-b556-2291f5bcdf3b>).
- This highlights the importance of robust seed-to-sale, or soil-to-oil documentation (e.g., COAs), as well as sourcing documentation and evidence of compliance.

- **Plaintiff's Attorneys**

- Filing claims against CBD firms for misrepresenting CBD content, THC content , drug testing claims, and beyond.
- Hemp Bombs Hit with Class Action Alleging CBD Products Are “Grossly Under-Dosed”: <https://www.classaction.org/news/hemp-bombs-hit-with-class-action-alleging-cbd-products-are-grossly-under-dosed>.

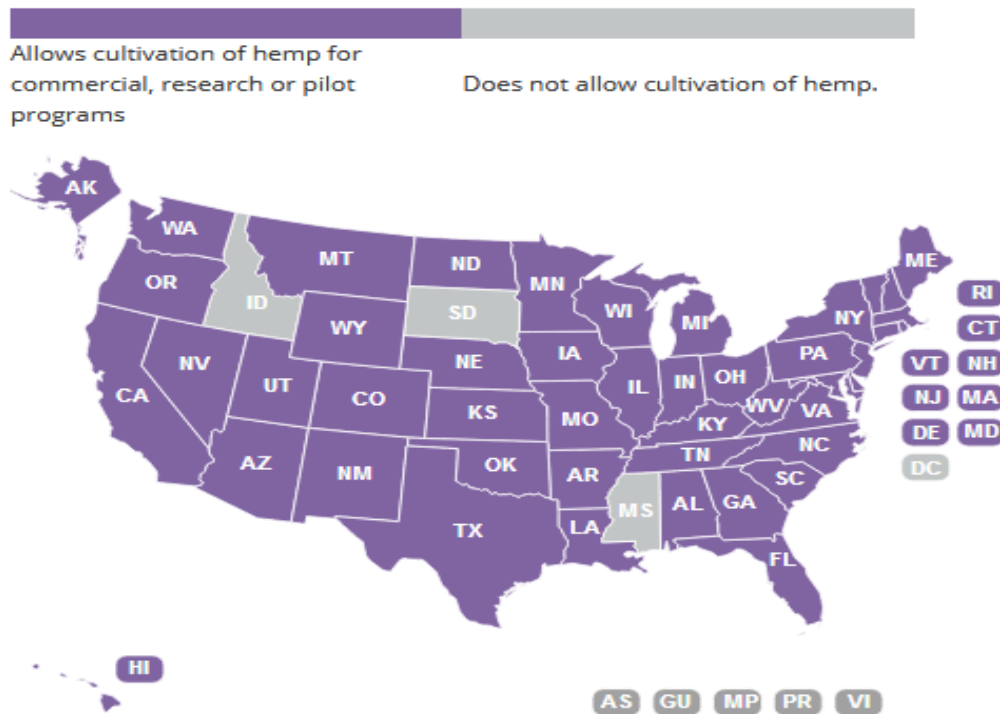
Current Areas of Marijuana Regulatory Focus

- Public health and safety issues such as under-age use, driving under the influence, product safety, and diversion outside the regulated system.
- Ownership disclosure requirements.
- Social equity.

Issues Related to Implementation of Marijuana Regulations

- Statutes and regulations were developed to address different viewpoints, while, needing to comply with the frameworks outlined in voter-approved ballot initiatives (creating rushed regimes).
- Laws are generally revisited every legislative session, generating subsequent changes to the regulations on an annual basis.
- Many businesses obtaining licensees have never operated in a highly regulated environment – resulting in the inabilities to remain compliant or attempts to circumnavigate the rules.
- Regulators afforded significant authority and public support to implement a system whose regulatory reach is far greater than other vice industries.
- Stringent rules formulated to restrict who could purchase marijuana, how much could be purchased, under what circumstances (for which conditions), and the place and manner in which purchases could happen.
- Regulations for such things as pre-licensing background checks, security surveillance, CRP, product labeling, and extensive laboratory product testing.
- Regulators tasked with managing dynamic between federal and state laws.

What About State Hemp Laws?



Source: NCSL

State and Local Approaches to CBD

- The CSA does not preempt state law. Many states automatically follow the Federal CSA, but some do not.
- A number of states are moving to align their CSA analogs with federal law (*i.e.*, descheduling hemp, and perhaps, hemp-derived CBD).
- Yet, other states and even some municipalities have taken note of FDA's position (*i.e.*, that CBD is not a lawful food/supplement ingredient), and in reaction to the same, have banned CBD, even if it is not a controlled substance.
 - “In New York, confusion reigns in the emerging CBD edibles business”
<https://www.reuters.com/article/us-usa-cbd/in-new-york-confusion-reigns-in-the-emerging-cbd-edibles-business-idUSKCN1RL129>.

Our Predictions

- States will continue to authorize cannabis medically and recreationally.
- The vaping crisis could cause federal and state regulators to further restrict CBD products.
- Failed drug tests for CBD-only users (even with 0.3% THC or less) could become an issue.

Questions?

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