

Cannabis Consumption Lounges Face Unique Liability Risks

By **Lauren Mendelsohn** (August 11, 2023)

Cannabis consumption lounges offer locations where adults ages 21 and over and patients can use cannabis products safely and legally — notwithstanding U.S. federal law, of course.

They can provide an economic benefit for states and localities by increasing tourism and bolstering tax revenue; offer a competitive edge against dispensaries that don't have a consumption area; and serve an important equity purpose by providing spaces where residents of multiunit housing can use cannabis without violating any anti-smoking policies that might apply to their living quarters.



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Cannabis consumption lounges are regulated differently across jurisdictions, with some, such as Colorado, requiring a stand-alone license for lounge activities, while others like New Mexico consider it part of a retail use.

Moreover, some states such as California allow every city and county to set their own policies when it comes to cannabis consumption lounges, resulting in a patchwork of inconsistent restrictions.

California's A.B. 374, which has passed through the state Assembly and is now making its way through the state Senate, would explicitly allow a local jurisdiction to authorize licensed cannabis retailers and microbusinesses that include a retail element to prepare and sell noncannabis food and beverage products in an area designated for cannabis consumption, provided that such activities are done in compliance with the California Retail Food Code. It would also allow them to host live musical and other performances and to sell tickets for such performances.[1]

This is significant because current state regulations from the California Department of Cannabis Control limit such operators to providing prepackaged food and beverages to their lounge patrons, with no mention of allowing events.

A similar bill, S.B. 285, which has successfully made its way through the state Senate and is now in the state Assembly, would also authorize local jurisdictions to allow licensed retailers and microbusinesses to prepare and sell noncannabis food and beverage products. This bill doesn't include any language regarding performances, but technically there is nothing in current statute or regulations prohibiting retail and microbusiness licensees from hosting ticketed or nonticketed events.[2]

As mentioned above, cannabis consumption lounges offer operators the ability to set themselves apart from other dispensaries and to provide a community gathering space. That being said, they do tend to raise concern among local officials, given the potential public safety risks involved, and can also cause headaches for operators who haven't considered all of the liability implications. Below, we aim to address some of these concerns.

Liability

Although the case law on this specific subject is yet to develop, courts will likely determine that cannabis consumption lounges are at least partially liable for injuries caused by an

intoxicated patron after visiting the lounge.

This is similar to how bars and other alcohol-serving establishments are treated under so-called dram shop laws, which allow parties who are injured by an intoxicated person to sue the alcohol provider.

Certain jurisdictions, such as California, place some limitations on this, such as restricting such suits to establishments that serve alcohol to minors.[3]

Some experts think that cannabis consumption lounges will lead to the development of dram shop laws specifically regarding the limits of lounge liability in the event that an intoxicated patron causes harm.

This has not yet happened, and as is the case with laws governing liability for alcohol-serving establishments, the extent of any protections will likely vary from state to state.

Therefore, lounge operators should be aware of this potential risk, and should consider having patrons sign valid liability waivers. In particular, such waivers should include clear language regarding assumption of risk and indemnification.

Furthermore, given the potential liability at stake, consumption lounges should take reasonable measures to reduce the likelihood of the other risks mentioned below, such as refraining from serving minors, recognizing the signs of overintoxication and having a good insurance policy.

Intoxicated Patrons

One of the biggest concerns with cannabis consumption lounges is the fear that patrons will consume too much cannabis and then cause injuries via vehicle accidents, unruly behavior or other impulsive actions.

Lounge employees should be trained to spot signs of overintoxication and stop serving patrons who've had too much.

Prior to entering the consumption area, all patrons should sign off on written lounge policies that prohibit driving while intoxicated, and conspicuous signage should be posted inside the lounge to this effect.

Additionally, lounge operators should provide information about ride-sharing services and taxis so that intoxicated patrons are able to get to their next destination safely.

Facility operators should consider temporarily or permanently barring patrons who fail to consume responsibly or who violate other posted rules.

A related concern has to do with the effect of combinations — i.e., combining multiple cannabis products, combining cannabis products with food or drinks that might be available at the lounge, and combining cannabis and alcohol or tobacco.

With regard to combining various cannabis products, lounge operators should make sure that information about dosage and onset time is provided for all cannabis goods that they provide, and they should also post signage warning patrons to go low and slow in terms of their consumption.

Similar reminders about combining cannabis with food or drinks should also be provided, with an additional note to exercise care with food or drinks containing allergens.

Additionally, laws governing cannabis consumption lounges typically prohibit the sale and consumption of alcoholic beverages and tobacco on the premises. Thus, it would be very unlikely for a lounge patron to be combining cannabis with alcohol or tobacco while in a lounge environment, and employees should quickly put an end to alcohol or tobacco use observed at the facility.

Consumption lounges may also consider limiting the amount of time each patron is allowed to spend at the facility so as to prevent overconsumption and deter loitering.

A caveat to this is that patrons who consume edible cannabis products at the lounge might not feel the effects for a while, in which case allowing longer visits makes sense.

There is no right or wrong answer to how much time someone should spend at a lounge, since everyone reacts to products differently; the critical factor is preventing overintoxication.

Underage Consumption

Another common concern related to cannabis consumption lounges has to do with the potential for underage consumption.

However, these facilities pose no more of a risk of underage consumption than dispensaries, as patrons are required to show valid identification demonstrating they are of legal age prior to entering the consumption lounge. Such ID checks do not occur outside of the regulated marketplace.

