



2018 Farm Bill Provisions Related to Hemp

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Since passage of the Agricultural Act of 2014 (“2014 Farm Bill”), states have been authorized to operate research-based pilot programs relating to hemp production. On December 20, 2018, President Trump signed the Agriculture Improvement Act of 2018 (“2018 Farm Bill”), which expanded the manner in which states and tribes may authorize and regulate hemp production and made other significant changes that generally transitioned hemp from a research-based product to an agricultural commodity under federal law.

Wisconsin currently operates a hemp pilot program that was created under the authority of the 2014 Farm Bill. 2019 Senate Bill 188 proposes various modifications to state law, in part to comply with the 2018 Farm Bill. The hemp-related provisions of the 2018 Farm Bill are summarized below.

DEFINITION OF HEMP UNDER FEDERAL LAW

Under the 2014 Farm Bill, “industrial hemp” was defined as “the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis.” THC is the cannabis plant’s primary psychoactive compound, and a level of 1% THC is considered by some to be the threshold for creating a psychotropic effect.

The 2018 Farm Bill eliminated “industrial” from the term and redefined “hemp” as “the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis.” The new definition explicitly includes cannabinoids, such as cannabidiol (CBD), which clarifies the scope of the defined term of “hemp” when used in other related laws. CBD is the primary nonpsychotropic cannabinoid in the cannabis plant.

REMOVAL FROM THE FEDERAL CONTROLLED SUBSTANCES ACT

The federal controlled substances act (CSA) generally prohibits possession, distribution, and manufacture of certain controlled substances, which are placed on a schedule numbering I to V based on a substance’s potential for abuse and medical uses. Marijuana and THC are both Schedule I controlled substances under the federal CSA.

The 2018 Farm Bill removed hemp from the federal CSA in two ways. First, it clarified that marijuana does not include hemp, as defined under the 2018 Farm Bill. Second, it created an exception for THC contained in hemp. Together, these provisions generally legalize the possession, distribution, and manufacture of hemp under federal law.

FEDERAL REGULATION OF HEMP PRODUCTION

The 2018 Farm Bill generally shifted the federal regulation of hemp production from research-based pilot programs to a regulatory scheme authorizing hemp production without limitations on its purpose. Under the 2018 Farm Bill, states and tribes are authorized to seek primary regulatory authority over hemp production from the U.S. Department of Agriculture (USDA). If a state does not seek or is not approved to have such authority, hemp production in that state will be governed by a federal plan to be promulgated by the USDA.

Pilot Programs

Under the 2014 Farm Bill, institutions of higher education and state departments of agriculture were authorized to grow or cultivate industrial hemp, subject to two conditions. First, state law must authorize such activities. Second, the growth or cultivation must be for purposes of research conducted under an agricultural pilot program. Under this authority, 2017 Wisconsin Act 100 created Wisconsin's hemp pilot program, which is administered by the Department of Agriculture, Trade, and Consumer Protection (DATCP).

The passage of the 2018 Farm Bill does not immediately affect state pilot programs. The 2018 Farm Bill repealed the federal law authorizing pilot programs, but the repeal is not effective until one year after the USDA establishes its plan for regulating hemp production for states and tribes without primary regulatory authority. In other words, states may continue operating hemp pilot programs until either the USDA grants the state primary regulatory authority over hemp production or until the federal law authorizing pilot programs is repealed. Once the federal plan is established, a hemp producer must either be licensed by the USDA or by the hemp producer's state, if that state has been approved to have primary regulatory authority over hemp production.

Primary Regulatory Authority

Under the 2018 Farm Bill, states and tribes seeking primary regulatory authority over hemp production must submit a plan for monitoring and regulating hemp production to the USDA. The plan must identify certain information, such as: practices for maintaining information regarding the land on which hemp is produced; procedures for testing THC levels in hemp; procedures for disposing of plants produced in violation of applicable requirements; and procedures for conducting annual inspections of producers.

The 2018 Farm Bill specifies the manner in which states and tribes with primary regulatory authority must enforce violations of certain requirements by hemp producers. The enforcement mechanisms differ depending on whether the state's department of agriculture determines a hemp producer has violated the state's plan negligently or with a culpable mental state greater than negligence. Negligent violations are not subject to criminal enforcement action, but do require a corrective action plan. Violations with a culpable mental state greater than negligence must be reported to the U.S. and state attorneys general.

FEDERAL PREEMPTION

The 2018 Farm Bill does not preempt any state law that regulates hemp production more stringently, or that generally prohibits hemp production in that state. However, states and tribes may not prohibit the transportation or shipment of hemp or hemp products. To that end, the 2018 Farm Bill clarifies that nothing in its provisions may be construed to prohibit the interstate commerce of hemp or hemp products. In a legal opinion issued on May 28, 2019, the USDA concluded that states and tribes may not prohibit the interstate transportation or shipment of hemp lawfully produced under the 2014 Farm Bill.

AUTHORITY OF THE FOOD AND DRUG ADMINISTRATION (FDA)

The 2018 Farm Bill specifies that it does not affect or modify the federal Food, Drug, and Cosmetic Act (FDCA), or the authority of the Commissioner of Food and Drugs or the Secretary of Health and Human Services under that act. In other words, other federal laws and regulations related to food and drug safety remain applicable, depending on the circumstances.

To date, the FDA has determined that the FDCA prohibits marketing products for therapeutic or medical uses when such products have not been approved by FDA for such uses, as well as introducing food containing added CBD into interstate commerce. On May 31, 2019, the FDA held a public hearing to obtain scientific data and information about the safety, manufacturing, product quality, marketing, labeling, and sale of cannabis-derived products. The FDA is expected to provide an update on its review of such information later in 2019.