

Hello, my name is Michael Vitiello. I am a professor of Law at University of Pacific, McGeorge School of law. The topic of this In Brief is an introduction to marijuana law.

Marijuana law is almost certainly the fastest area of growth in the legal community and also in many non-legal fields relating to marijuana. California already had in place laws governing medical marijuana when voters adopted Proposition 64 last November. That law requires the state to create rules and regulations regulating all aspects of recreational marijuana. Once the state publishes its regulations in January, it will need many employees to oversee the marijuana industry. The state will be hiring numerous lawyers and other professionals to handle the regulations it's going to be putting in place. Specifically, for example, the Bureau of Cannabis Control, the Department of Health and CalCannabis Cultivation Licensing are all going to be hiring. Other local and county agencies are already hiring as well as the industry gets online.

The legal field is remarkably rich in marijuana law. For a period of time, lawyers who did "marijuana law" were largely criminal defense lawyers who represented clients charged with various drug offenses. That is no longer the case. Now a "marijuana lawyer" must negotiate contracts with land owners, help develop business organizations, file licensing applications and help their clients wade through regulations at the local, county and state levels. They have to help their clients figure out how to handle the cash that their clients earn in the industry and to work with very restrictive banking regulations. They must work with insurance companies to be sure that their clients are adequately protected. That is only part of the story.

The marijuana industry is not free from risks, ones that many non-lawyers and even some lawyers do not understand. Before anyone gets into the marijuana business, he or she should understand some basics about the law.

Any and all use of marijuana is a violation of federal law. Dating back to Richard Nixon's Presidency, marijuana is a schedule one drug under federal drug laws. That means that it has no recognized medical or other use. Despite years of efforts to get the federal government to reschedule marijuana, the agency in charge of scheduling drugs has refused to do so. During the Obama Administration, the agency continued to refuse to reschedule marijuana. It did, at the same time did signal that it would allow greater flexibility for those intent upon doing the basic research to show that marijuana has medical benefits.

You might think, of course, then how can Colorado, Washington, and now California "legalize" marijuana? That story is a long one but here is the short version. During George W. Bush's presidency, federal agents aggressively pursued marijuana producers and sellers, including medical marijuana dispensaries. Candidate Barack Obama promised a more tolerant approach to enforcement of federal marijuana laws.

Attorney General Eric Holder's office published a memorandum called the Ogden memo (named for the attorney who drafted the memo) that laid out standards that states should follow. In effect, the administration guaranteed that if states complied with those standards, the federal government would limit enforcement of federal law in those states.

States like Colorado saw real benefits from compliance with the Ogden memo standards. It had in place a seed to sale system to control its medical marijuana industry. Indeed, the relative stability of the medical marijuana market emboldened those interested in legalizing recreational marijuana to put initiatives on Colorado and Washington's ballots in 2012.

Many of you know the results. Those states were the first to authorize recreational use. Again, advocates of marijuana use awaited the federal response. After some delay, the Obama justice department again issued a memorandum – this time named The Cole Memorandum, after James Cole, its primary drafter. What the Cole memo did was in effect the Ogden memo did. It laid out standards that promised that if states complied with those standards, the federal government would give those states a pass on enforcement of the laws.

Some marijuana advocates claim that the Ogden and Cole memos really did nothing to advance the legalization cause. Most of us who really look at the marijuana industry disagree and think that those memos have done more to advance the legalization movement than any other recent developments.

Indeed, the success of the marijuana industry in those states, for example, has encouraged other states, including California to adopt through initiative processes recreational marijuana laws.

So you may ask, "Where is the risk?" Prosecutors, here the Attorney General's office, have broad discretion whether to enforce particular criminal laws. The Ogden and Cole memos can be swept aside by the new administration.

Here, the new administration is giving mixed signals about whether it will change the law. Attorney General Jeff Sessions is famously on record as opposing marijuana legalization. Indeed, he has repeated many false claims, now widely disproven, including its role as a gateway drug and its correlation with violent crime. At the same time, candidate Trump promised to let states deal with the law as they saw fit – in effect, treating marijuana like alcohol, something subject to state-by-state regulations. Since the new administration took over, statements out of Washington have been inconsistent about the administration's position on marijuana.

What does the future hold? If you are going to invest in the marijuana industry or if you are an attorney advising clients, you must be aware that the federal government could get back into vigorous enforcement of federal law. That could involve raids, prosecutions, forfeiture of assets and the enforcement of other strict anti-marijuana laws.

If you're an attorney, depending on how you advise your clients, you might face ethical dilemmas. That's a subject that I'll take up in a future podcast.

In future podcasts, I will discuss in greater detail some of the specific areas of marijuana law. For now, let me close with a few thoughts about whether the Trump administration will return to full enforcement of marijuana laws. Be clear: this is speculation and it is not a guarantee of any kind.

Not all marijuana law scholars agree with my conclusions but there seems to be an emerging view that among those of us who observe the marijuana industry that the Trump administration will not return to an aggressive enforcement of marijuana laws. Let me explore three primary reasons why I think that is the case. Start with limited resources. Every prosecutor has to make a choice about law enforcement priorities. Marijuana enforcement has to be fairly low on the federal government's list of serious criminal justice matters. Consider, for example, the Trump administration's interest in vigorous enforcement immigration laws. No doubt, that is a greater priority than enforcement of marijuana laws.

The second reason why I think the Trump administration will not do a dramatic u-turn from the Obama administration at least as to medical marijuana, support for those laws is coming from surprising sources. Utah Senator Orrin Hatch is on record as supporting at least some medical use of marijuana. The Veterans' Administration is urging that the government allow vets to have access to medical marijuana. That is so because there's emerging studies suggest marijuana is an effective pain medication and is an alternative to opioids. Further, there are some indications that marijuana can help those addicted to opioid use to segue off opioids. Studies are now routinely showing up showing real benefits for medical use of marijuana.

Third, as my opening remarks indicated, employment in the industry is growing, and in some areas, booming. Capital is flowing into the industry with literally billions of dollars now invested in the business. Investment crosses political party lines, with many Republican business people interested in potentially high returns on investment. So I pose the question: would the Trump administration kill the golden goose with a significant negative impact on employment and on investment? I doubt it. But stay tuned. Even Trump supporters recognize that his administration has been unpredictable.