

4 COVERAGE ISSUES IMPACTING THE HEMP AND CBD INDUSTRIES

CONTACT

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ABOUT THE AUTHOR

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ON YOUR TEAM.

The regulatory landscape for cannabis is complex and constantly evolving. The same holds true for the CBD and hemp industries. With the federal legalization of hemp and its derivatives under the [2018 Farm Bill](#) and the increased popularity for health and wellness use, the global market for these products has reached [billions](#) of dollars in annual sales.

Under the Farm Bill, hemp is defined as cannabis containing no more than 0.3% of delta-9 THC, the chemical responsible for the mind-altering high traditionally associated with cannabis. In addition to THC, cannabis plants can contain over 100 other cannabinoids including cannabidiol (CBD). The Farm Bill removed hemp and hemp extracts from the purview of the Controlled Substances Act and transferred authority to regulate such products from the DEA to the USDA and FDA. Cannabis containing more than 0.3% delta-9 THC remains a schedule-1 drug, illegal under federal law for all purposes.

This article addresses four major insurance coverage issues that retailers should look out for on hemp and CBD accounts.

1. UNSUBSTANTIATED HEALTH CLAIMS

On December 17, 2020, the [Federal Trade Commission \(FTC\) announced](#) a crackdown on marketing CBD products with unapproved and allegedly deceptive health claims, resulting in legal action against six sellers. These companies made serious claims regarding their CBD products' ability to treat health conditions such as cancer and heart disease, or that their products could be effective substitutions for prescription medications.

With financial penalties of up to \$85,000, this action represents a significant escalation in the regulatory fight against unapproved claims used to market CBD products. The pharmaceutical Epidiolex is the only CBD product approved by the Food & Drug Administration (FDA) for medical treatment. Over the past several years, the [FDA has issued dozens of warning letters](#) to CBD companies making claims about their products' ability to cure, mitigate, treat or prevent medical conditions.

While the FTC's recent action highlights some extreme examples, it also demonstrates the importance of avoiding any unsubstantiated product claims. The internet is full of anecdotal stories about cannabinoids providing medical benefits that are nothing short of miraculous, but the critical distinction is whether such a claim is made as part of an effort to sell products. Anecdotal experience cannot be used as evidence that products are effective in treating certain conditions, and products must undergo extensive clinical trials to be approved by the FDA as drugs effective in treatment for specific conditions.

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Coverage issue – Whether on the receiving end of a large fine or just a warning letter, businesses subject to regulatory enforcement can expect product liability coverage to be more difficult and expensive to obtain. Any enforcement action serves as a red flag to underwriters, warning of potential claims or class action lawsuits which can be expensive to defend, even if not ultimately covered by a policy.

The worst-case product liability scenario would occur if an individual suffers bodily injury after forgoing proven treatments for serious medical conditions in favor of self-medicating with CBD or other cannabinoid products, based on unproven claims made by the manufacturer or retailer.

Best practices for cannabinoid companies include utilizing regulatory consultants to ensure that problematic claims are not made on product labels or in any marketing materials, potentially drawing the ire of regulators.

Brokers with expertise in writing product liability for the burgeoning cannabinoid market will also work with agents and businesses to recognize problematic claims that will restrict their ability to obtain coverage.

2. DELTA-8 THC

With only a minor chemical distinction from the better-known delta-9 THC, delta-8 THC (or delta-8) has become one of the most popular new products within the hemp space. Delta-8 can be derived from federally legal hemp since the [2018 Farm Bill](#) defined hemp as containing no more than 0.3% delta-9 THC, without restrictions on other variations of THC.

The legality of delta-8 is debatable and hinges on the interpretation of “synthetic,” as synthetic cannabinoids remain illegal under the Farm Bill. Delta-8 occurs naturally in hemp only in small concentrations, which seem to clearly fall under the definition of legal hemp. However, most delta-8 products on the market today are made by converting CBD into delta-8 through a chemical process. Whether that conversion process makes delta-8 a synthetic cannabinoid is open to legal interpretation and forms the basis for the legal debate on delta-8’s status under federal law.

Further complicating the matter is the patchwork of state laws on the substance. Laws in some states ban all variations of THC, while others only restrict delta-9 THC and are silent on delta-8. Still others regulate sales of delta-8 under medical or recreational marijuana laws that apply to delta-9 THC.

Coverage issue – Many carrier forms will define “hemp” based on total THC content, not distinguishing between delta-9 and other variants. Delta-8 products may be legal yet still excluded on the coverage form. Finished products may need to be covered as marijuana, not hemp, even if derived from hemp. It’s critical to work with a wholesale partner who understands these nuances and will utilize forms that affirmatively cover the insured’s products.

3. MINOR CANNABINOIDS

While CBD has received the most attention in the hemp product space, CBG, CBN and other minor cannabinoids have become increasingly popular as well. These products do not have the regulatory baggage of CBD since the FDA’s restrictive position on CBD supplements is based on CBD being the active ingredient in the pharmaceutical Epidiolex.

Coverage issue – Even though these products are more favorable from a legal and regulatory standpoint, they can create issues if not handled properly. Policies written with designated products limitation wording, defining an insured’s products as “CBD products” can unintentionally exclude other cannabinoid products that do not contain CBD.

4. HAND SANITIZER AND OTHER PPE

Many hemp businesses have pivoted to manufacturing or selling hand sanitizer or other Personal Protective Equipment (PPE) products in order to keep revenue flowing during the COVID-19 pandemic.

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Coverage issue – In an ideal world, clients would be notifying their insurance broker when they make substantial changes to their product line, however in practice, that is often not the case and major changes are only discovered at renewal. Obtaining proper coverage requires an understanding of which hemp markets will also cover hand sanitizer or PPE, and particularly which markets will write without a communicable disease exclusion.

SUMMARY

Both product development and the regulatory landscape for CBD and hemp are continuously evolving. To ensure proper protection for insureds, it's critical for retailers to stay on top of changes in this space or partner with a wholesale broker who has expertise with the markets, forms and policy considerations.

AmWINS has specialists across the country who are well-versed in property, casualty and professional lines coverage for insureds engaged in the CBD, hemp and cannabis supply chain.

