

Up in Smoke

NO, THERE ARE NOT
FREE SAMPLES.

A little history

In Colonial United States hemp was a crop mandated by the Crown. Cannabis was widely used for medicinal purposes.

John Adams (yes, that John Adams) grew hemp and wrote of “hemp’s mind altering capabilities”

In 1910, following a revolution in Mexico, immigrants introduced the recreational use of cannabis.

A little history

'20s Louis Armstrong played "Muggles"

'30s Harry Anslinger named Commissioner of the Bureau of Narcotics: *"No one knows, when he places a marijuana cigarette to his lips, whether he will become a philosopher, a joyous reveler in a musical heaven, a mad insensate, a calm philosopher, or a murderer."*

'38 marijuana is named as 'dangerous' by the Federal Pure Food, Drug & Cosmetics Act.



1970 the Controlled Substances Act made marijuana a Schedule 1 Controlled Substance. Production, Possession, Distribution and Use is Illegal.



A)...has a high potential for abuse



B)...has no currently accepted medical use in treatment in the United States.



C)...there is a lack of accepted safety for use of the drug or other substance under medical supervision.

Schedule 1 of the CSA

A little history

'70s & '80s Nixon, Ford, Carter & Reagan

'70s some states begin decriminalization process: OR, AK, ME, CO, CA, OH, MN, MS, NY, NC, NE (not all remain)

'90s Medicinal Use/Decriminalization/"legalization"

'00s Largest opponents to cannabis regulation are "exiting the electorate"

A little history

First Obama term: Raids conducted on over 270 state authorized medical dispensaries. \$300m spent (\$100 million more GW Bush)

'13 the Obama administration issues the Cole Memorandum.

'14 Rohrabacher-Farr Amendment

A little history

'15: 1% of all electricity in the United States was consumed in the production of cannabis. (3% of all power in California)

'15: Los Angeles reaches saturation point: there were more square feet of rental/lease space dedicated to dispensaries than Starbucks.

'16: The residual smell in Seth Rogen's office/residence made it difficult for the landlord to find a tenant after he moved. (though my source here is Star magazine...)

Let's Define Stuff!: Botany for beginners

For something called 'weed' cannabis is deceptively complex and hard to grow.

Cannabis has 3 principal species

- *Sativa*
- *Indica*
- *Ruderalis*

Tetrahydrocannabinol (THC): Main psychoactive chemical

Cannabinoids: Can be psychoactive or nonpsychoactive

- Tetrahydrocannabinol (THC) Main psychoactive chemical
- Cannabidiol (CBD) non-psychoactive

