

GENERAL COUNSEL'S CORNER

JUNE 23, 2022 • ISSUE 6



Cannabis and the Campus

Cannabis—also known as marijuana—has been legalized in the last two decades in more than half of the states. Thirty-nine states allow the use of medical marijuana, while 18 states and the District of Columbia permit both medical and recreational marijuana.¹ Despite what would appear to be increasingly lawful access to cannabis, it is still classified by U.S. law as a Schedule I Controlled Substance,² which means that its possession, sale or use is prohibited by federal law, even in those states whose laws have decriminalized the use of cannabis. Furthermore, colleges and universities are subject to stricter federal restrictions than other organizations, in that cannabis cannot be grown, possessed or used on campuses if the institution receives federal funds.³

Federal Laws Restricting Controlled Substances on Campus

The Drug-Free Schools and Communities Act Amendments of 1989 (the Act) is the main body of law governing the use of controlled substances on college campuses.⁴ In response to President George H.W. Bush's national drug control strategy, Congress passed legislation to require schools, colleges and universities to implement and enforce drug and alcohol prevention programs and policies as a condition of eligibility to receive federal funds and assistance. The specifics of the Act are articulated through the Education Department General Administrative Regulations (EDGAR) at Part 86, i.e., the Drug-Free Schools and Campuses Regulations (the Regulations), which are highlighted below.

Regulation Requirements

EDGAR at Part 86 requires that Institutions of Higher Education (IHEs) receiving federal funds or financial assistance must develop and implement a program to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees.⁵ Some of the requirements of this program involve the annual reporting of: standards of conduct; a description of sanctions for violating federal, state and local law and campus policy; a description of the health risks associated with Alcohol and Other Drug (AOD) use; a description of treatment options; and a biennial review of the program's effectiveness and the consistency of the enforcement of sanctions.⁶

Appendix A to the announcement of the Regulations describes the controlled substances covered by this

1 <https://mjbizdaily.com/map-of-us-marijuana-legalization-by-state/>

2 21 U.S.C. §812.

3 Additionally, all persons entering in or on Federal property, recipients of federal funds administered by the U.S. Department of Education, and Federal Contractors at their workplace are prohibited from use or possession Schedule 1 controlled substances. See 41 CFR § 102-74.400; 48 CFR § 52.223-6; 34 CFR § 86.2.

4 Public Law 101-226

5 <https://safesupportivelearning.ed.gov/sites/default/files/hec/product/dfscr.pdf>

6 <https://safesupportivelearning.ed.gov/sites/default/files/hec/product/dfscr.pdf>

Act. Included on the list of substances are methamphetamine, heroin, cocaine, cocaine base, PCP, LSD, fentanyl, fentanyl analogue and marijuana. The major category of marijuana is broken down further to include hashish and hashish oil in varying quantities.⁷

IHEs are required to certify that they have an AOD prevention program in order to remain eligible for certain forms of federal funding and assistance. This certification is included commonly in the "Representations and Certifications" section of an application or proposal.⁸

There also exist certain requirements to demonstrate compliance with the Regulations. On request, IHEs must provide a copy of their biennial report to the U.S. Department of Education or its representative. The Secretary of Education, or their designee, may review the report and supporting documentation as necessary and, where an IHE is noncompliant, may take action ranging from providing technical assistance to help the campus come into compliance to terminating all forms of federal financial assistance. IHEs may also be subject to related requirements under state and federal law and judicial rulings.⁹

Certification Requirements

The EDGAR regulations require that, as a condition of receiving funds or any other form of financial assistance under any federal program, an IHE must certify that it has adopted and implemented a program "to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees" both on the institution's premises and as part of any of its activities. When applying for federal assistance, IHEs certify to the existence of such programs, typically as part of a standard grant or contract application under the provisions referred to as Representations and Certifications.

Additionally, the Regulations indicate that IHEs must retain all records related to the Act for three years.

Annual Notification

To remain in compliance with the Act and its Regulations, IHEs must provide an annual notification to students and employees of certain information related to the Act. This notification must include: (1) standards of conduct; (2) possible legal sanctions and penalties; (3) statements of the health risk associated with AOD abuse; (4) the IHE's AOD programs available to students, staff and faculty; and (5) disciplinary sanctions for violations of the standards of conduct. The notification must be in writing and in a manner that ensures all students and employees receive it.¹⁰

Biennial Review

The Biennial review must comply with content standards articulated by the Regulations. To comply with the regulations, every two years an IHE must conduct a review of its AOD program to determine effectiveness and consistency of sanction enforcement, in order to identify and implement any necessary changes. The regulations do not specify how IHEs must conduct their reviews or how they should structure their reports. IHEs are therefore left with discretion to conduct their reviews in ways

