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Business North Carolina has asked legal experts to weigh in on some of the most pressing issues affecting business owners today. Topics such as employee-generated data and business succession plans are imperative for most small-business owners in the state, but laws are confusing and require a deep knowledge. Meanwhile, demand for CBD and hemp products is soaring, and more entrepreneurs are entering the related industries, but there are legal implications many aren't aware of. These issues are explored by some of the state's top legal minds in the following pages.

WHAT IS HEMP? IS IT EVEN LEGAL?

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Hemp and cannabidiol (CBD) products are dominating the airwaves and the marketplace, and North Carolina has been at the forefront, ranking sixth in the nation in acres of hemp produced in 2018. Many predict that the market will grow exponentially over the next decade.

With this boom, the hemp industry will increasingly impact other industries. Your business may have to decide whether to become involved with the hemp industry and, if so, address potential legal risks.

But first we need to understand: What is hemp? Is it even legal?

While difficult to distinguish from marijuana visually, hemp is a strain of cannabis bred to have insufficient THC levels to cause a user to become high. Hemp can be used to make many products, with consumer products using CBD, a compound extracted from hemp, among the most popular and profitable.

Until now, the hemp industry has operated under statutory "pilot projects." However, Congressional authorization for these projects was vague. Conflict resulted because some states–including North Carolina–promoted a broad commercial hemp industry, while the Drug Enforcement Administration read the authorization narrowly and threatened to curtail interstate hemp commerce.

In December 2018, the Agricultural Improvement Act of 2018, better known as the "Farm Bill," was signed into law. The bill has been widely praised as "legalizing" hemp products, including CBD oil, but that is an overgeneralization. The Farm Bill removed certain legal restrictions on growing and selling hemp products, most notably the principal grounds for DEA objections, by clearly permitting commercial hemp production and removing the threat of criminal prosecution of good-faith hemp farming. However, hemp and CBD products remain heavily regulated and, in some cases, illegal. Therefore, while hemp's promise is great, so is the need for care.

How do we know what we legally can and can't do with hemp products?

Producers are safe from criminal prosecution unless they intentionally violate the law. However, for others, the answers are less clear. The Farm Bill defines anything that has a THC concentration above the legal limit as illegal marijuana. While there is a safe harbor from criminal prosecution for producers who accidentally grow hemp above the legal limit, those protections apply only to producers, and not those who might otherwise possess non-conforming hemp, including companies that transport, warehouse or process it.

In order for producers to qualify for the Farm Bill protections, the production must take place under a regulatory plan adopted by the state and approved by the federal government. As of August 1, the federal regulations had not been proposed, and the state regulations await the federal ones. So, aside from the basic outline in the Farm Bill, there is no certainty what either hemp regulatory structure will look like for producers. It also remains unclear if there will be any protections for non-farmers participating in hemp distribution.

The Farm Bill also does not legalize all hemp and CBD products. The Food and Drug Administration and the state Department of Agriculture still can regulate the use of hemp and CBD in foods, nutritional supplements, drugs and cosmetics. And they do regulate it heavily.

The FDA has long held that CBD products may not be marketed as nutritional supplements or added to food. In essence, the FDA's position is that the entire CBD oil and extract industry for food and nutritional supplements is illegal. Both the FDA and the state Department of Agriculture have reaffirmed this position following the Farm Bill and continue to send warning letters to companies marketing CBD products. The FDA realizes, however, that this is not a viable long-term position, given Congress's promotion of hemp, and is currently considering changes to permit some CBD products to be marketed as food and nutritional supplements. But those regulations have not been proposed (much less adopted), so there has been no official change in the FDA's position, and nobody knows what sort of CBD products will ultimately be approved.

The FDA and the Federal Trade Commission also are keenly interested in health claims made about CBD products. A producer of any consumer product cannot make claims that the product can prevent, treat or cure diseases without a scientific basis for the claims. There are numerous other rules about marketing and labeling foods and nutritional supplements.

In addition to the federal regulations, states can adopt whatever restrictions on hemp production they like. As of August 1, the North Carolina General Assembly was debating whether to prohibit the production and possession of smokable hemp, which is impossible to distinguish from marijuana either visually or with current law enforcement field testing, making it impossible to determine whether a smoker is using a legal or illegal product. Even if this debate is resolved in favor of allowing smokable hemp, it demonstrates that even hemp-friendly states could limit certain types of hemp in the future.

