

A NOVEL CANNABINOID CONUNDRUM: LOOPHOLES, LIABILITY, AND LEGISLATION

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NATIONAL CANNABIS INDUSTRY ASSOCIATION
RISK MANAGEMENT & INSURANCE COMMITTEE



National Cannabis Industry Association
TheCannabisIndustry.org

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Who We Are

The National Cannabis Industry Association's [Risk Management & Insurance Committee](#) is a multidisciplinary group of risk management professionals convened to draw on the expertise and experiences of professionals dedicated to the cannabis community. This updated manual will help guide you through the various coverages and definitions used in the cannabis insurance industry.

Industry Overview

The cannabis industry is one of the fastest growing industries in the USA maturing at more than 25% annually. As the cannabis industry continues to emerge and flourish from state to state, there remains uncertainty as to the future of federal definition of cannabis as a "Schedule I" controlled substance.

The future of the cannabis industry will continue to experience the convergence between state and federal government regulations until a uniform regulatory and compliance framework can be established. Fundamental services such as banking, financing, and insurance along with section 280E of the federal tax code will continue to burden state regulated cannabis businesses. And, with the industry still in its relative infancy, emerging and shifting regulatory backdrops create risks to these businesses. Cannabis businesses can manage these risks in a variety of ways.

Perhaps the foremost among them is the procurement of appropriate insurance coverage. In just a few years, insurance coverage options for cannabis operators have grown from nothing to dozens of insurance carriers serving the industry. According to Fortune Business Insights the global market size for cannabis was valued at USD \$43.75 B in 2022 and Projected to grow to \$57.18B in 2023¹.

In 2020 and 2021, plant-touching cannabis companies were deemed essential businesses during the COVID-19 pandemic. Businesses had to adopt and pivot to new operating standards such as curbside pick-up, drive-up windows, and delivery. This allowed the industry to continue to move forward serving its local communities with uninterrupted healthcare options, legal access, and continued economic activity.

¹ Fortune: [Cannabis Market Size & Growth | Forecast Report \[2030\]](#)

This manual will explore the various insurable risks attributed to the cannabis supply chain. Cannabis operators must be proactive in developing a risk management program that conforms to local and state compliance and security requirements. As the industry continues to evolve, operators will need to be more diligent in controlling and managing risk.

Every aspect of the supply chain contains some portion of risk. Your qualified cannabis insurance broker should be able to assist your company in evaluating and obtaining proper insurance coverages to protect you, your business, and your employees.

Defining “Risk”

Every business has operational risks and cannabis businesses are no different. “Risk” is a difficult term to define and has several different connotations. For our purposes, risk is defined as the operational possibility of an occurrence or event. In addition to its unique risks, the cannabis industry faces exposures that are similar to those faced by other regulated industries. Companies throughout the supply chain are subject to risks such as product contamination and theft.

Most underwriters evaluate a prospective insured company based on size, number of employees, gross revenues, number and/or types of products and past losses or claims, to name a few variables that go into the process.

Cannabis operators must address risks that have not previously been addressed by the insurance industry. Cannabis operators are forced to consider the impact of continued federal prohibition. Federal illegality obliges many cannabis companies to do business exclusively in cash, which carries additional risks. With the industry still in relative infancy, new laws or regulations can help to reduce or create risks for these businesses. For example, a change in the interpretation of a regulation might make certain product lines unfit for sale or place restrictions on the ownership of a licensed business. This update will focus on this subject.

Framing the Issue - Are Novel Cannabinoids Covered by Your Product Liability Policy?

For better or for worse, the cannabis industry is easily the most fascinating experiment in state regulation that this country has ever seen.

- ❖ Rules vary widely from state to state.
- ❖ Product testing requirements lack uniformity.
- ❖ Packaging and labeling are a compliance nightmare.
- ❖ State laws are not the only things that vary, though...