7 https://archives.federalregister.gov/issue_slice/1990/8/16/33574-33601.pdf#page=8

8 <https://safesupportivelearning.ed.gov/sites/default/files/hec/product/dfscr.pdf>

9 <https://safesupportivelearning.ed.gov/sites/default/files/hec/product/dfscr.pdf>

10 <https://safesupportivelearning.ed.gov/sites/default/files/hec/product/dfscr.pdf>

that best meet the needs and circumstances of their campus.¹¹

Successful reviews have included program inventories, policy inventories and enforcement analyses. Their reports have included supporting documentation for each of these categories, such as descriptions or copies of the programs and policies, procedures for annual notifications and descriptions of and supporting documentation for the means of assessing program effectiveness and enforcement consistency.¹²

Cannabis and Curriculum

A quick web search revealed more than a dozen U.S. colleges and universities that offer various academic degrees and/or certificates related to cannabis. Some, such as Colorado State University-Pueblo, offer undergraduate degrees in the science of cannabis.¹³ These programs require students to take courses in the biology and chemistry of cannabis (and other medicinal plants as well), and appear to be focused on preparing students for careers in cannabis research, such as research on appropriate soil chemistry for the growth of cannabis, the effects of pesticides and related plant chemistry. Because of the federal prohibitions described above, these institutions, which receive federal funds, are not able to use cannabis or other plants with a tetrahydrocannabinol (THC) level above 0.3% in their academic programs unless they have a special federal license to conduct research on cannabis and the program complies with the research regulations. Hemp, which also contains THC but at lower levels, was previously included on the list of controlled substances. In December, 2018, the Agriculture Improvement Act of 2018, also known as the "Farm Bill," was passed by Congress.¹⁴ The Farm Bill removed low-THC hemp, which contains 0.3% or less THC, from the list of controlled substances. This change enabled colleges and universities to use hemp, rather than higher-THC marijuana, for research and educational purposes, without the restrictions surrounding the use of marijuana. Colleges offering these programs would also be required to comply with any state laws regulating the use of hemp.

Other institutions, such as Lake Superior State University in Michigan, offer undergraduate and associate degrees and certificates in the business of cannabis¹⁵ as well as cannabis chemistry. The schools explain that these programs prepare students to work in laboratories, in product development and the medicinal uses of cannabis, as well as on the management side of the cannabis industry. Still other institutions, such as Western Illinois University,¹⁶ offer minors in cannabis-related subjects, such as cannabis business or cannabis production. And finally, universities such as the University of Maryland offer master's degrees in Medical Cannabis Science & Therapeutics,¹⁷ offered through the University's School of Pharmacy.

Even more institutions offer certificates related to either the business or the science of the cannabis industry. Those that do not receive federal funds are not subject to the higher education-focused federal laws that prohibit colleges and universities from allowing Schedule I Controlled Substances on campus but are subject to other federal laws and state regulation. One example of such an institution

11 <https://safesupportivelearning.ed.gov/sites/default/files/hec/product/dfscre.pdf>

12 <https://safesupportivelearning.ed.gov/sites/default/files/hec/product/dfscre.pdf>

13 <https://www.csupueblo.edu/cannabis-biology-and-chemistry-bs/index.html>

14 Public Law 115-334 §§ 10113, 12619

15 <https://www.lssu.edu/college-innovation-solutions/lukenda-school-of-business/cannabis-business/>

16 http://www.wiu.edu/cbt/agriculture/cannabis_production.php

17 <https://www.pharmacy.umaryland.edu/academics/ms-medical-cannabis-science-and-therapeutics/>

is Oaksterdam University,¹⁸ located in Oakland California, which offers eight-week certificate courses for cannabis horticulture or business, as well as “Home Grow” instruction.

For those institutions that receive federal funds, curriculum planning will need to be done carefully for several reasons. First, risk assessment is critical in order to ensure that the program does not stray across the legal boundaries that are still very much present. Second, truth-in-advertising is important, particularly with respect to the current inability of federal fund recipients to promise students that they will be working with real marijuana, rather than lower-THC hemp or with marijuana that is of lesser strength than medical-quality marijuana or marijuana that recreational users could access. This is of particular importance in programs where students will be studying the therapeutic uses of THC, whether found in hemp (at low levels) or in the higher THC-level marijuana. And thirdly, current federal prohibitions on marijuana sale and possession have persuaded many banks to refuse to do business with the marijuana industry over concerns about potential liability for money-laundering.¹⁹ This and other legal complexities must be addressed in those programs that aim to prepare students to work in the business of cannabis production and sales.

