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Marijuana Marketing: The Do's and Don'ts of Cannabis Advertising in California

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The new cannabis market is bringing with it the traditional competitive pressures on businesses to establish brands they hope will dominate the expanding industry for years to come. Advertising and marketing that runs afoul of California's statutory restrictions, however, could undermine these efforts or even force a business out of the industry entirely.

Cannabis products must comply with stringent standards on how they may be legally marketed and advertised. Section 26150 of the California Business and Professions Code sets forth the definition of a cannabis advertisement, which "includes any written or verbal statement, illustration, or depiction which is calculated to induce sales of cannabis or cannabis products." Product labels and editorials not written by or at the direction of a licensee do not fall within the ambit of the rules.

Section 26152 of the Code prohibits licensees from advertising or marketing in a manner that is "false or untrue in any material particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter, tends to create a misleading impression." This includes, for example, improper representations of the cannabis place of origin and the name of any California county unless the cannabis used in the product was grown there. Looking to the alcohol industry, an illustrative action was filed against **MillerCoors** alleging deceptive marketing of its Blue Moon beer by concealing MillerCoors's connection with the brand, thereby misleading the public to believe it is a small-batch "craft" beer. This action was ultimately dismissed with prejudice in MillerCoors's favor, but not before the company was forced to incur substantial legal costs for its defense.

California-based businesses also must be wary of violating California's prohibition against making any statements related to health that "expressly or by implication, suggest a relationship between the consumption of ... cannabis products and health benefits," which are "untrue in any particular manner or tend to create a misleading impression as to the effects on health of cannabis consumption."

Applied to manufacturers, health-related statements "must be supported by the totality of publicly available scientific evidence ... and for which there is significant scientific agreement, among experts qualified by scientific training and experience to evaluate such claims." California Code of Regulations, Title 17, Division 1, Ch. 13, §40410. For instance, an advertisement claiming that cannabis, or a particular strain, can cure cancer would run afoul of the Code; but advertising that cannabis may help to manage pain or discomfort associated with cancer would not, so long as adequate supporting evidence for the claim exists.

Cannabis businesses looking to place an advertisement in television, radio, print or digital communications are further advised to consult up-to-date audience composition data before entering into any agreement. Under California Business and Professions Code, section 26151, such advertisements are permitted only where at least 71.6 percent of the audience is reasonably expected to be at least 21 years of age. Placing the burden to ensure compliance on the cannabis business represents a marked distinction from traditional advertising regulations where the burden of compliance has traditionally been placed on the broadcaster. In addition, marketing intended to encourage the consumption of cannabis or cannabis products by persons under 21 years of age and advertisements that are attractive to children are in violation of the Code. Section 26152 further prohibits advertisements within 1,000 feet of a daycare center, school, playground or youth center.



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What about Federal Law?

In general, the United States Supreme Court has held that if a product is legal, then one may advertise that product so long as the advertising is not misleading. See *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). Despite widespread state legalization, cannabis remains illegal under federal law. To date, the federal government has not prosecuted anyone for publishing cannabis advertisements in states where it is legal. However, it is a felony under the Controlled Substances Act (CSA), punishable by up to four years in prison, to “place in any newspaper, magazine, handbill, or other publications, any written advertisement knowing that it has the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule I controlled substance.”

So what is the bottom line? First, all cannabis advertising must be truthful and appropriately substantiated. A cannabis business with growth aspirations needs to review the accuracy of its marketing content. Producers should communicate with retailers that sell their products to ensure they are not making promises that the products cannot uphold. If something goes wrong and a retailer has made an unsubstantiated promise, an aggressive plaintiffs’ attorney may name that business – and everyone else along the supply chain – as defendant in a complaint for false advertising, misbranding and/or consumer fraud. Moreover, allegations of false advertising often are uninsured claims, leaving a business on its own without cover. Fortunately, instituting best advertising and marketing practices consistent with California’s regulations should mitigate most risks associated with an expensive lawsuit.

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