Product Liability definitions of what is ‘covered’ by a cannabis insurance policy range widely between insurance companies. Now, a tidal wave of novel cannabinoid products threatens to upend the traditional American perception of cannabis – and possibly teach a few lackadaisical insurers an expensive lesson.

State Licensed and Regulated THC Products

Cannabidiol (CBD) and tetrahydrocannabinol (THC) are the two most prominent cannabinoids found in cannabis. THC is the psychoactive chemical compound in cannabis responsible for a euphoric “high.” An average batch of cannabis contains between 5% and 20% THC, and some premium cannabis can contain more than 30% THC.

The first step to understanding THC is to understand cannabinoids. Cannabinoids are chemical compounds found in the cannabis plant that interact with receptors in the brain and body to create various effects. There are dozens of terpenes and potentially more than one hundred cannabinoids in the cannabis plant, but THC is the most widely known among these due to its abundance and psychoactive attributes.

Federally Legal Hemp

Hemp, as defined by federal law, is cannabis with a maximum delta-9 THC level of 0.3%, making it less likely for a consumer to feel inebriating psychoactive effects. Hemp is also used in thousands of commercial and industrial products, such as paper, cordage, construction material, textiles, and clothing. Hemp is stronger and more durable than cotton and is also a source of foodstuffs (hemp milk, hemp seed, hemp oil) and biofuels.

High-THC potency cannabis looks physically different from hemp. The plants tend to

be either broad leafed, a tight bud, or resemble a nugget with hairs. Hemp, on the other hand, has skinnier leaves that are concentrated at the top of the plant. Hemp plants are available for purchase online and via home delivery, or at retailers in all 50 states and over 40 countries around the world.

CBD is typically extracted from the cannabis or hemp plant. CBD extract has become widely popular and is being introduced into many consumer products such as food/beverage, cosmetics, soaps, oils and vape pens. However, the FDA has explicitly stated as of this writing that CBD cannot be used as a food/beverage supplement until it publishes product approval regulations.

The passage of the 2018 Farm Bill removed hemp and hemp-derived CBD -Delta 8 from the Drug Enforcement Administration's list of "Schedule I" controlled substances, making it an ordinary agricultural commodity and allowing it to be legally sold under federal law.

Cannabis with THC content greater than 0.3% remains classified as a Schedule 1 substance. Insurance companies take a different view of hemp and CBD companies now that the hemp plant is not a Schedule I controlled substance.

Navigating Product Liability Exposures

Cannabis companies in the United States face a daunting task when it comes to navigating the complex and constantly evolving landscape of regulations governing the production, distribution, and sale of cannabis products. With forty sets of rules governing different state markets, plus a handful of federally licensed businesses, ensuring compliance can seem like an insurmountable challenge.

One of the most significant issues facing cannabis companies is product liability, including the ongoing blight of product recalls. As with any consumer product, there is a risk of harm associated with the usage of cannabis products – things like adverse reactions, contamination, mislabeling, or improper dosage, to name a few. The legal and financial implications of product liability can be severe, including lawsuits, fines, and irreversible reputational damage. Given the complexity of the state-segregated cannabis supply chains and the lack of clear federal guidance, it is additionally challenging for companies to identify and mitigate potential risks.

Traditional cannabis companies must also contend with the emergence of novel cannabinoids. As researchers continue to explore the potential therapeutic benefits

of cannabis, previously unknown cannabinoids are being discovered and brought into the mainstream. These compounds may have unique properties and potential therapeutic applications, but they also pose challenges in terms of safety and regulation. For example, some novel cannabinoids may be more potent or have different effects than traditional cannabinoids like THC and CBD. What's worse, some novel cannabinoid products can even produce substances that are deleterious to human health (for example - the vaporization of THC-O Acetate produces toxic ketene gas).

The Science of THC

What are THC Analogs and Isomers? The most popular THC analogs at time of writing are:

- ❖ Δ 8-THC
 - Mildly psychoactive - mainly associated with body high.
 - Bonds with only one CB1 receptor endocannabinoid system so effects are less pronounced.
 - Legal if derived from hemp or if manufactured from hemp-derived CBD.

