



## Insurance Coverage for the Cannabis Industry

**Risk, unfortunately, is unavoidable in the cannabis industry. Insurance, however, can help mitigate that risk. Because marijuana remains illegal at the federal level in the United States, though, procuring insurance and then accessing coverage when a first-party loss or a third-party claim occurs presents a unique set of challenges for policyholders doing business in or with this dynamic industry.**

Positioned at the crossroads of cannabis and coverage, Leech Tishman’s attorneys are uniquely situated to help policyholders of all sizes navigate and overcome these industry-specific challenges.

As with virtually any business in any industry, businesses in or adjacent to the state-legal cannabis industry need to protect their products, property, and people. Insurance is key. Determining the precise coverages to obtain, however, may not be so simple. Industry-specific risks, as well as applicable state regulations, must be taken into account when determining the types and amounts of insurance to purchase. The unique challenges do not stop there, though. Securing the desired coverage oftentimes is complicated by a limited insurance market. Insurers willing to cover cannabis-related risks enter and exit the market. Certain insurers will only insure select types of risks, and overall capacity is limited. Worse still, many insurance policies offered to cannabis-related or ancillary businesses actually contain language that would effectively negate some or all of the desired coverage.

Then, if and when a loss or claim occurs, additional challenges may arise. Despite knowing that its policyholder is involved in or with the cannabis industry, insurers have attempted to use the nature of the policyholder’s operations, and marijuana’s status under U.S. federal law, as a means to avoid coverage. An insurer may invoke particular insurance policy conditions or exclusions, or make certain public policy-based arguments, to try to defeat coverage. The enforceability of cannabis-related contracts – including, but not limited to, insurance policies – continues to be litigated in courts across the country.

These challenges need not be insurmountable. Experienced insurance coverage counsel who also understand the “ins and outs” of the cannabis industry can help.

### **The U.S. Cannabis Conundrum: A Multibillion-Dollar, But Federally Illegal, Industry**

The U.S. cannabis industry is a multibillion-dollar industry that continues to grow at a fast pace. It is not just “plant-touching” cannabis growers and dispensaries that comprise the industry. Others – from landlords to contractors, from retailers to lawyers and other service providers, as well as many others – are actively involved in the industry today. More businesses – that do and do not “touch the plant” – enter the industry every day.

A majority of states now allow for the use of medical marijuana, and, already, 11 states and the District of Columbia permit its “adult use.” At the same time, however, marijuana remains a Schedule I controlled substance, and therefore illegal at the federal level, in the United States. The resulting conflict between state and federal law creates a myriad of unusual obstacles for this industry. Among them are a limited insurance market and the potential for troublesome insurance policy language that arguably could yield illusory coverage. Further still, it is this conflict – and the status of marijuana under federal law – that insurers have seized upon at times to try to avoid covering cannabis-related losses and/or claims.

Whether purchasing or renewing coverage or litigating a coverage dispute, a deep understanding of both insurance coverage law and the cannabis industry is critical to overcoming these obstacles.

### **Insurance Policy Review, Placement, and Counseling**

When considering its insurance needs, a cannabis-related business must first consider its business model, the attendant risks, potential liabilities, any state insurance requirements, and other applicable state regulations. Once it has identified those risks, potential liabilities, and legal requirements, it can then determine the specific coverages it needs. Those coverages may include, but are not necessarily limited to, one or more of the following:

- Builder’s Risk
- Commercial Auto
- Commercial General Liability
- Crop
- Cyber Liability

- Directors and Officers'
- Employment Practices Liability
- Environmental/Pollution Liability
- Product Liability
- Product Recall
- Professional Liability/Errors and Omissions
- Property/Business Interruption
- Workers' Compensation

Leech Tishman's attorneys can help identify a business' coverage needs. We can also perform policy reviews to determine whether there are any gaps in existing coverage and, if so, how best to fill them.

Further, when it comes time to purchase or renew an insurance policy, we can work with businesses (and their insurance brokers) to address their coverage needs, vet policy proposals and quotes, and review specimen insurance policies and proposed policy language. Policy language always matters. It is especially important, though, for the cannabis industry. Insurance policies offered to businesses in this industry may contain a health hazard exclusion, certain vaping exclusions, some form of an illegal acts exclusion, or myriad other terms and conditions that could negate coverage. As such, prior to purchasing an insurance policy, it is critical to review that policy and understand what coverage is – and is not – being secured. Even if it is not possible to negotiate policy language, it is important to purchase insurance with “eyes wide open.”

To be sure, it is not just “plant-touching” or “traditional” cannabis businesses, such as dispensaries and growers, that must carefully review their insurance policies. So too must ancillary businesses. Today, more and more businesses – including, for example, beverage companies, retailers, commercial landlords, and brands – are entering the cannabis space. As these businesses move into this new space, they cannot and should not just assume that the insurance coverage they already have in place will protect them in the event of a cannabis-related loss or claim. They too must carefully review the policies they already have in place and that they plan to purchase or renew to make sure that there is no problematic exclusions or other coverage-defeating policy language.

### Insurance Claims

Unfortunately, the cannabis industry is not immune from first-party losses or third-party claims. Fires, explosions, product recalls, cyber issues, securities claims, liability claims, a pandemic, and more have already affected this young industry. When a cannabis-related or ancillary business experiences such a loss or claim, it is important that the business be prepared and know what to do. Leech Tishman's experienced insurance coverage and cannabis counsel can help. We can assist a business review its insurance policies to determine which one(s) should respond, provide notice to its relevant insurer(s), and comply with other contractual obligations. We also can assist the business document, quantify, and mitigate its losses and/or damages.

Unfortunately, regardless of a policyholder's business, insurance companies may deny coverage or issue complicated reservation of rights letters. They may ask continual questions or seek endless documentation. When the affected policyholder does business in or with the cannabis industry, the insurer's coverage position(s) and/or information requests may be more complicated or fraught with additional peril. Our attorneys are skilled in understanding and responding to insurers' coverage correspondence and coverage positions. We know when and how to push back to make sure that every policyholder gets the full benefit of the coverage it purchased.

### Coverage Litigation & Other Dispute Resolution

Although we work diligently with our clients to resolve disputes with insurers out of court, sometimes that is not possible. As such, to secure the insurance coverage they purchased and expected, policyholders, at times, must pursue litigation, arbitration, mediation, or some other form of alternative dispute resolution. Our attorneys have experience litigating complex insurance coverage claims against many different insurance companies in federal and state, as well as trial and appellate, courts across the country.

Although the outcome of such litigation may turn in large part on traditional insurance coverage-law principles, it is important to retain counsel who not only understands insurance coverage law but who also understands the nuances of the cannabis industry. To achieve the best results for the policyholder, it is imperative that counsel be able to apply those general legal principles to specific industries and businesses. As such, it is essential to retain counsel who understands the operations of cannabis-related and/or ancillary businesses, as well as the unique risks with which those businesses must contend. Resolution of a coverage dispute affecting this industry may also turn in part on federal public policy or other law. Leech Tishman's attorneys are uniquely familiar with both insurance coverage and cannabis, including relevant federal and state law and public policy.

### Risk Mitigation, Transfer, and Allocation

In addition to procuring insurance, there are other ways that cannabis-related and ancillary businesses can work to mitigate their risk. For example, as part of a supply agreement, lease, or other contract, a business can include certain indemnification provisions. It can also require the other party to the contract to maintain certain types and amounts of insurance. Leech Tishman's attorneys are well-versed in drafting and analyzing such contractual provisions, and we routinely counsel clients – including ones in or adjacent to the cannabis industry – about various risk mitigation, transfer, and allocation mechanisms.