Because of the still-developing regulatory structures, if your business is thinking of sticking its toes into the hemp waters, here are some of the questions to consider:

Transportation, Storing and Processing of Hemp: If conforming hemp is protected, but non-conforming hemp is marijuana, how will you protect yourself? What steps do you need to take to ensure that hemp is conforming, or at least that you are acting reasonably and in good faith?

CBD and hemp retailers: In addition to the omnipresent CBD and hemp specialty retailers, CBD and hemp products will increasingly be sold in a variety of retailers, both brick-and-mortar and online. Before you sell these products, consider that the FDA currently takes the position that CBD cannot be sold in nutritional supplements and food. It is important that you understand the FDA's evolving position in its upcoming rules. Also consider how you will protect yourself from the risks that your CBD products contain excessive THC concentrations or were produced from non-conforming hemp.

Media, advertising and marketing: The FDA and other regulators have focused their attention on those making unlawful health claims about CBD products. As the market grows, all companies involved in media, advertising and marketing must try to understand what can be said about any potential benefits of these products and what cannot. That is particularly important for broadcast media, since their FCC licenses may be at risk if they participate in illegally aggressive advertising.

Landlords: Should you rent farmland that could be used in hemp production or retail space to tenants who could sell CBD products? If so, what steps do you need to take to ensure your tenants are operating lawfully? And will you be protected by the coming regulations?

Banks and finance: Should you issue loans that will be secured by hemp crops or CBD inventory? How would you foreclose on, market, and sell the products if you needed to do so, since (as to hemp) you are not licensed to produce it, and (as to CBD inventory) the FDA believes some products cannot be sold? Because of these questions, the American Bankers Association has asked for federal guidance with respect to hemp. Further complicating these issues, Congress has authorized crop insurance for hemp, but it is not currently available.

The loosening future regulations around hemp and CBD create a lot of opportunity, not just for those mentioned above but for science and technology companies, manufacturers and a variety of other industries. However, it is crucial that businesses make sure they understand not just the potential reward, but also the likely risks, as they explore these new avenues.

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NAVIGATING THE RISKS OF PROCESSING EMPLOYEE-GENERATED DATA

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Although the use and abuse of user-generated data by social media companies has dominated national headlines for years, privacy advocates have started raising concerns in response to the increasing collection and processing of employee-generated data in the workplace. In recent years, many employers have gone beyond the traditional forms of monitoring for the sake of policy enforcement and trade secret protection and have started to consider how they can use advanced data analytics in support of various organizational goals and priorities.

While it is easy to wonder if implementing an internal data processing initiative is right for your organization, it is important to be aware of the various risks that come with transitioning from a monitoring policy to a processing policy. By way of example, the International Association of Privacy Professionals (IAPP) recognizes four general categories of risk that an organization should contemplate and address prior to implementing a data collection and processing policy: legal risks, reputational risks, operational risks, and investment risks.[1] While the reputational, operational, and investment risks of a data processing initiative are subjective, the legal risks are more objective and concrete. While this article is not intended to be an exhaustive review of employee workplace privacy, it will help demonstrate the need for having a well thought out information management plan prior to initiating a data-processing operation at your own organization

International Law

Although the General Data Protection Regulation (GDPR) is a European Union (EU) regulation, it is applicable to many US companies. The GDPR provides data privacy protections for EU citizens both domestically and abroad. Accordingly, the language of the GDPR covers a variety of data-processing activities on a potentially global scale. By way of example, the GDPR covers companies engaged in data processing in the EU as well as companies that offer goods or services to (or monitors the behavior of) EU residents. It can also apply to companies that process and hold the personal data of EU residents, regardless of the company's location or business activities.

Although the GDPR has been in effect for a little over a year, many US companies are still unsure of the various ways it may affect their business operations moving forward. Based on the broad scope of activities and individuals, the GDPR can impact North Carolina businesses in a variety of ways that can feel confusing and difficult to understand. This issue is further complicated by the unexpected costs that can arise when processing data compliant with the GDPR. Among other things, the GDPR provides the data subject certain rights of access, portability, and breach notifications that can become costly and time consuming to implement. The GDPR also threatens steep penalties for compliance issues up to a maximum of 4% of annual global "turnover" or 20 million euros (whichever is greater) for the most serious infringements.

