Medical Marijuana and Federal Prosecutions – A New Take on Protections for State Licensees

Feb 25, 2022

Categories:

Blogs
Health Law Matters
Hemp Legally Speaking

Authors:

Andrea Hope J. Steel

In late January, the U.S. Court of Appeals for the First Circuit issued its opinion in *United States v. Bilodeau*, 2022 WL 225333 (1st Cir., Jan. 26, 2022), a case involving two marijuana growers from Maine who were indicted by the federal Department of Justice (DOJ) on charges of violating the Controlled Substances Act (CSA). The growers were operating three facilities in Maine where they grew and/or distributed marijuana, purportedly as registered caregivers to qualified patients, which is legal under Maine's medical marijuana laws. The growers maintained "facially valid documents" demonstrating their compliance with such laws.

However, after an investigation into the growers' operation, federal agents executed search warrants for two of the growers' facilities and subsequently indicted the growers for, among other things, "knowing and intentional manufacture and possession of marijuana with intent to distribute in violation of the CSA and conspiracy to do the same." The growers then petitioned the U.S. District Court for the District of Maine for an injunction preventing the federal government from proceeding with the prosecutions, arguing that the Rohrabacher amendment prohibited the use of federal funds for such an endeavor.

Rohrabacher's Practical Limit on Prosecution

The Rohrabacher amendment, named for former US Representative for California's 48th district Dana Rohrabacher, is a rider that has been attached to Congress' annual appropriations bill every year since 2015. The amendment stipulates that none of the funds made available to the DOJ under Congress' annual appropriations bills may be used to prevent any of the fifty states from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." As stated by the First Circuit, the Rohrabacher amendment "places a practical limit on federal

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

prosecutors' ability to enforce the CSA with respect to certain conduct involving medical marijuana."

The growers asserted that, pursuant to the Rohrabacher amendment, the DOJ could not use federal funds to prosecute them for violating the CSA. They argued that because their allegedly illegal activities were authorized under Maine's medical marijuana laws, a prosecution for such activities would therefore amount to the DOJ effectively preventing Maine from implementing its own laws authorizing the cultivation and distribution of medical marijuana. The District Court did not agree with the growers, however, and ruled that the prosecution of all counts against them could proceed. The court premised this decision on its finding that the growers were "patently out of compliance" with Maine's medical marijuana laws and were instead "part of a 'large-scale… black-market marijuana operation'" that was clearly not authorized by such laws. The growers then appealed the Court's decision to the U.S. Court of Appeals for the First Circuit.

A Nuanced Interpretation of Rohrabacher

In hearing the interlocutory appeal, the First Circuit became only the second of the federal circuit courts to interpret the Rohrabacher amendment, following the Ninth Circuit's 2016 decision in *United States v. McIntosh*, 833 F.3d 1163. In its opinion, the First Circuit began by agreeing with the Ninth Circuit's reading of the amendment and its conclusion that "the DOJ may not spend funds to bring prosecutions if doing so prevents a state from giving practical effect to its medical marijuana laws." The First Circuit further echoed the Ninth Circuit by acknowledging that "the prosecution of persons whose conduct fully complied with" Maine's medical marijuana laws would prevent those laws from having much practical effect, which is "precisely what the rider forbids."

Importantly, however, the First Circuit ultimately disagreed with the Ninth Circuit regarding the circumstances under which a federal prosecution would prevent a state from giving practical effect to its medical marijuana laws. Rather than adopting the Ninth Circuit's "strict-compliance test to differentiate between prosecutions that prevent a state's medical marijuana laws from having practical

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

effect and those that do not," the First Circuit opted for a more nuanced approach. It rejected the strict-compliance test promulgated by the Ninth Circuit in *McIntosh* on the grounds that "the potential for technical noncompliance is real enough that no person through any reasonable effort could always assure strict compliance."

While recognizing that the strict-compliance requirement went too far, however, the First Circuit stressed that "Congress surely did not intend for the [Rohrabacher amendment] to provide a safe harbor" to those with facially valid documents "without regard for blatantly illegitimate activity." The First Circuit stated that in this case, the evidence clearly showed that the growers' outward appearance of compliance with Maine's medical marijuana laws was a façade, employed for the purposes of selling marijuana to unauthorized users. Thus, the First Circuit upheld the ruling of the District Court, affirming its denial of the growers' motion to enjoin their prosecutions.

Impact of *Bilodeau* on Medical Marijuana Laws

Though the Maine growers were unsuccessful in challenging their prosecution by the DOJ under the Rohrabacher amendment, the First Circuit's interpretation of the amendment is an important development in the field of medical marijuana law. The only previous judicial guidance regarding the application and effect of the Rohrabacher amendment, provided by the Ninth Circuit in *McIntosh*, stipulated that individuals involved in the cultivation and distribution of medical marijuana must strictly comply with all aspects of their state's medical marijuana laws to avoid being prosecuted by the federal government for violations of the CSA. The First Circuit has now supplied a fresh interpretation in *Bilodeau* that is much friendlier to those in the medical marijuana business.

Under the First Circuit's approach, one who is legally engaging in the industry under their state's medical marijuana laws cannot be prosecuted by the DOJ for it unless their conduct rises to the level of "blatantly illegitimate activity." If a medical marijuana grower or distributor is making a reasonable effort to comply with their state's medical marijuana laws, they will be protected from federal

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

prosecution by the Rohrabacher amendment, even if there are aspects of their conduct that are not in strict compliance with such laws.

Of course, it must be noted that the First Circuit's interpretation of the Rohrabacher amendment in *Bilodeau* is not binding on other federal judicial circuits, nor does it provide a bright line rule. The First Circuit itself acknowledged that in "charting this middle course," it did not "fully define [the] precise boundaries" of what types of conduct would qualify as "blatantly illegitimate activity." The only activity that the First Circuit has clearly classified as "blatantly illegitimate" is that of the growers in *Bilodeau* – an operation "aimed at supplying [marijuana to] persons whom [none of the prosecuted growers] ever thought were qualifying patients under Maine law."

Takeaways for Medical Marijuana Businesses

In light of *Bilodeau,* those engaging in the medical marijuana business should continue to make every effort possible to fully comply with all aspects of their state's medical marijuana laws. Though it is promising that the First Circuit's decision in *Bilodeau* interprets the Rohrabacher amendment as providing greater protection from DOJ prosecution for state-licensed medical marijuana growers and distributors, this is still a very new area of law which is rife with the possibility of conflict between the federal government and the state legislatures that have enacted statutes legalizing medical marijuana within their borders.

Those in Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico who are legally growing, selling, buying, or using medical marijuana under their state's laws can take some degree of comfort in knowing that they are not likely to be federally prosecuted for minor failures to comply, so long as they are not engaging in blatantly illegitimate activity. However, those in other states should continue to err on the side of caution when it comes to strict compliance, as there is no telling whether the First Circuit's interpretation of the Rohrabacher amendment will be adopted by other federal circuit courts.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons

If you have questions or need assistance complying with your state's medical marijuana laws, please contact one of the authors or reach out to a member of Frost Brown Todd's Manufacturing and Health Care Innovation teams.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons