

Marijuana Policy and Law in Washington State: We're Not High, These Really Are the Regulations

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To Auto Insurers Conducting Business in Washington State:

As the Chair of the Washington State Liquor Control Board, I have had an opportunity to think about issues associated with the passage of I-502 in 2012. As you know, this measure will allow the public to have access to recreational marijuana through retail outlets that are licensed and regulated by this agency. I am concerned that the public does not have sufficient information about “Driving Under the Influence” (DUI) as it relates to the use of recreational marijuana. While authorized segments of the public will now have the right to buy and use recreational marijuana in Washington State, it is important that the public is not put at risk by drivers who are involved in marijuana-related DUI offenses.

Earlier this year I invited a group of insurance industry representatives to our offices to discuss these concerns. Pursuant to these discussions, I would like to invite insurers, insurance trade associations, insurance agents and brokers, and other insurance professionals to include in their communications with policyholders and the insurance-buying public notices about responsible driving, and encouraging drivers to avoid behavior that risks a marijuana-related DUI. Many companies may be able to include specific information in routine communications that are mailed out to policyholders and other consumers. Others may want to include this information on their company websites. Others may find ways to use Facebook, Twitter, and other social media in new and creative ways to communicate these concerns to the insurance-buying public. I hope you will join me in this effort.

Please see attached suggestions for taglines that can be used by the insurance industry to inform policyholders.

Thank you,

A handwritten signature in cursive script that reads "Sharon Foster".

Sharon Foster
Chair, Washington State Liquor Control Board

Attachment: Possible Taglines for Insurance Industry

Possible taglines that can be used by the insurance industry to inform policyholders:

Marijuana use affects coordination and concentration. Be safe. Don't drive impaired.
For more information, go to www.LearnAboutMarijuanaWA.org.

The consequences of driving impaired by marijuana or alcohol are not worth the risks. Use a designated driver. To learn more, go to www.LearnAboutMarijuanaWA.org.

Enjoy your freedom? Don't drive high.
www.LearnAboutMarijuanaWA.org

Driving high is driving impaired. It's not worth the risk.
Learn more at www.LearnAboutMarijuanaWA.org

Drive high – Get a DUI.
www.LearnAboutMarijuanaWA.org

Marijuana use by those 21 and older may be legal in Washington, but driving impaired is not. For more information, go to www.LearnAboutMarijuanaWA.org.

Washington State Regulators Preclude Marijuana Retail Outlets from Selling Other Products, Including Tobacco

–RCW 69.50.357(1) prohibits a retail outlet as defined in RCW 69.50.101(hh) from selling any products or services other than marijuana concentrates, useable marijuana, marijuana infused products, or paraphernalia intended for the storage or use of marijuana concentrates, useable marijuana, or marijuana infused products;

–WSLCB: “State statute does not allow for someone to have a joint license to sell both marijuana and tobacco products at the same location.” WSLCB staff noted that officials who are responsible for monitoring and enforcing compliance with tobacco and marijuana laws could have difficulty due to the different standards (age 18 for the purchase of tobacco, and age 21 for the purchase of marijuana) regarding the two products.

<http://app.leg.wa.gov/RCW/default.aspx?cite=69.50.357>

<http://app.leg.wa.gov/RCW/default.aspx?cite=69.50.101>

Washington State Regulators Require Marijuana Licensees to Obtain Liability Insurance at Specified Levels--Coverage May Only Be Purchased from Insurers with Specified Rating by Best's Reports

- \$1 million minimum liability insurance requirement included in WAC 314-55-082(1). Some question if this level of coverage is excessive, leading to higher insurance costs;
- Coverage may only be purchased from insurers with most recent rating by Best's Reports of A-Class VII or better.
- The reference to ratings published by Best's Reports in WAC-314-55-082(2) is unusual. We are not aware of regulators in other states incorporating a reference to a private rating service into rules regarding insurance requirements for marijuana licensees.
- Best's Reports is a private entity. Using its standards and ratings for public purposes in a formal WSLCB rule presents a questionable delegation of authority to a private entity.
- Insurers that are fully regulated by the Office of the Insurance Commissioner are fully subject to solvency regulation. Question has been raised as to whether public entities should use private rating services to screen insurers who are otherwise fully authorized to write specific coverages.