- ❖ Δ 9-THC
 - **Most commonly associated with marijuana since this causes the psychoactive effect.**
 - **Can be “legally” commercialized from hemp that contains less than .3% THC on dry weight.**
 - When derived from legal hemp it can create a similar mild psychoactive effect when combined with a hemp full spectrum or other isolate cannabinoids like CBG, CBD, CBN, and CBC.

- ❖ Δ 10-THC
 - Mildly psychoactive - associated with “cerebral high”.
 - Naturally occurs in trace amounts.
 - **Legal if derived from hemp or if manufactured from hemp-derived CBD.**

- ❖ THC-O/THC-O Acetate
 - **Reported to be 2-3x stronger than Δ 9-THC and can produce hallucinogenic effects.**

- THC-O Acetate can be synthesized by adding sulfuric acid and acetic anhydride to naturally occurring cannabinoids.
- The US Military originally studied THC-O Acetate as a non-lethal incapacitating agent in the 1950s after noting its ability to produce ataxia in canine subjects.

- ❖ THCP (tetrahydrocannabinol)
 - **A synthetic homologue of THC said to have at least 30 times higher affinity to cannabinoid receptors than THC, making it even more psychoactive than THC-O Acetate.**

Please note: THC analogs are not the same as the synthetic cannabis that was commonly sold in gas stations a decade or so in the past like “Spice” or “K1”.

When evaluating the safety of these novel cannabinoids, there are a few things to take into account.

- ❖ How are these cannabinoids derived?
- ❖ Are they tested by a legitimate testing laboratory?
- ❖ What is the means of consumption?
- ❖ Avoid consumption of untested products -especially through combustion or vaporization.

Are THC Analogs Legal?

From a federal standpoint, psychoactive cannabinoids derived from hemp exist in a legal gray area. Cannabinoids derived from marijuana are still considered federally illegal. However, there is not a great answer for this except in states that have enacted legislation or issued guidance on THC analogs.

Marijuana is a Schedule I Controlled Substance under the 1970 Controlled Substances Act. Under a section of the CSA called The Federal Analog Act, chemicals that are ‘substantially similar’ to a controlled substance in Schedule I or II can be treated as if it were listed in Schedule I - but only if intended for human consumption. The federal government could use the Federal Analog Act to crack down on the proliferation of ‘rare and minor cannabinoids.

Part of the confusion is due to the [lack of regulatory guidance from the Food and Drug Administration \(FDA\)](#), which has declined to enact rules allowing hemp-derived CBD products to be marketed as food and beverage items, or as dietary supplements. The FDA says it needs congressional support to implement such regulations.

The DEA stated all “synthetically derived tetrahydrocannabinols remain schedule I controlled substances.” Why is this significant and how is it related to Delta-8? Well, for companies to have enough Delta-8 THC in their products, it must be converted from cannabidiol (CBD) via a structural isomerization process conducted under laboratory conditions.

This isomerization process takes CBD, alters its molecular structure, and turns it into Delta-8. Since it is produced by chemical or biochemical synthesis and not sourced straight from the hemp plant itself, the DEA believes Delta-8 is a synthetic substance.

DEA’s Drug and Chemical Evaluation Section said that officials have received “multiple petitions” on the issue and are “in the process of modifying our [regulations]” on cannabis constituents based on recommendations from the U.S. Department of Health and Human Services (HHS).

As of this writing, the DEA will be releasing a rule to reschedule certain hemp-derived cannabinoids. While we do not yet have a copy of the rule or information on the timing of issuance, the implications are significant and far-reaching.

It is important that businesses remain diligent and engaged with the current federal agency scheduling activity relating to marijuana and hemp that will impact the legality of cannabis products. The FDA and DEA are currently poised to make scheduling reforms for both marijuana and hemp, and key congressional legislation such as the 2023 Farm Bill may also change the legal classification of certain cannabis products.

