
Wisconsin Legislative Council



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Director

TO: REPRESENTATIVE DAN KNODL

FROM: Michael Queensland, Senior Staff Attorney, and Amber Otis, Staff Attorney

RE: Legality of Delta-8 THC Under Federal and State Controlled Substances Acts

DATE: June 29, 2020

You asked whether delta-8-tetrahydrocannabinol (delta-8 THC) is legal under current state and federal controlled substances laws. Delta-8 THC is one of many cannabinoids found in the cannabis plant. More commonly understood cannabinoids include cannabidiol (CBD), which is non-psychoactive, and delta-9-tetrahydrocannabinol (delta-9 THC), which is psychoactive.¹

The short answer is that a substance meeting the definition of “hemp” is legal for purposes of state and federal controlled substances laws regardless of its delta-8 THC concentration. The remainder of this memorandum provides relevant background information about the legality of marijuana and tetrahydrocannabinols (THC) and an analysis of your question.

LEGALITY OF MARIJUANA AND THC

State and federal law each contain a Controlled Substances Act (CSA) under which controlled substances are regulated by placement on a schedule numbering I to V based on a substance’s potential for abuse and medical uses. Generally, Schedule I controlled substances have the highest potential for abuse and no currently accepted medical use, while Schedule V controlled substances have a low potential for abuse and a currently accepted medical use. Both the state and federal CSAs generally prohibit the possession, distribution, and manufacture of controlled substances, though the specific prohibited acts vary depending on the applicable schedule. [21 U.S.C. chs. 13 and 961, Stats.]

Federal CSA

Under the federal CSA, marijuana and THC are both considered Schedule I controlled substances. [21 U.S.C. s. 812 (c) (Schedule I) (c) (10) and (17).] Marijuana is defined to mean “all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.” [21 U.S.C. s. 802 (16).]

However, both the federal definition for marijuana and the Schedule I listing for THC contain exceptions. Substances that meet these exceptions are not subject to the prohibitions under the federal CSA and are generally lawful.

¹ For more information, see [Congressional Research Service, *Defining Hemp: A Fact Sheet*, March 22, 2019.](#)

The federal CSA's exception for "hemp" is most relevant to your question, in that "hemp" is not considered to be marijuana or THC under the federal CSA. The Agriculture Improvement Act of 2018 (2018 Farm Bill) excluded hemp from the definition of "marijuana." Similarly, the 2018 Farm Bill provided that, under the federal CSA's Schedule I, THC does not include THC contained in hemp.

Federal law uses the following definition of hemp:

[T]he 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 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

[7 U.S.C. s. 16390 (1).]

State CSA

Chapter 961, Stats., constitutes the state CSA under Wisconsin law. Unlike under the federal CSA, marijuana is not a scheduled drug under the state CSA. However, the state CSA lists as a Schedule I substance THC in any form, including THC contained in marijuana, obtained from marijuana, or chemically synthesized. [s. 961.14 (4) (t), Stats.]

The state CSA provides numerous exceptions to the definition of THC.² Like federal law, one of these exceptions is for a substance that meets the definition of hemp. The state law definition of hemp is nearly identical to the federal law definition. However, state law specifies that "hemp" does not include "a prescription drug product that has been approved by the U.S. food and drug administration." [s. 94.55 (1), Stats.]

ANALYSIS

Whether delta-8 THC is unlawful depends on whether it meets an exception to what is considered marijuana or THC under federal or state law. A substance may contain an unlimited amount of delta-8 THC so long as the substance does not otherwise meet the definition of a controlled substance.

For purposes of the federal or state CSAs, a substance containing delta-8 THC is legal if it meets the definition of hemp, because hemp is excluded from the prohibitions in both the federal and state CSAs that apply to marijuana and THC. In order to meet the definition of hemp, a cannabis-derived substance must meet both of the following criteria:

- Be part of the **cannabis plant**, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers.
- Have a **delta-9 THC** concentration of not more than 0.3 percent.

In other words, a substance containing delta-8 THC does not meet the definition of hemp unless it is derived from the cannabis plant and contains not more than 0.3 percent concentration of delta-9 THC.

² The state CSA exempts THC in certain portions of the cannabis plant, similar to exceptions to the definition of marijuana under federal law. State law also provides an exception to THC for a Food and Drug Administration-approved drug called Epidiolex and for the possession of CBD in certain circumstances. [s. 961.14 (4) (t), Stats.]

CONCLUSION

For the reasons stated above, a substance meeting the definition of “hemp” is legal for purposes of federal and state CSAs regardless of its delta-8 THC concentration. However, other laws not addressed in this memorandum may apply to a particular cannabis-derived product. For example, other federal laws and regulations related to food and drug safety remain applicable, depending on the circumstances. Lastly, this memorandum should not be relied upon as legal advice. In particular, any person engaging in commercial activities relating to cannabis should consult an attorney.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

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