



Research paper

How four U.S. states are regulating recreational marijuana edibles



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ABSTRACT

Background: Sales of edible marijuana products have been strong in Colorado and Washington State since the legalization of recreational marijuana. Initially, these states did not have comprehensive labelling or packaging requirements in place. In response to increases in marijuana-related emergency room visits and poison control centre calls, additional regulations were implemented. Currently, Alaska, Colorado, Oregon, and Washington each have passed into law various labelling and packaging requirements for edibles.

Methods: This article presents the primary legal research findings of relevant statutes and regulations for edibles in Alaska, Colorado, Oregon, and Washington. These laws were identified by using Boolean terms and connectors searches in these states' legal databases in LexisNexis.

Results: Alaska, Colorado, Oregon, and Washington vary greatly in how they regulate labelling and packaging. Colorado, Oregon and Washington require a Universal Symbol to be affixed to edibles, but only Oregon and Washington require that the use of pesticides be disclosed on the label. Only Colorado and Oregon require that the packaging for edibles bear a Nutrition Facts Panel on the label. Δ^9 -Tetrahydrocannabinol (THC) in a single serving or single edible product as Alaska and Oregon. All four states prohibit the manufacture or packaging of edibles that appeal to youth.

Conclusion: State laws governing recreational marijuana edibles have evolved since the first recreational edible products were available for sale. Alaska, Colorado, Oregon, and Washington now require edible product labels to disclose a variety of product information, including risk factors associated with consumption. However, there still remain concerns about the regulatory gaps that exist in each of these states, inherent difficulties in enforcing laws around the labelling, packaging, and manufacturing of edibles, and the outstanding question of whether these edible laws are actually informing consumers and keeping the public safe.

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Introduction

In 1970, Congress classified marijuana as a Schedule I controlled substance under the federal Controlled Substances Act, designating it as a substance that “has a high potential for abuse” and “has no currently accepted medical use in treatment in the United States” (*Schedules of Controlled Substances, 21 U.S.C. 812, 2016*). This classification makes it illegal under federal law “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense” marijuana products (*Prohibited Acts A, 21 U.S.C. 841(a), 2016*). As recently as August 2016, the Drug Enforcement Agency declined a petition to reschedule marijuana (*Department of Justice, Drug Enforcement Administration, 2016*). Despite this federal classification, marijuana is the most commonly used illicit drug in the United States.

Moreover, marijuana use is becoming more extensive, with increasing state legalization for medicinal and recreational use (*Bui, Simpson, & Nordstrom, 2015*). In 2010, 11 states had medicinal marijuana policies, but none had legalized the recreational use, possession, or retail sale of marijuana. By October 2016, 24 states and the District of Columbia had passed laws legalizing medicinal use, and four states (Alaska, Colorado, Oregon, and Washington) had legalized recreational use and sales. Voter initiatives to legalize recreational marijuana in four additional states (California, Maine, Massachusetts, and Nevada) were approved, and voters in another four states (Arkansas, Florida, Montana, North Dakota) approved legal access to medicinal marijuana in the November 2016 election. In sum, 28 states and the District of Columbia currently have laws legalizing some form of marijuana use.

Generally, federal laws that prohibit a certain activity preempt, or overrule, state law(s) that allow that same activity. A state that decriminalized the sale and possession of marijuana is not in conflict with federal law, because states are not required to

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criminalize at the state level something that has been criminalized at the federal level (Chemerinsky, Forman, Hopper, & Kamin, 2015). By contrast, state-level medicinal and recreational marijuana laws that legalize the sale and distribution of marijuana conflict with federal law, which lists marijuana as a Schedule I substance that cannot be lawfully possessed, used, or sold. However, the federal Department of Justice has stated in a memo issued to U.S. Attorneys General throughout the country that it primarily will focus its federal enforcement efforts on the prevention of use by minors and the prosecution of drug traffickers, rather than on personal use by adults (Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Justice, to U.S. Att'ys, *Guidance Regarding Marijuana Enforcement*, Aug. 29, 2013).

In states in which recreational marijuana use has been legalized, edibles (food products that contain marijuana or marijuana extract) often have their own set of laws, or specific requirements within certain laws. Indeed, the regulation of edibles represents a unique legal conundrum for policy makers. Since marijuana is illegal under federal statute, its use in food products such as marijuana edibles is not regulated as a food additive by the Food and Drug Administration (FDA) (see *Color Additives in Standardized Foods and New Drugs*, 21 C.F.R. § 70.10, 2016). Hence, states are taking the lead in developing policies to manage the issues associated with edibles.

This paper summarizes the various restrictions and regulations that apply to the packaging and labelling of marijuana edible products in the four states that have legalized their recreational use and already passed laws that put into place a regulatory framework: Alaska, Colorado, Oregon, and Washington. These state-level laws (and to-be-determined regulations that will be passed in the four additional states that legalized recreational marijuana in November 2016) will govern the cultivation, manufacture, sale and distribution of these products unless and until Congress reschedules marijuana and authorizes federal-level regulations of marijuana-infused edible products.