Hemp: Dense fibers used for everything from clothing to biofuel

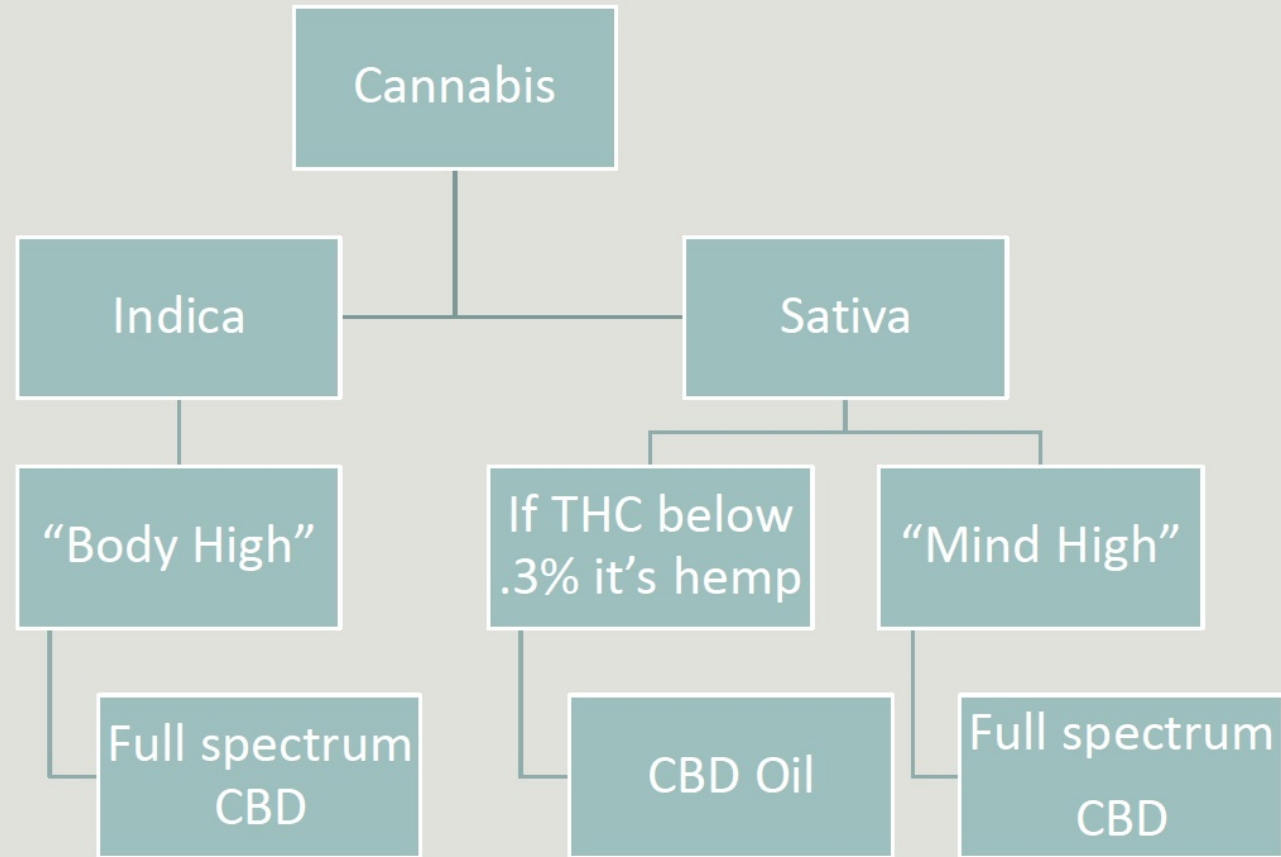
What's the deal
with CBD?
Yes, more
botany!

CBD Full Spectrum (whole plant) is Cannabidiol CBD that contains all other cannabinoids found in the cannabis plant including Cannabinol (CBN) Cannabigerol (CBG), and Tetrahydrocannabivarin (THCV) and trace amounts of THC.

CBD Isolate is purified CBD that is isolated from the other cannabinoids.

Marijuana can contain up to 30% THC, Hemp has less than .3% THC. CBD can be derived from either.

botany



DEA Ruling on Epidiolex

THE DEA DID NOT RESCHEDULE CBD!