Delta-8

Delta-8 has grown incredibly popular, especially in states where adult-use cannabis is illegal. Many people are using Delta-8 vapes, oils, edibles, and other products for both recreational and therapeutic effects.

What Is Delta-8?

Delta-8 is one of 113 cannabinoids found in varieties of cannabis (hemp or marijuana) and a variant of delta-9-tetrahydrocannabinol (THC). It is psychoactive and intoxicating, causing a “high” when consumed.

Is Delta-8 legal? It depends. For now, Delta-8 THC is federally legal if it is derived from hemp (cannabis with low delta-9 THC levels). Some states are starting to ban or regulate this cannabinoid. Here is an up-to-date look at the Delta-8 laws of each state and an interactive legality map.

Why Are U.S. States Now Restricting or Banning Delta-8 THC?

The reason several U.S. states are restricting or banning Delta-8 is the result of confusing, conflicting, and unclear federal guidelines. This confusion pushed Delta-8 into a legal gray area. Were Delta-8 users consuming a potentially illegal substance? Were Delta-8 producers creating a controlled substance? Were Delta-8 vendors selling prohibited products? These questions had vague answers and the concerns were (and still are) very real.

Delta-8 Legal States



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Insurance for Cannabis (THC/CBD) vs Hemp (CBD Only)

When referring to the State Regulated THC cannabis industry, this means licensed companies involved in the sale, manufacture, cultivation, transportation, and testing of legal cannabis, hemp, CBD, and ancillary goods and services directly associated with the cannabis industry.

As previously mentioned, cannabis with greater than 0.3% THC is still considered federally illegal and is regulated in each state where the cannabis industry has been adopted and licensed.

Cannabis insurance policies are mostly offered by non-admitted or surplus lines insurance companies, though there are a handful of admitted insurance companies writing policies in the State of California.

Because hemp is now federally legal, admitted insurance options are more widely available. There are more insurance carriers available for the hemp industry.

Why Is Cannabis Insurance Different from Other Insurance Products?

Federal banking restrictions are one of the reasons larger admitted insurance companies do not offer cannabis-related insurance policies. The banking system is essential for all insurance companies and violating federal law on cannabis could jeopardize their ability to use that system, thus reducing the number of insurance carriers willing to provide policies in the cannabis market.

Insurance, Safety, and Legal Concerns

The challenges associated with product liability and novel cannabinoids highlight the need for clear and consistent regulation of the cannabis and hemp industry. While some states have taken steps to create comprehensive regulatory frameworks for cannabis, the lack of federal guidance has created an incoherent patchwork of rules and regulations that can be difficult for even the most seasoned minds in compliance to navigate.

Without sensible and congruous regulations, companies may be forced to operate in a legal gray area, increasing the risk of non-compliance and potential harm to consumers. In fact, this is exactly what is happening with the unregulated intoxicating cannabinoid market. A veritable alphabet soup of novel intoxicants like Delta-8 THC, THCP, THC-O Acetate, and others have sprung up to fill the gap in access perpetuated by the federal illegality of 'normal' marijuana products. Beyond that, some folks are synthesizing delta-9 THC (the 'normal' THC molecule) from hemp and marketing it as if it were naturally occurring THC from marijuana.

These products are increasingly problematic for cannabis consumers. While intoxicating hemp-derived products are technically legal through a loophole in the Farm Bill, states have had to take action to ban or regulate novel cannabinoid products. The states that have not acted are effectively endorsing the sale of untested cannabis goods often derived from federally legal hemp. This means that novel cannabinoid products get a free pass in many areas for heavy metals, mycotoxins, pesticides, residual chemicals, and other contaminants that the regulated cannabis industry must monitor to maintain good standing with a state cannabis program.

Insurance Purchasing Considerations

When purchasing insurance for your delta 8 and other novel cannabinoids, keep these exclusions in mind.

