



Insurance Coverage for Hemp, CBD, and Vaping

Far from monolithic, the “cannabis industry” comprises many different products in addition to those containing tetrahydrocannabinol (“THC”). Today, it also includes “hemp,” which is no longer a Schedule I controlled substance in the United States, as well as products containing hemp-derived cannabidiol (“CBD”). CBD vape oils, pens, and cartridges are particularly popular. Companies doing business in these three markets (collectively, the “Hemp/CBD Market”) face many challenges – some of which are unique to this space, and others of which are no different than those faced by any business in any industry. Regardless, insurance can help mitigate those risks.

While not always as difficult as obtaining insurance coverage for state-compliant but federally illegal “marijuana” operations, securing insurance for a hemp-, CBD-, and/or vaping-related business is not without unique challenges. To start, these businesses too must fully appreciate the particular risks and potential liabilities they face. Moreover, not every commercial insurer will insure such businesses. And, those that will cover them may offer policies containing exclusions that negate or limit the desired coverage. If and when a first-party loss or a third-party claim occurs, an insurer may then refuse to provide the coverage for which the policyholder already paid.

With a deep understanding of insurance coverage law; the cannabis industry broadly; hemp; CBD; and the differences between marijuana, hemp, and CBD, Leech Tishman’s attorneys are uniquely situated to help policyholders of all sizes navigate and overcome these industry-specific challenges.

Marijuana, Hemp, and CBD in the United States: A Brief Legal Overview

The U.S. Agriculture Improvement Act of 2018, also known as the “2018 Farm Bill,” expressly removed “hemp” from the definition of “marijuana” in the U.S. Controlled Substances Act. That definition no longer includes not only “hemp” but also no longer includes “the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant

which is incapable of germination.”

According to federal law, “[t]he term ‘hemp’ means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”

Although no longer a Schedule I controlled substance, hemp and hemp-derived CBD products are still subject to federal and state regulation. For example, pursuant to the U.S. Federal Food, Drug, and Cosmetic Act, it still is not legal to include CBD in food and beverages.

Insurance Policy Review, Placement, and Counseling

When reviewing, purchasing, or renewing an insurance policy, a deep understanding of insurance coverage law as well as of the Hemp/CBD Market is critical. Depending on the nature of one’s CBD-containing products, issues attendant to federal illegality can still arise, limit the available insurance market, and complicate the process. Even when it comes to entirely federally legal products, education is often required to explain the nature of the policyholder’s business and/or the legal and scientific difference between “hemp” and “marijuana.”

Moreover, like any business, a policyholder doing business in the CBD/Hemp Market must first consider its business model, related risks, potential liabilities, and applicable state regulations. Once it has identified those risks, potential liabilities, and legal requirements, the policyholder 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, we can work with policyholders (and their insurance brokers) to vet policy proposals and quotes and to review specimen insurance policies and proposed policy language.

Policy language matters, especially in this space. For example, consider the following definition of "cannabis" in a policy form that purports to exclude coverage for "cannabis" but not for "goods or products containing or derived from hemp":

"Any good or product that consists of or contains any amount of Tetrahydrocannabinol (THC) or any other cannabinoid, regardless of whether any such THC or cannabinoid is natural or synthetic."

Of course, CBD is a "cannabinoid." Worse still, that policy also defines "cannabis" specifically to include, in relevant part, "[a]ny compound, byproduct, extract, derivative, mixture or combination, such as ... [h]ash or hemp." As such, the definition of "cannabis" could be read to swallow the exception for "hemp." Such imprecise language – that may lead to ambiguity or at least to unnecessary confusion – should be avoided, if at all possible.

Additionally, insurance policies should be carefully reviewed to make sure that they do not contain problematic exclusions, or at least so the policyholder understands the extent and effect of any such exclusion. For example, there are different types of vaping exclusions. One exclusion may preclude coverage for any vaping-related loss or claim, while other exclusions may be tied only to vaping products from certain countries or certain suppliers. Even if it is not possible to negotiate or manuscript policy language, it is still important to purchase insurance with "eyes wide open."

Any policyholder doing business in the Hemp/CBD Market must proceed with caution. Today, more and more businesses are entering this market. Hemp growers are sprouting up across the country. Retailers are selling all sorts of CBD products. Even beverage companies are considering including CBD in their products (for sale domestically and/or internationally). As 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 hemp-, CBD-, and/or vaping-related loss or claim. They 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

Like any other business in any other industry, businesses in the Hemp/CBD Market are not immune from first-party losses

or third-party claims. Fires, exploding vape pens, mislabeling claims, product recalls, a pandemic, and more have already negatively affected businesses in this market.

When any 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 Hemp/CBD Market, 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 Hemp/CBD Market. 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. Leech Tishman's attorneys are uniquely familiar with both insurance coverage and this market, including relevant federal and state law and public policy.

Risk Mitigation, Transfer, and Allocation

In addition to procuring insurance, there are other ways that businesses in the hemp, CBD, and/or vaping space 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 the Hemp/CBD Market – about various risk mitigation, transfer, and allocation mechanisms.