Accordingly, it is important to consult with a data privacy professional in order to understand the potential impact the GDPR could have on your business' efforts to process employee data. Although the GDPR obligations can appear onerous and difficult to understand, a trained privacy professional can help your organization navigate the GDPR and reap the benefits of internal data processing activities.

Federal/State Law

In contrast to the EU, the US does not currently have a Federal law analogous to the GDPR. However, there are many situations where various state and Federal regulations touch on, and potentially restrict the use of, employee data. Under the current US system, the applicability of any given regulation largely turns on the type of information that is being collected, and the purpose for which that information is going to be used. Understanding the US system can be further complicated by the variety of government agencies that are responsible for enforcing this patchwork system. While some regulations may be enforced by the Department of Labor, others can be enforced by the Federal Trade Commission (FTC) or the Consumer Financial Protection Bureau (CFPB).

Both North Carolina and Federal law provide certain protections over a range of information that an employee may possibly pass along to their employer, such as protected health information, Social Security numbers, and bank account information. Consequently, your organization should speak with employment and privacy professionals to discuss what information you intend to use and how you intend to use it. Although each organization's needs and concerns will differ, there are some laws that will apply to most organizations collection and processing efforts.

At the Federal level, there are three major regulations that address the collection and retention of workplace communications: the Wiretap Act, the Electronic Communications Privacy Act (ECPA), and the Stored Communications Act (SCA). As most employers are already engaged in some form of employee communications monitoring, it is important to understand how these laws may impact your data processing initiative.

As a general matter, the Wiretap Act and ECPA provide strict restrictions on the interception of wire communications, oral communications, and electronic communications. Accordingly, these laws cover phone calls, emails, and other electronic communications. However, most employers that engage in some form of interception based monitoring fall into one of two exceptions provided under the laws. Generally, the employer has either obtained the consent of one of the individuals that is party to the communication, or the interception was done "in the ordinary course of business."

Similarly, the SCA generally prohibits unauthorized access to electronic communications while it is in a facility through which an electronic communications is provided. However, the law also provides some carve-outs for an employer that either is the entity that provided the services or is the user of the service with respect to a communication of, or intended for the company. North Carolina also has several pieces of legislation that mirror the workplace employee privacy protections offered by Federal law. By way of example, North Carolina generally prohibits the installation or use of a pen register or "trap and trace" device without first obtaining a court order. However, there are certain exceptions whereby the installation or use is permitted, such as with the user's consent.

Despite the potential safe harbor, there are a variety of ways in which an employer may unintentionally run afoul of these restrictions. For example, an employee may have signed a consent release that covers various forms of employer monitoring. However, an employer should be wary of relying on prior consents to expand collection and monitoring procedures without engaging in a thorough review of the activities and purpose of the data collection activities contemplated in the release. Violations of these laws can carry criminal charges and private rights of action.

Ultimately, it is important that your business carefully contemplate the various risks associated with collection, retaining, and processing employee-generated data. While the potential benefits of such an initiative may be high, the penalties for misuse are higher. Consequently, spending time implementing a well designed data management policy can help your company minimize risks while maximizing returns.

[1]Swire, Peter P., and DeBrae Kennedy-Mayo. *U.S. Private-Sector Privacy: Law and Practice for Information Privacy Professionals.* International Association of Privacy Professionals, 2018

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IS IT TIME TO REVIEW YOUR SUCCESSION PLAN DOCUMENTATION?

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Business succession and estate plans are made based on circumstances existing at the time they are put in place.

Though skillfull attorneys strive to prepare comprehensive documents that take into account all reasonably foreseeable contingencies, it is impossible to prepare a document that addresses every twist and turn that life can take. Only periodic reviews of your documentation will ensure that your plan remains appropriate for you and your situation. To illustrate with an example, consider the following:

Stale Buy-Sell Agreements

Ricky and Scott were buddies from childhood and decided to go into business together after college. With some start-up funds they borrowed from their parents, they started an HVAC business, R&S Mechanical, Inc. They used an attorney to prepare the necessary corporate documentation and, upon her advice, entered into a Buy-Sell Agreement governing transfers of their stock. The key provision of the Buy-Sell Agreement was a mandatory purchase and sale of a shareholder's stock by the corporation upon his death. The purchase price for each shareholder's 50% of the corporation's stock was a fixed amount of $100,000, based upon the $100,000 that Ricky and Scott each initially contributed to the corporation. The Agreement provided that the purchase price would remain fixed until the shareholders amended the Agreement. The attorney warned them that they needed to update the valuation periodically as the value of the company increased. Ricky and Scott placed the Agreement in the corporation's safe with their other important papers and proceeded to build a thriving business.

