

Cannabis Business Blog

How to Avoid Litigation in Uncertain Times

on 2.22.18 | Posted in Federal Law, Litigation

The shredding of the Cole memo last month leaves the cannabis industry in an uncertain regulatory environment.

Industry-wide anxiety of this sort can sometimes breed business disputes that wind up in litigation. Besides being expensive, defending a lawsuit from a business partner, investor, supplier, or employee can be a major distraction from your business goals.

If tensions are simmering in your company, maybe it's time to address any legal loose ends governing your business relationships. Virtually every lawsuit ever filed could have been avoided had the parties identified sources of conflict early and attempted to resolve their differences.

Here are some key questions to help identify whether legal issues may be bubbling beneath the surface of your cannabis business.

- **Do your business partners agree on the “deal” that is reflected in your company’s formation documents?** Most small businesses are limited liability companies rather than partnerships, but the LLC agreement or other key contracts should accurately express who is doing what and how profits will be split. If those documents fail to reflect reality, that could become a source of friction and legal problems down the road.
- **If your business has investors, are they happy?** If you don't know, it may be time to communicate with your investors. Be candid and transparent about challenges your cannabis operation faces in these uncertain regulatory times. If your investors have relevant expertise, consider asking them for advice informally. People who are consulted and kept informed are less likely to hold a simmering grudge that could spark a pricey lawsuit. Managing your business includes managing expectations.
- **Do you have handshake deals with suppliers or vendors that should be documented?** Consider turning those handshake deals with vendors or suppliers into written agreements. In an uncertain business climate, the goal should be to bring predictability to uncertain business relationships. And if you already have written agreements, they should accurately reflect the reality of the deals you're doing.

- **Do you have a compliance plan to help you navigate regulatory pitfalls?** Because the cannabis industry is unlawful under federal law, it is imperative that cannabis operations comply strictly with state rules and procedures—even when times are tough. A lackadaisical approach to compliance could not only prompt state regulators to shut down your business, it could land you in hot water with federal drug enforcement agencies. Having a formal, written compliance plan can help. It demonstrates your company’s commitment to the letter and spirit of the cannabis regulatory regime. If implemented and carried out properly, a compliance plan can be an effective means of ensuring the people you work with are on the same page when it comes to navigating complex industry rules.
- **Are your employees anxious about the industry’s future?** Make sure you promote a positive, safe, and professional work environment—one that scrupulously observes labor and employment laws, in addition to the cannabis rules.

There are many creative and inexpensive ways to resolve conflicts early before they become litigation. But most companies wait too long before calling in trusted counsel. They wait until a lawsuit is imminent or actually filed, when only expensive, time-consuming options remain.

Don’t wait. Identify elephants in the room now. Resolve those simmering tensions, and tie down those legal loose ends.

Warning Regarding Federal Law: The possession, distribution, and manufacturing of marijuana is illegal under federal law, regardless of state law which may, in some jurisdictions, decriminalize such activity under certain circumstances. Penalties for violating federal drug laws are very serious. For example, a conviction on a charge of conspiracy to sell drugs carries a mandatory minimum prison term of five years for a first offense and, depending on the quantity of marijuana involved, the fine for such a conviction could be as high as \$10 million. In addition, the federal government may seize, and seek the civil forfeiture of, the real or personal property used to facilitate the sale of marijuana as well as the money or other proceeds from the sale. Although the U.S. Department of Justice (DOJ) recently rescinded its guidance regarding prioritization of criminal prosecutions of individuals and entities operating in compliance with effective state regulatory systems, DOJ left in place long standing guidance to federal prosecutors regarding how to exercise this discretion. Individuals and companies are cautioned to consult with experienced attorneys regarding their exposure to potential criminal prosecution before establishing business operations in reliance upon the passage of state laws which may decriminalize such activity. Federal authority to prosecute violations of federal law as crimes or through seizures and forfeiture actions is not diminished by state law. Indeed, due to the federal government’s jurisdiction over interstate commerce, when businesses provide services to marijuana producers, processors or distributors located in multiple states, they potentially face a higher level of scrutiny from federal authorities than do their customers with local operations.

Tags: business disputes, Cannabis, cannabis businesses, cannabis industry, Cole Memo, compliance, compliance plan, employment and labor laws, investors, limited liability companies (LLCs), Marijuana, marijuana businesses, regulatory, small business, suppliers, vendors