Background

Recreational marijuana became legal in Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington through ballot initiatives. The ballot initiatives in the first two states that legalized recreational marijuana in 2012, Colorado and Washington, stated that marijuana would be regulated similarly to alcohol (see *Colo. Const. art. 18, § 18, 2016*, which codified Colorado's Amendment 64; *Application for License, Wash. Rev. Code § 69.50.331, 2016*, which codified Washington's Initiative Measure 502). In practice, this meant designating the minimum age of purchase to be 21, overseeing and granting licenses for the products' sale and distribution, applying excise and sales taxes, and assessing penalties for violating the new state laws. After voters in Colorado and Washington voted to legalize recreational marijuana, the retail sale of recreational marijuana products did not begin until more than 1 year after the ballot initiatives had passed. Because these states had never before regulated recreational marijuana, it took time to set up a system of licensing and enforcement and to determine the various restrictions that were needed to regulate various aspects of cultivation, use, sale, and distribution. Although Alaska and Oregon were less explicit in their ballot initiatives about adopting a system of regulation modelled after alcohol, these states maintained the same basic regulatory structure that Colorado and Washington had created.

Recreational marijuana policies in the form of actual legislation and regulation in Alaska, Colorado, Oregon and Washington have developed over time, especially with regard to how edible products are packaged, labelled, tested, and sold. Although discussion of marijuana legalization often overlooks edibles, which have become

a popular alternative to smoking or vaping marijuana, edibles pose unique issues that are not present in other forms of marijuana. Indeed, as described further in the discussion, Colorado recently tightened its restrictions on edibles due to these unique concerns. Additional research is needed to understand more fully the societal impact of these products, as well as the short-term and long-term physical effects of intentional consumption.

For example, because edibles are ingested, weight, metabolism, gender, and eating habits all contribute to how quickly and intensely the user feels the effect, and it takes longer for the consumer to experience the intoxicating effects (45 min to 3 h after ingestion). Therefore, compared with smoking marijuana, edibles often result in a high that is longer-lasting and more intense (Grotenhermen, 2003). Furthermore, while state laws require that the total milligrams (mg) of Δ^9 -tetrahydrocannabinol (THC) and number of servings be included on the package, a single brownie for retail sale could contain as much as 100 mg of THC in Colorado and Washington (equivalent to 10 servings within the single brownie) or up to the allowable limit of 50 mg of THC in Alaska and Oregon (10 servings within the single brownie). As is apparent from these figures, serving size also differs across the four states. Whereas Alaska and Oregon define a serving as 5 mg, the serving size in Colorado and Washington is twice this amount (10 mg). The absence of a standardized serving size may be of particular concern to visitors who may not be familiar with state laws.

Adding to the confusion of determining how much of an edible to ingest, when recreational edibles were first made available for sale in Oregon on June 2, 2016, consumers were able to purchase recreational edibles that contained more than three times the originally stated limit of 5 mg of THC per serving. This temporary Oregon regulation governing the sale of recreational edibles allowed up to 15 mg of THC per unit, but then only allowed customers to purchase one unit per day (*Limited Marijuana Retail Sales, Or. Admin. R. 333-008-1500, 2016*). In interviews with patients, Hudak, Severn, and Nordstrom (2015) found that their patients thought it was practical to consume the entire edible product in one sitting just as they would a normal baked good. The consumption of edibles is responsible for the majority of health care visits among adults due to marijuana intoxication, which is likely due to the failure of adult users to appreciate the delayed effects (Monte, Zane, & Heard, 2015).

To address accidental consumption by children, Alaska, Colorado, Oregon and Washington each prohibit the manufacture and packaging of products that may appeal to children (e.g., gummy candies, lollipops, cookies). The availability of such products increases the probability that children may unknowingly consume edibles. Despite such regulation, accidental consumption by children remains a concern. For instance, Wang et al. (2014) found that decriminalization of marijuana is associated with increased unintentional exposures in children, aged 0–9 years. Specifically, the call rate to poison control centres in decriminalized states increased from approximately 4 per 1,000,000 population in 2005 to ~15 per 1,000,000 population in 2011 compared with ~2.5 per 1,000,000 population annually from 2005 to 2011 in nonlegal states (Wang et al., 2014). Another study found that, among paediatric patients younger than 12 years old presenting to the emergency department of a large Colorado hospital with accidental ingestion of a substance, exposure visits related to marijuana in Colorado increased from 0 before legalization to 14 of 588 (2.4%) children after October 2009, with most of the cases due to the ingestion of edibles (Wang, Roosevelt, & Heard, 2013).

Ingestion of edibles by youth may also be intentional. According to 2014 survey data findings from the National Survey on Drug Use and Health (NSDUH), 7.4% of youth between the ages of 12 and 17 presently use marijuana, which represents use by about

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