<http://apps.leg.wa.gov/wac/default.aspx?cite=314-55-082>

Risks and Liability Areas

- ▶ **Federal law** – Federal Controlled Substances Act
Marijuana is a Schedule 1 substance. Possessing, growing and distributing marijuana remain illegal under federal law for recreation or medical use.
 - ▶ Attorney General Eric Holder called both Governors Jay Inslee and John Hickenlooper (Colorado) to outline the federal government's guidance on legalized marijuana re: youth access and public safety.
 - ▶ Conflict Between Federal and State Law
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Brief History of I-502 Recreational Marijuana in Washington

- ▶ Initiative 502 – Alison Holcolm and the ACLU
- ▶ Decriminalize possession of small amounts of marijuana from a social justice perspective
- ▶ Successful because of tough DUI and minors component in the initiative.



I-502 Recreational Marijuana in Washington

- ▶ Legal to possess up to one usable ounce of marijuana if 21 years or older.



- ▶ December 6, 2012: I-502 went into effect in Washington.
- ▶ Statistics –

Types of I-502 Licenses

- ▶ Producer – grows the marijuana for wholesale to other I-502 licensees. (Tier 1-3)
- ▶ Processor – processes, packages, and labels marijuana and infused products such as edibles for wholesale to I-502 retailers.
- ▶ Retailer – allows for sale of usable marijuana and marijuana infused products at I-502 retail outlets. (334 retail shops determined by lottery location, now increased to 556 to include medical retail).

I-502 Taxes & Insurance

- ▶ Updated Tax Scheme: 37% excise tax and sales tax at the retail level and additional B&O tax at all levels.



- ▶ Insurance: Required to have \$1M in a CGL policy.

Tracy v. USAA Casualty Insurance Company (2012) Civil No. 11–00487 LEK–KSC, 2012 WL 928186 (D. Hawaii Mar. 16, 2012):

Held that requiring a first-party insurer to compensate an insured for the loss of marijuana plants would be **contrary to Federal law and public policy**. Because the plants were illegal under Federal law, to enforce the policy coverage of the marijuana would be against public policy.

RCW 48.18.080(2) – In Washington, an “insurable interest” is any lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damages.

In the case where marijuana sale and possession is legal under state law, the argument is that it constitutes “any lawful” economic interest and thereby qualifies as an insurable interest.

Are Business Contracts Between Cannabis Businesses Illegal and Unenforceable?

Arizona State Superior Court in *Hammer v. Today's Health Care II*, CV2011-051310, found that loan documents were unenforceable and void due to illegality because they violated federal law even though medical marijuana was permissible at the state level. The court went further to say: "But this is not all, for one who enters into such a contract is not only denied enforcement of his bargain, he is also denied restitution for any benefits he has conferred under the contract."

Bankruptcy protection for Marijuana Businesses?

In Sept. of 2014, a US Bankruptcy judge dismissed the case of a Denver marijuana business owner saying that although the activities are legal under Colorado law, he was violating the federal Controlled Substances Act. Other similar cases have been dismissed in CA.

Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co., __ F.Supp 3rd __, No. 13-CV-03452-MSK-NYW, 2016 WL 632357 (D. Colo., Feb 17, 2016).

Green Earth operated a retail medical marijuana grow business in Colorado and applied for a commercial property policy with Atain Specialty Ins. and completed the questionnaire identifying the marijuana inventory.

Smoke and ash from a nearby wildfire overwhelmed the facilities ventilation system and destroyed the plants.

The insurer refused to pay for the loss, claiming a “contraband” exclusion and a violation of public policy due to federal illegalities.

The court did not buy the contraband exclusion and found it to be ambiguous because the insurer had knowledge that it was insuring the marijuana inventory and the court rejected the insurer’s argument that the contract was void as against public policy.