After 20 years of hard work, R&S Mechanical, Inc. grew into an enterprise with a net worth of over $10,000,000. Remembering the advice of their attorney and recognizing that one of them would need cash one day to fund a buyout of their partner, Ricky and Scott each purchased a term life insurance policy on their partner's life with a face value of $5,000,000. With no idea of how Ricky and Scott's succession plan worked, their insurance agent issued the policies directly to Ricky and Scott as the owners and beneficiaries of the policies. Ricky and Scott placed the policies in the company safe on top of the stack of important papers which were covering the old Buy-Sell Agreement they signed many years ago.

Two months later, Ricky was killed in a car wreck. Imagine Scott's surprise when he pulled out the old Buy-Sell Agreement he and his friend signed so long ago and realized that the corporation had the right to buy Ricky's stock for $100,000, while Scott received $5,000,000 in proceeds from his insurance policy on Ricky's life.

Scott tore up the old Buy-Sell Agreement and paid Ricky's estate the $5,000,000 for Ricky's stock. However, what if these two partners were not such great friends? Scott could have gotten a windfall, and Ricky's family could have been left with a fraction of the value of his stock.

Stale valuations and improperly placed life insurance are very common problems with Buy-Sell Agreements. If you are not certain that your Buy-Sell Agreement does what you want it to do, it is time to give it a fresh look.

Outdated Wills

Though Scott took the honorable path and paid Ricky's estate fair value for his stock, Ricky's saga does not end there. The sales proceeds, along with Ricky's other assets, must now pass in accordance with Ricky's Last Will.

Ricky was an outgoing young adult. He had an endearing personality that helped him succeed at business, but it also landed him in hot water when he fathered a son, Tom, while in high school. Though he married Tom's mother, it became quickly apparent that they were not the right match, and they divorced before he left for college. Though Ricky tried to stay involved in Tom's life, Tom's mother had custody and made it difficult. By the time Ricky graduated from college and started his business with Scott, he had married again, this time to the love of his life, Katie.

Around the same time that Ricky and Scott's Buy-Sell Agreement was put in place, Ricky engaged an attorney to prepare his Will. Ricky wanted to ensure that Tom, who was five years old at the time, received a significant legacy while at the same time leaving the vast majority of his assets to Katie. Ricky obtained a life insurance policy that would provide a death benefit of $2,000,000 and made it payable to his estate. His Will directed that an amount equal to the federal estate tax exemption, which at the time was $650,000, was to pass to a trust for Tom, and all remaining assets were to pass outright to Katie.

Ricky died having never reconsidered his Will. Unfortunately for Katie, the estate tax exemption amount had increased to $11,400,000 in 2019, the year of Ricky's death. Consequently, Ricky's Will directed the entire estate to the trust for Tom and no assets to Katie. Fortunately, NC law allows a surviving spouse such as Katie to file for an elective share to claim up to half of Ricky's assets, but she was forced to spend thousands on legal fees to litigate that claim. Moreover, Ricky wanted Katie to receive the bulk of his estate, so his intention was thwarted.

The tragedy does not stop there. The trust for Tom provided that it was to terminate when Tom reached age 25 and, at that time, distribute its assets to him. Tom turned 25 just before Ricky's death and, sadly, had developed an alcohol and drug problem. He had millions of dollars dumped in his lap, which he spent frivolously to fuel his addiction. Rather than giving Tom the step-up in life that Ricky had intended, the inheritance that Ricky worked so hard to amass ultimately destroyed Tom's motivation and hastened his demise.

For many people, confronting their mortality and the often difficult decision of how to divide assets among loved ones is an uncomfortable experience. As a result, many people tend to treat establishing a Will as a set-it-and-forget-it proposition. Because changes occur with respect to your family and asset situation as well as with respect to the law, periodic review of your Will is crucial to ensuring that it remains an accurate expression of your wishes.

Conclusion

Life happens, time passes, and situations change. Business succession and estate planning is a process, and plans should evolve over time to mesh with new circumstances. Failing to reconsider your legal documentation periodically can be a recipe for disaster.

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