Job Postings and Internships

Given the federal law restrictions discussed above, colleges and universities that receive federal funds will need to consider carefully their policies with respect to accepting internship or job postings from cannabis-related employers. Even in states where the production and sale of cannabis is legal, federal law forbids it, and prohibits recipients of federal funds from being involved in activities related to “illicit drugs.” This situation would seem to apply to institutions’ acceptance of job postings targeted at students, as well as internships, whether or not for pay, and particularly if the internship carries college credit. In our judgment, the safest approach is to refuse to accept job or internship postings from cannabis-related employers that are involved in the production or sale of cannabis-related products. See, for example, the Career Services Policy at Colorado State University.²⁰

Implications for Counsel

Unless the federal government reduces or removes its restrictions on cannabis—either by removing it from the list of Schedule I Controlled Substances or amending the federal laws prohibiting its presence on campus, counsel will need to be vigilant with respect to pressures—from marijuana producers and suppliers, faculty who wish to conduct scientific research on the uses and health effects of marijuana²¹ and students who are eager to participate in the increasingly lucrative cannabis industry. One source estimates that global cannabis sales will reach \$33.6 billion by 2025,²² which is a powerful incentive for entry into this growing industry. It appears that the Food and Drug Administration may be approving additional producers of marijuana suitable for scientific and medical research,²³ but there seems to be little interest presently at the federal level for removing cannabis from its current restrictions. Counsel will need to monitor political developments in their states and at the federal level, as well as keeping a sharp eye on internal initiatives to link the institution to this rapidly expanding and highly regulated industry.

¹⁸ <https://oaksterdamuniversity.com/product/horticulture-semester-fast-track/>

¹⁹ <https://www.reuters.com/world/us/us-pot-sellers-stash-cash-banks-leave-them-high-dry-2021-05-24/#:~:text=Marijuana%20can%20be%20sold%20legally,afoul%20of%20money%20laundering%20laws>. See also <https://www.aba.com/advocacy/our-issues/cannabis>

²⁰ <https://career.colostate.edu/csu-recruiting-eligibility-requirements/>

²¹ Legal restrictions on campus-based research involving cannabis will be addressed in a future General Counsel’s Corner article.

²² <https://www.investopedia.com/biggest-challenges-for-the-cannabis-industry-in-2019-4583874#:~:text=The%20legalization%20and%20sale%20of,to%20%2433.6%20billion%20by%202025>.

²³ <https://www.deadiversion.usdoj.gov/drugreg/marijuana.htm>

Given the clash between federal prohibitions and the permissiveness of many state laws, counsel will need to work with those individuals involved in cannabis-related curriculum development to ensure that the institution's federal funding is not at risk, that the developers of courses and programs are knowledgeable and thoughtful about program design, and that students understand the limitations currently facing program content.



General Counsel's Corner is a publication presented by one of Bond's former general counsels and academic administrators of higher education institutions: [Monica Barrett](#) (Rutgers); [Sandra Casey](#) (SUNY and Siena College); [Shelley Sanders Kehl](#) (Pratt Institute); [Barbara Lee](#) (SVP for Academic Affairs at Rutgers); [Sarah Luke](#) (Governors State University); [Gail Norris](#) (University of Rochester); and [Jane Sovern](#) (CUNY). In each issue, a different attorney from this team will share with you recent legal developments, tips, strategies and useful information to assist you with your daily work on campus.



This post is brought to you by [Barbara A. Lee, Ph.D.](#) in our New York City office and Catherine A. Graziouse in our Albany office. Barbara previously served as Senior Vice President for Academic Affairs at Rutgers University where she continues on as a Distinguished Professor of Human Resource Management. She is a former director for the National Association of College and University Attorneys (NACUA), and a prolific author, speaker and editor. Barbara is also the former chair of the New Jersey Bar Association's Higher Education Committee. Catherine is a higher education attorney in Bond's Albany office and assisted in co-authoring this article.



Bond has prepared this communication to present only general information. This is not intended as legal advice, nor should you consider it as such. You should not act, or decline to act, based upon the contents. While we try to make sure that the information is complete and accurate, laws can change quickly. You should always formally engage a lawyer of your choosing before taking actions which have legal consequences. For information about our firm, practice areas and attorneys, visit our website, www.bsk.com. Attorney Advertising. © 2022 Bond, Schoeneck & King PLLC.



Bond, Schoeneck & King, PLLC



BondLawFirm



Bond, Schoeneck & King



bondlawfirm