Consumption lounge operators should ensure that their staff is properly trained to ask for ID prior to allowing patrons into the consumption area, and prior to providing or serving patrons with any cannabis.

A record of patrons should be maintained along with the name or employee ID number of the staff member who reviewed the patron's ID and the date and time of the patron's visit.

In the event that a minor attempts to gain access to the consumption lounge after the age restriction is explained to them, staff should take appropriate actions to safely remove the minor from the premises.

Additionally, conspicuous signage should be displayed stating that underage consumption is prohibited.

Air Quality Concerns

Another common concern with cannabis lounges has to do with the air quality in these facilities. Many jurisdictions have laws restricting indoor smoking, which may pose a challenge to cannabis consumption lounges.

However, some jurisdictions have also developed requirements specifically for cannabis consumption lounges that are designed to maintain high air quality standards and mitigate odors while still allowing smoking, vaporizing or dabbing to take place.

These requirements typically involve an engineered odor control system designed by a qualified professional, which may consist of carbon filtration, negative pressure, odor neutralizers and similar technologies.

A good example of how to regulate consumption lounge odors and air quality is the city and county of San Francisco, which issues special cannabis consumption lounge permits through its Department of Public Health, and has promulgated specific regulations for these facilities as well as requirements for smoking room ventilation.[4]

Proper Warnings

Yet another concern surrounding consumption lounges has to do with providing other warnings that may be required by a state or local jurisdiction.

For example, California's Proposition 65 has specific warnings, set forth in Title 27 of the California Code of Regulations, which must be provided in designated cannabis smoking, vaping or dabbing areas.[5]

This is because both cannabis smoke[6] and Delta-9 THC[7] are on the Prop 65 list — a list of chemicals considered by the state of California to cause cancer or reproductive harm.[8]

A Prop 65 warning for areas where cannabis smoking and vaping or dabbing of products containing Delta-9 THC occurs must include (1) the triangular yellow warning symbol; (2) the word "WARNING:" in all capital letters and bold print; and (3) the following language:

Breathing the air in this area exposes you to cannabis smoke, which increases your cancer risk and, during pregnancy, exposes your child to delta-9-THC and other chemicals that can affect your child's birthweight, behavior, and learning ability. For more information go to www.P65Warnings.ca.gov/cannabis.

Slightly different language is required if Delta-9 THC vaping or dabbing, but not cannabis smoking, occurs in the designated area.

It's important to note that the Proposition 65 warning language for cannabis consumption lounges is different from the warning language required by Proposition 65 for designated noncannabis smoking areas.[9]

Failure to provide these warnings in consumption lounge areas can have significant consequences — as can failing to provide consumer product warnings for THC, cannabis smoke or other listed chemicals that may be found in cannabis goods sold in California.[10]

Other jurisdictions may have different warning requirements for cannabis consumption lounges, so operators should be sure to do their research.

Consumption lounge operators should also consider posting:

- Reminders about responsible consumption;
- Clear statements prohibiting underage consumption;

- Warnings about driving or operating machinery after consuming cannabis;
- Reminders about the activation time for different types of cannabis products;
- Any pertinent restrictions regarding what can and cannot be brought in or out of the lounge according to relevant law; and
- Warnings regarding any allergens if food is served or allowed in the lounge.

Insurance

Given the potential liability involved with operating a cannabis consumption lounge, operators of these facilities would be wise to hold an insurance policy that explicitly covers — or, at minimum, does not explicitly exclude — lounge activities and injuries caused by lounge patrons. A number of insurance providers currently offer such coverage.

As always, it's important to review any insurance policy carefully for any language regarding compliance with federal cannabis laws, as this could effectively invalidate the policy with respect to consumption lounges, which are still illegal under U.S. federal law.

Potential Consequences and the Importance of Compliance

For most of the foregoing concerns, a number of potential consequences exist, including loss of licensure at the state and local level, civil lawsuits brought by regulators and injured members of the public, and even potential criminal prosecution related to, for example, serving underage patrons.

Consumption lounge operators should take note of the best practices mentioned here in order to best address the unique risks they face.

Additionally, such businesses should ensure that they are in full compliance with all relevant local and state laws and regulations in order to avoid disciplinary or other enforcement actions outside the scope of their lounge activities.

We are eager to see an increased interest around cannabis consumption lounges, and hope this contributes to further normalization toward, and decreased stigma against, lounge patrons and the businesses that serve them.

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[1]

See https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB374.

[2]

See https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB285.

[3] See Cal. Business & Professions Code §25602.1; Cal. Civil Code §1714.

[4] See <https://www.sfdph.org/dph/eh/MCD/default.asp>.

[5] 27 C.C.R. §§ 25607.46, 25607.47.

[6] See <https://www.p65warnings.ca.gov/chemicals/cannabis-marijuana-smoke>.

[7] See <https://www.p65warnings.ca.gov/chemicals/delta-9-tetrahydrocannabinol-d9-thc>.

[8] The current Proposition 65 chemical list can be found here: <https://www.p65warnings.ca.gov/chemicals>.

[9] See <https://www.p65warnings.ca.gov/places/designated-smoking-areas>.

[10] For more information about California's Proposition 65, visit <https://oehha.ca.gov/proposition-65> and <https://www.p65warnings.ca.gov/>.