- ❖ 'Knowing Violations of State Law,' which could restrict coverage in the 18 states with specific laws regarding analogs.
- ❖ 'Products containing Cannabis' includes cannabis and derivatives as covered.

Cannabis Product Liability Issues

The term "product liability" is used by many in the cannabis industry to generically describe a wide variety of product risks, some of which do not fall within the traditional legal definition of strict product liability that arises from a defective or dangerous product.

This broad definition encompasses non–bodily injury claims by consumers or competitors who allege consumer fraud, false advertising, label errors and unfair competition. Although such claims have given rise to significant product recalls and consumer class actions involving cannabis products, these should be considered a distinct set of risks compared with traditional product liability injury claims.

Traditional Product Liability

It is axiomatic that a manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of a product causes injury while the product is being used in a reasonably foreseeable way.

Strict liability has been invoked for three types of product defects that include manufacturing defects, design defects and warning defects, which include inadequate warnings or failures to warn. Any person or entity that is an integral part of the overall production and marketing enterprise may be subject to strict product liability.

The Risk-Utility Test

An alternative means of proving a strict product liability design defect is the risk-utility test, also called the risk-benefit test, some version of which has been

adopted in approximately 30 states.

Under California's version of this test, which is similar to that used in many states, the plaintiff must prove that the product's design was a substantial factor in causing harm.

Failure to Warn

The liability test with the best chance of resulting in a liability determination is failure to warn.

To prove a warning defect, the plaintiff must establish that the defendant failed to adequately warn of a potential risk that was known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific community at the time of manufacture, distribution or sale.

Cannabis Product Risk Mitigation

To reduce product liability risks, myths and misperceptions about cannabis use must be dispelled so that companies can engage customers in an informed evidence-based conversation about their cannabis products. Education is therefore essential to properly mitigate the true liability of products that contain cannabinoids.

This includes education for both cannabis companies and their customers. Similar to how companies in other market sectors mitigate risk, cannabis companies should designate persons within the organization to have responsibility for understanding the state-of-the-art product risks and stay informed of emerging data. This internal education should then be disseminated to customers in the form of reasonable product warnings and instructions.

Cannabis companies will eventually embrace more-robust cannabis product warnings, but these warnings must be factual to result in effective risk reduction. New product warnings may happen suddenly through new regulations, or it may be through a slower process that is accelerated by large jury verdicts.

Either way, it is difficult to imagine a future without cannabis and hemp product disclaimers of the type that accompany most over-the-counter medical products and other regulated consumer products.

Warnings may include statements about the difference between smoking cannabis and orally consuming it, the duration of effects, cannabinoid ratios and the impact on impairment, the risk of adverse health effects and warnings directed to specific vulnerable groups.

Allowing the establishment of any standard that stops short of this demand for accuracy will only exacerbate the confusion that already plagues the industry.

As if varying state regulations weren't enough, insurers' definitions of what is considered 'cannabis' vary widely too. Some policy forms contemplate hemp-derived cannabinoids as 'cannabis' and some do not. A few examples of policy wording are below:

❖ **Carrier A:**

- "Medical Marijuana means cannabis or marijuana, including constituents of cannabis, THC, and other cannabinoids, as a physician-recommended form of medicine or herbal therapy."

❖ **Carrier B:**

- Simple exclusion for 'Hemp-Derived Intoxicating Cannabinoids'

❖ **Carrier C:**

- "Cannabis" means:
 - 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.
 - The paragraph above includes, but is not limited to, any of the following containing such THC or cannabinoid:
 - (1) any plant of the genus Cannabis, or any part thereof, such as seeds, stems, flowers, stalks, and roots; or
 - (2) any compound, byproduct, extract, derivative, mixture, or combination, such as, but not limited to:
 - ◆ (a) Resin, oil or wax;
 - ◆ (b) Hash or hemp; or
 - ◆ (c) Infused liquid or edible marijuana;
 - ◆ Whether or not derived from any plant or part of any plant set forth in the paragraph above.

