

Is Cooperative Federalism Attainable in Cannabis Regulation? AG Weiser Seems to Think So

It is not uncommon for state attorneys general (AGs) to weigh in on proposed federal legislation, particularly where states' interests are implicated. In certain situations, state AGs may wish to alert Congress that they are intruding on an area of law traditionally left to the states. In other situations, state AGs may expressly invite federal cooperation and partnership. Federal authorities would be wise to pay close attention to the state AGs' opinions on such topics: state AGs are best positioned to understand how a new piece of federal legislation might impact states and their citizens. It also stands to reason that when one state AG takes a stand on an issue, others will follow.

AG Weiser Urges Congress to Learn From the States' Experience in Cannabis Reform

On August 24, 2021, Colorado Attorney General Phil Weiser sent a letter to Speaker Nancy Pelosi (D), Senate Majority Leader Chuck Schumer (D), House Minority Leader Kevin McCarthy (R), and Senate Minority Leader Mitch McConnell (R) regarding national cannabis reform and the recently proposed legislation by Sen. Schumer titled the Cannabis Administration & Opportunity Act (CAOA). In his letter, AG Weiser "[requested] that the Congress engage with the states when designing a federal regulatory system [for the cannabis retail market] that protects public health and safety." He noted the states' experience in developing regulatory programs for cannabis without solid federal guidance, stating that "[t]hrough these experiences, states and state agencies developed a depth of knowledge about the complexities of transitioning to a regulated market." However, AG Weiser also identified areas in which the state regulatory landscape could benefit from federal support, such as "[preventing] youth consumption of high potency products that may have long-term effects on the developing brain."

AG Weiser expressed a desire to see the cannabis regulatory landscape reflect a form of "cooperative federalism," whereby the federal government sets national health and safety standards, among other things, with states serving as the primary regulatory authority. AG Weiser also encouraged Congress to formulate federal laws that will work in tandem with state programs, and to consider how federal legislation might preempt state laws and disrupt thriving local industry, especially with respect to taxation and social equity programs. Ultimately, he concluded that "[a] regulatory model that applies appropriate federal health and safety standards to protect consumers engaged in interstate commerce, while preserving the states' role in the regulation and control of distribution outlets, will provide the strongest possible protections against known and unknown risks of legalization."

When AGs Speak, Congress Listens (Mostly)

Beyond cannabis legalization, state AGs have written to Congress on a host of other issues to alert the federal government of the impact of federal lawmaking on the states. For example, a bipartisan group of 25 state AGs wrote to urge Congress to repeal the Office of the Comptroller of the Currency's "True Lender" rule that essentially stripped the states of the ability to enforce their own interest rate caps on loans to their constituents. The letter framed the issue as one of safeguarding "the right of sovereign states ... to safeguard our citizens from rent-a-bank schemes designed to work end-runs around essential consumer protection." Shortly thereafter, Congress did repeal the True Lender Law.

And When Congress Doesn't Listen, States Step In

However, if Congress fails to act, the states will step into the breach. We have seen that in the



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cannabis industry, but it is also apparent in other areas of the law. For example, a number of states are taking steps to increase their authority in the area of consumer privacy, in part because Congress has failed to pass a national privacy framework or data breach law. California enacted both the California Consumer Privacy Act and the Consumer Privacy Rights Act over the last three years, while Virginia and Colorado followed California's lead this year in passing their own strong data privacy laws. In all three of these states the state AG has been granted significant, if not exclusive, enforcement authority to protect consumers. Similar legislation was introduced, and sometimes narrowly defeated, in other states earlier this year — proving that when Congress does not act, the states will invariably do so.

A Patchwork of State Cannabis Regulations is Here to Stay

In fact, with the growing number of state cannabis laws on the books, it is unlikely that state AGs will casually surrender their sovereign authority to regulate the cannabis industry to federal lawmakers. State AGs have certainly been vocal opponents of any federal privacy law that purports to preempt their state laws. For affected businesses, this means the “patchwork” of state regulations is likely here to stay, whether it relates to consumer privacy or cannabis. In the cannabis industry, though, state regulation provides opportunities for businesses that federal regulation may not, allowing for creativity and innovation in response to different regulatory interests. If Congress wants to ensure that federal legislation supports the cannabis industry while also protecting consumers and state economies, policymakers should consider accepting AG Weiser's invitation to engage in “cooperative federalism,” in order to leverage the states' enforcement authority on the one hand and federal resources on the other.

DISCLAIMER: Cannabis is still classified as a Schedule I controlled substance by the U.S. Drug Enforcement Agency, and as such it remains a federal crime to grow, sell, and/or use cannabis. Any content contained herein is not intended to provide legal advice to assist with violation of any state or federal law.