

Play It Safe

*Insuring the cannabis industry:
E&O risks*

By Julie Carter

At press time, medical marijuana is legal in 28 states and Washington, D.C., and recreational marijuana is legal in eight states and Washington, D.C. The cannabis market is already a multibillion-dollar industry, with revenue expected to reach \$20 billion by 2021.



Like any other business, marijuana growers and distributors need insurance coverage for their assets and potential liabilities. But although individual states control the laws regulating both the marijuana industry and the insurance industry, growing, distributing and possessing marijuana is still a crime under federal law—as is aiding and abetting these activities.

The Obama Administration made it clear it did not intend to seek prosecution of marijuana-related activities in states where it has been legalized. But Attorney General Jeff Sessions recently stated that the Trump Administration intends to “crack down” on such activities—and that means procuring insurance for cannabis enterprises is extremely risky. The concern centers around two primary issues:

- 1) **Is insuring a federally illegal activity a criminal activity in itself, rendering the insurance contract unenforceable?** A court could easily determine that an insurance contract is void as the result of insuring an illegal activity—a clear risk for the business and the insurance agent who procures the policy. Besides, a carrier could potentially deny coverage for certain acts due to the federal law issue, leading to a “failure to procure” E&O claim against an agency.
- 2) **Do exclusions in many standard-form policies provide illusory coverage for an insured?** Many traditional insurance policies exclude coverage for “illegal activities,” “criminal acts” and “intentional behavior.” Exposures such as civil RICO claims, money laundering and reputational risk are valid concerns for businesses involved in the cannabis industry. But can these exposures be covered by an insurance policy?

Considering the dichotomy between state and federal laws regarding legalization, as well as conflicting court rulings regarding insurer obligations to provide

coverage, an agent who procures this coverage faces great risk. For starters, policies would likely not be standard ISO forms, but that's not the only implicating factor.

Marijuana growers and distributors are required to obtain specific licenses and permits depending on location—California, for example, requires 20 types of licenses, including permits for farmers, delivery services, testing labs, distributors, dispensary operators and more. Any insurance provider would need to develop an in-depth knowledge of all applicable licensing issues prior to entering this space.

To avoid an E&O claim, the prudent insurance agent will stay on the safe side—and wait until the smoke clears before considering procuring insurance for a client in this field.

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