The following can be inferred from these definitions/exclusions:

- ❖ **Carrier A:** not an adult-use cannabis company's best choice as it only defines 'medical marijuana.' This could leave the door open for potentially uncovered claims from recreational products.
- ❖ **Carrier B:** insurance company is looking to protect itself from issues with the new wave of novel cannabinoid products – but specifically, only the dozen or so intoxicating cannabinoids that can legally be synthesized from hemp (without testing mandates in most states). An important takeaway is that this definition would cover non-intoxicating cannabinoids like CBN or CBC, even if they were derived from hemp.
- ❖ **Carrier C:** this language is/was commonly used across a number of insurance carriers who cover cannabis. Their policies may carry some restrictions, but this broad definition of cannabis includes synthetic cannabinoids and could expose the carrier to major lawsuits.

Those with broader definitions that include all cannabis-derived products often restrict their product liability coverage in other ways. All things considered; the industry has a long way to go until the available product liability coverage can truly be called comprehensive.

Policies that insure cannabis risks often contain exclusions and endorsements that restrict or delete coverage in a policy. Reviewing an insurance policy is as important as reading a legal contract, because it is a legal contract.

Additionally, the framework should support ongoing research into the therapeutic potential of cannabis, including novel cannabinoids. This research should be conducted in a manner that ensures the safety and efficacy of new compounds before they are introduced to the market. By creating a robust regulatory framework that balances innovation with consumer protection, the cannabis industry can continue to grow and evolve in a responsible and sustainable manner.

It is the duty of a risk professional in this field to convey the urgency of these issues and the need for action. By working together to create a regulatory framework that supports both innovation and consumer protection, risk professionals can ensure that the cannabis industry continues to thrive while safeguarding public health and safety.

It is time for policymakers, industry leaders, and consumers to come together to address these critical challenges and build a sustainable future for the American cannabis marketplace that is inclusive of all the various products that can be developed from cannabis.

Relevant Policies

General Liability Insurance

Coverage that protects against bodily injury and property damage liability claims arising out of premises exposures, business operations, products sold, as well as advertising and personal injury exposures. Here are the main types of GL coverage.

- ❖ **Coverage A:** Bodily Injury & Property Damage (Coverage is determined, and claims paid when the insured's business operations or premises is legally liable for 3rd party bodily injury or property damage)
- ❖ **Coverage B:** Personal & Advertising Injury (Coverage pertaining to misacts such as libel, slander, malicious prosecution, copyright infringement)
- ❖ **Coverage C:** Medical Payments (Covers those who have suffered bodily injury as a result of the insured's negligence. Legal liability is not necessary for this coverage to be effective and can help deter lawsuits by paying medical costs)
- ❖ **Damage to Premises Rented to You Coverage** for fire damage to rented premises and damage by any cause other than fire to premises and/or its contents rented for a maximum of 7 days.

Excess Liability Insurance

Coverage provides additional limits, exceeding those of the underlying liability of a single policy, like a general liability policy.

Umbrella Liability Insurance

Similar to excess liability coverage in that it provides additional limits, but for multiple underlying liability policies.

Product Liability Insurance

Provides protection from bodily injury or property damage claims *resulting from products that have been manufactured or sold.*

- ❖ Cannabis Operators are required to be compliant with their states regulated industries policies. Product liability involves strict legal liability and all businesses that come into contact with a product can be liable for damages, regardless of their role in the manufacturing or distribution chain.

To minimize risk, your business should demand certificates of insurance (and ideally the full policy) from vendors to confirm protection in the event of a claim arising from another company's product that you may sell to consumers.

