

Looking Back at the Biggest Developments in Cannabis in 2021, and What to Watch for in 2022

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By Alex Malyshev. Published in the *New York Law Journal*.

While cannabis remains illegal at the federal level, 2021 was a historic year for the industry. As the year draws to a close, we look back at some of the biggest developments, and look forward to things to watch in 2022.

In 2021 the Cannabis Industry Is Bigger Than Ever. By some estimates, the size of the state-legal cannabis industry (which includes both marijuana and hemp derived products) will reach \$20 billion in 2021. When measuring its broader impact of multiplier effects, including its economic impact on things like tax revenues, commercial real estate demand, and the needs of industry workers, the industry was projected to reach \$92 billion in 2021 according to an analysis published by MJBizFactbook. According to that analysis, for every \$1 consumers and patients spend, an additional \$2.5 is injected into the local economy. Even if overly optimistic, these projections show that cannabis is already big business.

In 2021 More States Got Into Medical and Adult Use Cannabis-But That Is Only the Beginning. Considering the financial incentives involved, it should not be surprising that cannabis legalization was the biggest winner of 2020-21. Although those gains were marred somewhat by a recent South Dakota Supreme Court decision nullifying a voter-passed amendment to the state constitution that legalized adult-use cannabis, more than half a dozen states legalized or significantly overhauled their medical and adult use programs. In the Northeast, that included New York, New Jersey and Connecticut, which all legalized cannabis for recreational use. New York's Marijuana Regulation and Taxation Act was covered in great detail in these pages, but the legislation itself is only the tip of the iceberg.

Before any licenses are issued, a newly formed regulator must publish rules and regulations, and then review applications on a competitive basis. At this point it is not expected that recreational retail licenses in New York will be available until late 2022 or early 2023, while New Jersey (which already had a regulator in place) recently published its rules and will start accepting applications for manufacture and cultivation on Dec. 15, 2021, and retail on March 15, 2022. Connecticut also appears to be further along, with sales expected to start in 2022.

In 2021 the CBD Industry Continued To Push the Envelope. It has now been almost two years since the U.S. Food & Drug Administration (FDA) asserted regulatory oversight of CBD, but as of this writing it doesn't appear that its ongoing rulemaking is anywhere near the finish line. In the meantime, CBD manufacturers and distributors have been largely left to guess as to where the proverbial third rail lies, which would bring scrutiny and warnings from the FDA. In 2019 and early 2020 this was largely centered on health claims and the addition of CBD to food and drinks. As states stepped in to promulgate their own guidance on these topics, the landscape shifted to Delta-8 THC made from hemp-derived CBD oil. While the federal government works through whether such products fall within of the definition of "cannabis" that remains on Schedule I of the Controlled Substances Act (and are therefore illegal), several states stepped in with their own bans. To be sure, the next innovation (and battlefield) is just around the corner.

More States Will Try To Legalize in 2022. With medical cannabis being legal in 36 states, and adult use cannabis being legal in 18, there is now momentum for further legalization and liberalization in many states that are missing out on the tax revenues their neighboring states enjoy (or expect). Delaware and Oklahoma appear poised to pass adult-use legalization in 2022, and momentum is building in Maryland, Ohio, Pennsylvania and Rhode Island towards the same goal. On the medical side, Mississippi is likely to pass legalization a second time (after its Supreme Court overturned a 2020 voter-approved ballot initiative), and advocates in Nebraska and Wyoming are renewing their own efforts.

Pressure Will Build on Congress To Act in 2022. With state-level legalization in full swing and nationwide support for legalization at an all-time high, with 60% of adults believing that marijuana should be legal for both medical and recreational use, pressure is building on Congress to act. While some level of protection exists due to a Congressional Budget rider—commonly known as the Rohrabacher Amendment, for its original sponsor—that prohibits the Department of Justice from prosecuting medical cannabis operators, access to things like banking and insurance remains constrained.

Over the last few legislative cycles, several bills were introduced to address those bottlenecks. The most well-known is the Secure and Fair Enforcement (SAFE) Banking Act, which has been passed by the House five times (although it has never made it through the Senate). The SAFE Banking Act would provide protections to financial institutions doing business with state-legal cannabis businesses. Its insurance-oriented companion bill is the Clarifying Law Around Insurance of Marijuana Act (CLAIM Act), which would do the same thing for the insurance industry. These bills are backed by established industries and are likely to pass in some form (if not in 2022, then perhaps in 2023 or 2024).

There are also two longer-shot legalization bills that may reappear during the next legislative session. The first is the Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2021, which was introduced in the House. It would remove cannabis from the CSA, expunge cannabis convictions, and bring in federal tax revenue by imposing an initial 5% tax on retail sales of cannabis (which would increase to 8% over three years). Its analogue bill in the Senate is the Cannabis Administration Opportunity Act (CAOA). While ambitious, these bills are largely symbolic, as there doesn't appear to be sufficient bipartisan backing for them to make it through the Senate and President Biden remains lukewarm to adult-use cannabis legalization.

Nevertheless there are some glimmers of hope that legalization is becoming a bipartisan issue, as a Republican Representative (Nancy Mace of South Carolina) introduced the States Reform Act (SRA), which would shift cannabis oversight to states (in much the same way the earlier STATES Act did in the 2019–2020 legislative session).

Conclusion. While it does not appear that full federal legalization is around the corner for cannabis, the reality on the ground (aided by healthy margins and tax revenues) is that both voters and local governments are coming around to the idea that cannabis is here to stay. The question in 2022 and beyond is what form it will take, and whether the new social equity initiatives are likely to succeed where previous iterations have failed.

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