# DON'T LET YOUR TRADEMARK RIGHTS GO UP IN SMOKE!

## New guidelines for cannabis-related trademark protection

A guide brought to you by Wood Herron & Evans LLP

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As individual states have relaxed laws surrounding the cultivation, sale, and consumption of cannabis (i.e. marijuana), this multibillion-dollar industry has exploded with new products, services, and brands. However, federal law has made registration of those brands difficult, if not impossible, and inconsistent handling by the U.S. Patent and Trademark Office (USPTO) has caused significant confusion over what can and cannot be registered. Now, the USPTO has issued new guidelines to clarify what cannabis-related products and services can be listed in federal trademark applications.

The USPTO is prohibited from issuing trademark registrations for products or services that are illegal under federal law, even if a company's local/state laws permit it. This has forced many producers in the cannabis industry to rely on unregistered or "common law" trademark rights, or obtain state trademark registrations, both of which provide fewer protections compared to federal registration.

However, the 2018 Farm Bill, enacted last December, removed "hemp" from the definition of cannabis. Hemp is defined as cannabis that has no more than 0.3 percent THC on a dry weight basis (THC being the chemical that produces the "high" associated with cannabis consumption). This effectively means that these low-THC cannabis plants, their seeds, and any of their derivatives or extracts, such as CBD, no longer constitute controlled substances and can potentially be listed in trademark applications with the USPTO.

### A few key points to keep in mind:

1. New trademark applications listing hemp-related products will need to explicitly state that the goods contain no more than 0.3 percent THC on a dry weight basis.

2. Any pending applications that were filed before December 20, 2018, when the Farm Bill was enacted, will need to either be abandoned and refiled or amend their list of goods to clarify the low THC level. Such applications will also need to amend their filing dates to December 20, 2018 (i.e. when the products became legal), along with some additional procedural hurdles.

3. Some products that fall under the purview of the FDA, such as foods, beverages, dietary supplements, and pet treats, will still be refused until the FDA completes clinical investigations and approves of the inclusion of hemp or hemp-derivatives in such products. Further, cannabis with higher THC-levels and derivative products remain illegal under federal law.

4. Some services, such as publishing information about cannabis, hemp, etc., have always been legal and registrable, and will remain so. However, services involving the cultivation or production of hemp and hemp-related products will be subject to additional scrutiny to confirm proper licensing by state or (eventually) federal authorities (the USDA is still evaluating the situation).

We expect trademark registration guidelines and options for cannabis-related products and services will continue evolving at a rapid pace, and we will be monitoring developments closely. While these recent changes to the law open new registration options, and provide greater clarity, effective protection of your brand may still involve a patchwork of federal, state, and unregistered rights. If your business is considering entering the cannabis, hemp or CBD markets (or you are already there), effective protection of your trademarks will require a careful strategic plan that is routinely evaluated to provide maximum protection and rights.

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