Know Your Policy Details

- ❖ **Occurrence Policy:** Insurance policy that covers claims that occur during any point within the policy period.
- ❖ **Claims-Made Policy:** Insurance policy that provides coverage for claims that are filed with the insurance company during the policy period. If a retroactive date is specified, the event that gave rise to the claim must have occurred on or after that date for coverage to apply.
- ❖ **Retroactive Date:** A clause in many claims-made policies stating that a wrongful act must have taken place on or after a specific date for coverage to apply.
- ❖ **Policy Effective and Expiration Dates:** The dates on which a policy becomes effective and through which the insured's coverage extends.
- ❖ **Contractual Liability:** Covers an insured for the liability they have assumed by entering into a contract (in accordance with such contractual terms).
- ❖ **Defense Inside or Outside the Limits:** Insurance policies may be written with (legal) defense costs contained within the policy limits or outside of the limits. A policy that

includes (legal) defense cost within the limits provides less coverage than a policy that pays for (legal) defense costs in addition to the limits of indemnity.

Endorsements/Exclusions/Protective Safeguard or Warranty

An insurance endorsement is an amendment or addition to an existing insurance contract which changes the terms or scope of the original policy.

Endorsements may sometimes be referred to as riders. An insurance endorsement is used to add, delete, exclude, and/or otherwise alter coverage in the insurance policy.

An exclusion is a policy provision that eliminates coverage for some portion of the risk. Exclusions narrow the scope of coverage provided by the insurance agreement.

The insurance agreement is very broadly worded in most insurance contracts. Insurers then use exclusions and endorsements to carve out or limit coverage for risks they do not wish to insure or see insured under a separate kind of insurance policy.

It is important to read the exclusionary language in each policy. Exclusionary language may leave your company and business exposed to risks that can directly impact your operations and the survival of your company.

It is vital that any policy you obtain provides the coverage necessary to indemnify you in the event of a claim.

QA/QC (Quality Assurance/Quality Control)

Cannabis operators are required to perform QA/QC programs that are formal and documented.

A cannabis business should also confirm whether there is a “duty to defend” covenant in its liability policies.

The duty to defend describes an insurance company’s obligation to provide legal defense of claims made under a liability insurance policy. As a general rule, an insured need only establish that there is potential occurrence for coverage under a

policy to give rise to the insurer's duty to defend.

The following is a non-exhaustive list of exclusions that are included in some cannabis policies, and may become the basis for a coverage dispute:

Federal Crimes Exclusion

This exclusion may void all cannabis coverage within a policy.

Health Hazard Exclusion

Any products sold by a company that may cause some form of health hazard will not be covered. These hazards include any form of adverse health effects, including injuries sustained from vaping.

Cannabis Exclusion

The general cannabis exclusion is designed to render an insurance policy void.

For cannabis companies, this can leave them exposed to a variety of risks associated with product liability, directors' and officers' claims, and regulatory claims.

Carcinogens Exclusion

Cannabis companies that sell dried flower, vaporizers, and any form of a cannabis product that contains carcinogens or has the potential to create carcinogens probably won't respond if their liability insurance policy contains this exclusion.

The carcinogen exclusion will prohibit coverage for bodily injury, property damage, and personal and advertising injury.

Any products with the potential to alter an individual's mental state would not be covered in a product liability lawsuit if this exclusion was included in the policy.

Virtually all forms of cannabis alter your mental state, whether or not they are psychoactive.

Hardware Exclusion

Be certain to check for this exclusion if you sell vape cartridges, batteries, or any hardware that assists with consumption.

Drugs/Controlled Substances Exclusion

This exclusion typically excludes coverage for the use, sale, manufacture, delivery, transfer, or possession of a controlled substance as defined by the federal Controlled Substances Act (“CSA”).

Under the CSA, it is illegal to manufacture, distribute, dispense, or possess cannabis.

Governmental Acts Exclusion

This exclusion removes coverage for any loss or damage caused by or resulting from confiscation or destruction by the government or public authority.

Business Risk Exclusion

This exclusion concerns claims for damages associated with a business’s faulty goods or services, as opposed to damage caused to others.

Designated Premises Limitation

This limitation is included on many policies issued for cannabis/hemp companies. This limitation excludes operations that are beyond your primary location, such as a special event or delivery services or locations that were not disclosed to the carrier.