In September of 2018 the DEA rescheduled CBD drugs that

1. Have been approved by the FDA, and
2. That contain no more than .1% THC.



2018 Farm Bill removes industrial hemp from Schedule 1 of the CSA.



10/31/19 USDA publishes Interim Final Rule



11/1/19-1/29/20 Public Comment period for IFR from USDA

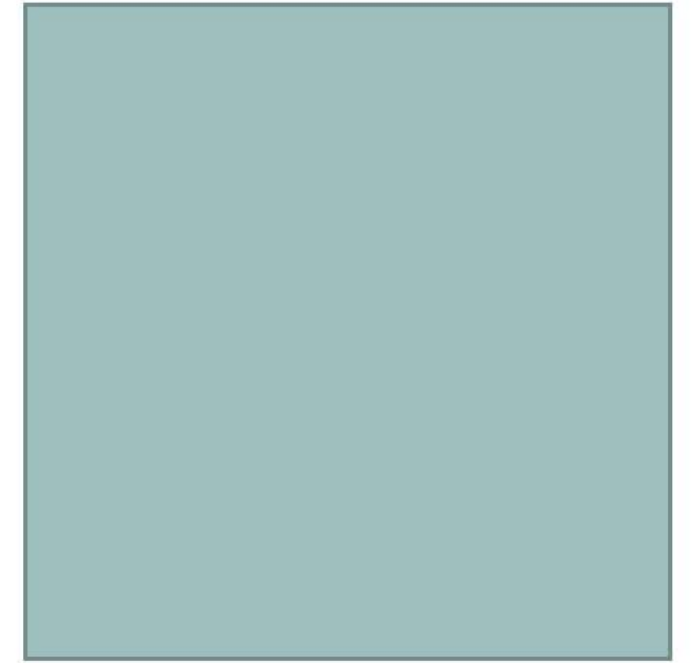
hemp



CALIFORNIA



10 million pot plants worth \$1 billion destroyed in Kern County



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CALIFORNIA

California may pause student physical fitness tests due to bullying concerns

New York prosecutor to drop marijuana charges in Vermont hemp seizure

Published November 20, 2019

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Prosecutors are planning to drop all charges against the man arrested on marijuana possession charges in connection with a case in which 106 pounds of hemp plants shipped from Vermont were mistaken as MJ and seized by the New York Police Department.

The Brooklyn district attorney's office said that Ronen Levy's felony marijuana possession charge will likely be dismissed Dec. 2.

Further, the police claimed that a field test came back positive for marijuana, but those tests often can't distinguish legal hemp from pot.

BUSINESS NEWS NOVEMBER 3, 2019 / 12:24 PM / 3 MONTHS AGO

For many U.S. farmers who planted hemp, CBD boom leaves bitter taste

Isabella Jibilian

5 MIN READ



(Reuters) - Dan Maclure planted eight acres of hemp on his Vermont farm for the first time this year, aiming to cash in on the exploding demand for CBD, a derivative of the plant reputed to ease anxiety and other ills without the high of its close cousin, marijuana.

About 65% of U.S. hemp farmers lack a buyer for their crop this season, leaving them few alternatives, according to a July survey by Whitney Economics. Hemp has less infrastructure than other crops, so farmers cannot rely on selling their crop to a local grain elevator.

Decriminalization?

Decriminalization

State Regulated Medical use (33 states & DC)

State Regulated Recreational use (11ish states & DC)

Controlled Substances Act

“It shall be unlawful for any person knowingly or intentionally...to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance.”

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Supremacy Clause

Article 6 of the United States Constitution

But Trista, if it's illegal,
why is it okay in 33+
States?

OR...HOW WE GOT HERE

Cole Memorandum

- 1. Prevent distribution to minors.**
- 2. Prevent revenues from supporting criminal enterprises.**
- 3. Prevent diversion to state without decriminalization.**
- 4. Prevent cannabis activity from being used as a cover for trafficking or other illegal drugs or illegal activity.**

Cole Memorandum

- 5. Prevent violence and the use of firearms in the production and distribution.**
- 6. Prevent drugged driving.**
- 7. Prevent growth of cannabis on public land.**
- 8. Prevent cannabis use/growth on federal property.**

Rohrabacher-Farr Amendment

Prohibits DOJ from using funds “to prevent states from implementing their own state laws that authorize the use, distribution, possession or cultivation of medical marijuana.”

CSA Cases of interest

GONZALES V. RAICH

No affirmative defense under the CSA for complying with the marijuana laws of a particular state.

U.S. V. ROSENTHAL

Jury prevented from hearing that the alleged criminal activity was decriminalized under state law.

Touching the plant
Not Touching the plant

**Criminal conspiracy laws
don't make a legal
distinction- there is no
requirement that you
"touch the plant"**



NAR Survey

Impact on residential property value near dispensaries

More than 75% saw no change

10% have seen an increase

12%-14% have seen a decrease.

University of Mississippi



Economists Cheng Cheng and Walter J. Mayer compared the increases in home prices in Colorado municipalities that regulated retail cannabis sales to home prices in municipalities that prohibited retail sales. They found a larger increase in municipalities with cannabis.



Economic Inquiry reports an increase in housing values of 6% that they credit to regulation of cannabis retail sale.

NAR Survey



Commercial property value near dispensaries



71% saw no change



19% saw an increase



10% saw a decrease

New York Times

Commercial Real Estate developers report a 50% increase in prices for warehouse properties in Denver.

California Real Estate developers have seen 100% increases in prices for greenhouse space.

No interstate distribution means local commercial/industrial boom.

NAR Survey

Do tenants want to locate near a dispensary?

42% say don't know

20% some tenants opposed

19% No change

2% Demand to be near a dispensary

NAR Survey



43% in medicinal states and 36% in recreational states had no issues leasing a property where cannabis had been grown or consumed.



Smell and moisture were the most common issue.

Cannabis real estate concerns



INSURANCE



**CONTRACT
ENFORCEABILITY**



BANKING



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Insurance

Residential Case Study

Cause of loss

Cannabis ember?



Fire



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commercial

MOLD?



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CANNABIS CULTIVATION?



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Clarifying law around insurance of marijuana act (CLAIM Act)



Prohibit federal agencies from penalizing or discouraging insurers from underwriting or handling claims for a cannabis-related business.



Forbid terminating or canceling the licenses of an insurer solely because the insurer engaged in the business of insurance in connection with a cannabis-related business.



Officers, directors, and employees of an insurer may not be held liable pursuant to any federal law solely for engaging in the business of insurance for working with a cannabis client.



Cash is king

It's a green industry...

When cash is king...

When leasing to a cannabis business, must have a system in place to process cash payments.

Lease must address any particular requirements of cash process that are different from traditional lease.

When cash is king...

Security: Guns and Drugs do not mix!

Question 11e on Form 4473 – which asks if the buyer is “an unlawful user of, or addicted to, marijuana ... or any other controlled substance?” – now has a warning printed below it in bold type that states: “The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.”

Is there a requirement that you are a “registered patient” or employee to enter the dispensary?

When cash is king...

Prior to leasing, landlord bank should be consulted. Depending on structure, they may have to comply with the requirements of FinCEN memorandum.

US Treasury Financial Crimes Enforcement Network (FinCEN)

Goal was to “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses”

- Focuses on the Cole memorandum priorities
- Heavy emphasis on due diligence and reporting
- Required currency transaction reports (CTRs) required for any receipt or withdrawal of cash above \$10,000 in any one day.

THE SECURE AND FAIR ENFORCEMENT BANKING ACT (SAFE)



Protect financial institutions and insurance companies from federal prosecution if they provide services to cannabis clients.



If those cannabis clients are following state or tribal law.



Passed **US House** with significant bipartisan support.



Stalled in the **US Senate**.

zoning

City of Riverside v. Inland Empire Patients

Planned Unit Developments



Homeowners Associations

2/3 of respondents to NAR Marijuana Survey reported HOAs often have rules and restrictions on smoking & growing in home or common areas.

6% report that HOAs allow growing or smoking in common/home areas.



Acknowledgment



Required by state law in most authorized states.



No “innocent owner defense” available in civil forfeiture statutes.

Lease
Considerations

Lease Considerations

Permitted Use

Avoid “lawful cannabis business”

Be Specific!

Product form.

Medicinal or recreational sale.

Cultivation? How many plants?

Processing? How and into what form?

Lease Considerations

Early termination rights: “trigger” events

Federal criminal prosecution for conspiracy to sell or produce a controlled substance.

Seizure of your property under federal asset forfeiture laws.

Potential nuisance claims at the local level.

Failure to receive state licensure.



Lease Considerations

Smoking prohibitions, vaping prohibitions, dabbing prohibitions

Lease Considerations

Illegal Use Prohibitions

Compliance with all laws is impossible.

“tenant will comply with all applicable state and local laws, including but not limited to the state marijuana licensing and program rules”

Lease Considerations

Tenant improvements:

Tenant bears all expenses for improvements or alterations. (Landlord/owner sets parameters)

Tenant is responsible and bears all expenses for removing improvements at the termination of the lease.

Lease Considerations

Indoor Cultivation

Water

Heat

Humidity

Energy consumption

Hydroponic water waste

Pesticide

Fertilizer



Lease Considerations

If owner of property wishes to base rent on % of income- this may make the property owner a partner in the cannabis business and then the state authorization/regulation law requirements come into play.

Owner's Right to Inspect

Trade secrets associated with the cultivation and processing of marijuana related products.