Adverse Health Effects Exclusion

This endorsement is often attached to product liability policies.

Ingredients Exclusion

Cannabis/hemp insurance companies that offer products coverage may apply this

endorsement to their policies. However, the scope of this endorsement can vary greatly from company to company.

Vaporizing Equipment and Components Exclusion

For manufacturers, distributors, wholesalers, and retailers, this form can be a massive risk to your operations. If this exclusion is included in your policy, there is no coverage provided for any claim arising out of the use, handling, or ownership of vaporizing equipment, or any part of the accessories attached or used with vaporizing equipment, including pens, cartridges, mouth pieces, batteries, chargers, coils and any miscellaneous products used with, or attached to, vaporizing equipment.

Considering the wrongful death lawsuits and bodily injury lawsuits emerging recently, it is important to negotiate the removal of this form from your policy, if possible and applicable.

For more information on this subject, you can search the internet for health hazard exclusions on cannabis insurance policies.

Are You at Risk?

Product liability claims and directors' & officers' claims are at the forefront of cannabis litigation.

First-party claims refer to any type of claim arising from an accident, injury, or loss caused by manufacturing defects, improper labeling, and failure to warn consumers about a wide variety of potential hazards.

These claims range from inaccurate THC measurements to mold to the presence of carcinogens.

Third-party claims refer to any type of claim that could see a business held liable for damages that result from the use of a product. This may include property damage, loss of wages, driving under the influence claims, medical expenses, and bodily injury.

Prospective insured parties should seek out agents and brokers who have a comprehensive understanding of this state-regulated industry. The agent or broker must

be educated on the many local, state, and federal regulations that affect the insured and their operations.

Cannabis/hemp companies need many types of insurance, including but not limited to property insurance, product and general liability insurance, directors' and officers' liability employment practices insurance, cyber liability, auto liability, and workers compensation insurance. A qualified agent or broker must be able to analyze and address all the exposures. One challenge in getting the right insurance policy for a cannabis business lies in understanding the limitations due to the legal restrictions surrounding cannabis and making sure that the cannabis insurance policy is crafted around those restrictions.

At a minimum, cannabis operators should:

- ❖ Make sure their broker stays current with the laws and policies relevant to the national and state regulated cannabis industry.
- ❖ Make sure your agent or broker has access to all insurance companies offering policies.
- ❖ Obtain references from existing cannabis clients.
- ❖ Ask to see sample policies. If you do not understand the policy wordings, ask your agent or broker to explain it to you.
- ❖ Read the endorsements and exclusions for each policy closely. Make sure they provide needed coverage for your cannabis operations.
- ❖ Have your own attorney review all insurance policies.
- ❖ Develop a comprehensive risk assessment of your business.

Professional risk managers and specialist insurance attorneys are resources to consider along with your broker or agent.

The NCIA Risk Management & Insurance Committee recommends that all cannabis operators have an attorney review their policies for suitability. How do I find an agent/broker who understands cannabis insurance? Contact the NCIA Risk Management and Insurance Committee members below for recommendations of qualified cannabis insurance brokers.

In Conclusion

To address these challenges, policymakers, industry leaders, and consumers must work together to create a regulatory framework that protects public health and safety while supporting the growth of the legal cannabis industry. This should include clear guidelines for product labeling, testing, and dosing to ensure that consumers have access to safe and accurately labeled cannabis products. It should also include provisions for product recalls and liability to protect consumers in the event of unexpected quality control issues.

Please stay diligent on new and changing regulations that each local, state, and federal agency may enact and/or enforce regarding how your business operates, regulations regarding products it sells and regulations/compliances the company is obligated to follow.

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Additional Resources

- ❖ [Is Delta 8 THC Legal in Your State? Laws and Map](#)
- ❖ [DEA Proposes to Reschedule Hemp-Derived Cannabinoids](#)
- ❖ [What Cannabis Companies Must Know About Strict Product Liability](#)
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