Strains can't be patented b/c of the illegality at the federal level.

What Can Go Wrong?

The Federal Government can and does seize property used for cultivating, manufacturing, or selling marijuana.

In the last several years, the Federal Government has netted at least one billion dollars from seizing personal and real property used to manufacture or distribute drugs illegal under federal laws.

The Federal Government has seized property associated with the production of marijuana products in states with decriminalization.

Asset Forfeiture

CRIMINAL

Against a person *after* a conviction for an underlying criminal offense.

CIVIL

The government sues the property itself and the property owner is treated as a third party claimant.

Does not require that the government prove the landowner is guilty of a crime.

Substantial connection between the property and the alleged crime.

What can go wrong?



Bankruptcy court is not available for a cannabis based business.



You can't have a security interest in cannabis.

Contract Enforceability

MANN V.
GULLICKSON,
2016 WL 6473215
(N.D. CAL.
NOVEMBER 2,
2016)

- **Plaintiff Mann sold marijuana business to Gullickson. Gullickson agreed to pay \$400,000 in three installments.**
- **Gullickson failed to make payment and Mann sued alleging breach of contract.**
- **Gullickson moved for summary judgment arguing that the contract was void “because it relates to medical marijuana, which is still a prohibited substance” under the **Controlled Substance Act.****
- **The court concluded that “even where contracts concern illegal objects, where it is possible for a court to enforce a contract in a way that does not require illegal conduct, the court is not barred from according such relief.”**
- **Court looks at this and says touching the plant is illegal - possession, cultivation, distribution are in violation of the **CSA.** Paying what you owe doesn’t require touching the plant.**
- **In the opinion of the court however it cites “the federal government’s waivering policy on medical marijuana” in determining that its ruling doesn’t “condone or encourage” illegal conduct.**

HAMMER V.
TODAY'S
HEALTH CARE II,
CV 2011-051310
(ARIZ. SUPERIOR
CT. APR. 17,
2012)

Took the opposite approach of Mann v. Gullickson and refused to enforce a contract where funds were loaned to a marijuana business.

Hammer is pre-Cole, Mann is post-Cole: in a post-Sessions memo analysis- the court may find that there is no distinction in “touching the plant” and find the contract void.

Parties to a contract may waive defenses to enforcement- agreements with cannabis industry clients should include this waiver.

Obama

“Marijuana is no more dangerous than alcohol.”

How does Trump Impact?

“I would just say it does remain a violation of federal law to distribute marijuana throughout any place in the United States, whether a state legalizes it or not.”

**Jeff Sessions, (Former) United States Attorney
General**

Rescheduling

Attorney General (or HHS Secretary) initiates review.

Scientific and medical evaluation by FDA

- 1. Scientific evidence of its pharmacological effect, if known...**
- 2. The state of current scientific knowledge regarding the drug or other substance...**
- 3. What, if any, risk there is to public health...**
- 4. Its psychic or physiological dependence liability...**
- 5. Whether the substance is an immediate precursor of a substance already controlled.**

Rescheduling

FDA transmits report to the Secretary of HHS, who then sends the findings and recommendations to the Attorney General.

Attorney General simultaneously conducts own review of petition delegating it to the DEA.

If the Secretary of the HHS recommends that a drug be descheduled that finding “shall be binding on the Attorney General.”

If the Attorney General recommends rescheduling, the rulemaking process begins.

Kanovsky Memorandum

What to do when patients using medical marijuana live in federally subsidized housing.

On January 20, 2011 HUD issued the Kanovsky Memorandum, addressing the question of whether PHAs and owners of federally assisted housing could grant residents reasonable accommodation for the use of medical marijuana.

HUD emphasized the Quality Housing and Work and Responsibility Act of 1998 which “requires PHAs and owners to deny admission to those households with a member who the PHA or owner determines is, at the time of consideration for admission, illegally using a ‘controlled substance’ as the term is defined by the CSA.

Kanovsky Memorandum

Makes it clear that HUD interprets federal nondiscrimination laws to not require PHAs or owners to make reasonable accommodations for medical marijuana use.