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Wisconsin industrial hemp, the 2018 Farm Bill, and CBD:

Two thousand and eighteen marked the first year of Wisconsin's industrial hemp program. Changes made at the federal level in December in the 2018 Farm Bill legalized hemp throughout the country, ensuring that 2019 will be a year of additional opportunities for the industrial hemp industry in Wisconsin. While the industry took major steps forward, a level of uncertainty still surrounds the regulation of hemp-derived CBD.

2017 Wisconsin Act 100

Wisconsin's industrial hemp law was enacted in November 2017, taking advantage of a federal Farm Law exemption to the Controlled Substances Act.¹ The program authorizes growing and processing industrial hemp, provided it is done pursuant to a state industrial hemp pilot program. Forty-one states, including Wisconsin, currently allow the growth and processing of industrial hemp. The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) has promulgated emergency rules for the program and permanent rules are scheduled to take effect in July 2020.

During the 2018 growing season, 135 licensed growers reported planting hemp crops.² Plantings totaled roughly 1,850 field acres and an additional 23 acres were used for greenhouse growing.

DATCP also issued 99 processor licenses. Hemp processors are allowed to "store, handle and convert industrial hemp into a marketable form under Wisconsin law."³ The Wisconsin Attorney General has stated that licensed processors may use industrial hemp to produce cannabidiol (CBD) and that CBD produced as part of the pilot program, or another state's pilot program, may be legally sold at retail in Wisconsin.⁴

Industrial hemp licensing for 2019

- Industrial hemp license renewal or registration applications for the 2019 growing season are now being accepted by DATCP, and the filing deadline was extended to March 1, 2019.⁵

The information in this article is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

¹ See 2017 Wisconsin Act 100; see also [Wisconsin's Industrial Hemp Pilot Program – CBD Processing](#)

² There were a total of 245 hemp grower permits issued.

³ Wisconsin Admin. Code ER § ATCP 22.03(3).

⁴ Statement of the Wisconsin Attorney General, *AG Schimel and Stakeholders Resolve Questions Surrounding DATCP Industrial Hemp Research Pilot Program*, May 10, 2018.

⁵ See [here](#) for complete information about licensing requirements and required fees.

- Current license holders do not need to reapply, but they do need to register with DATCP if they plan to grow or process hemp during 2019.
- All industrial hemp license applicants are required to pass a criminal background check, and no grower or processor licenses will be issued to anyone with a state or federal drug conviction.⁶
- Growers may not harvest hemp until it has been tested by DATCP. For hemp to be certified as “fit for commerce,” its THC concentration must be 0.3 percent or less on a dry weight basis.⁷
- Processors may only acquire hemp that has been issued a “fit for commerce” certificate by DATCP or that is from a grower in another state with an industrial hemp pilot program provided that the hemp is accompanied by documentation demonstrating that it tested at or below 0.3 percent THC.⁸
- Growers are required to submit a planting report to DATCP by July 1 of each year or within 30 days of planting, whichever is earlier. Final production reports are due by Dec. 15 of each crop year.⁹
- Processors also are required to submit a report to DATCP by Dec. 15 of each year, and it must specify the quantity of hemp received and the processor’s intended markets for all hemp received and processed.¹⁰

2018 Farm Bill

Signed into law on December 20, 2018, the 2018 Farm Bill creates new opportunities for the hemp industry.¹¹ While not significantly altering the status of Wisconsin’s industrial hemp regulatory framework for 2019, the law will have an impact in future years as Wisconsin laws and regulations will need to be updated to reflect the federal law changes.

- Most importantly, the 2018 Farm Bill legalized hemp nationwide by amending the Controlled Substances Act to exclude hemp from the definition of marijuana.¹² Additionally, the bill clears the way toward making hemp a mainstream crop in a national market, by guaranteeing the ability to transport hemp or hemp products through the states and granting access to federal crop insurance and federal-funded research.
- While hemp has been legalized, it is still regulated. The Farm Bill allows states and Indian tribes to adopt primary regulatory authority over the production of hemp by submitting a plan to the Secretary of Agriculture. The plan must include certain criteria, including procedures for tracking on which land hemp is being produced, testing concentration levels, disposing of plants found in violation, annual inspections, and enforcement of violations.
- If a state or tribe does not submit a state regulatory plan, then a plan established by the U.S. Secretary of Agriculture will control the production of hemp in that state. The federal plan must address the same criteria as a state or tribal plan, and also includes a federal licensing requirement.
- Along with the legalization of hemp, the 2018 Farm Bill specifies that the state industrial hemp pilot program, in

⁶ Wisconsin Admin. Code ER § ATCP 22.03(5) and (8).

⁷ Wisconsin Admin. Code ER § ATCP 22.12.

⁸ Wisconsin Admin. Code ER § ATCP 22.12(2); DATCP FAQs on Industrial Hemp, see [here](#).

⁹ Wisconsin Admin. Code ER § ATCP 22.05.

¹⁰ *Id.*

¹¹ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018).

¹² The act defines 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 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”

which Wisconsin currently participates, will be repealed one year after the U.S. Secretary of Agriculture establishes the federal regulatory plan. Prior to that date, Wisconsin must elect to pursue a state regulatory plan or follow federal regulation and licensing.

- By and large, the criteria required for the state and federal regulatory plans are currently addressed in Wisconsin law as part of Wisconsin's participation in the state industrial hemp pilot program. However, certain criteria required under the pilot program, such as growing or processing pursuant to a research agreement, may no longer be required when the Farm Bill provisions are fully implemented. Similarly, there are other expected amendments to Wisconsin law to confirm with federal law under the 2018 Farm Bill.
- For the time being, however, the 2019 growing season will continue under the state industrial hemp pilot program adopted and implemented through 2017 Act 2010 and DATCP regulations. But, expect changes to state law in the coming years to reflect the legalization of hemp at the federal level.

US Food and Drug Administration regulations

Shortly after the passage of the 2018 Farm Bill, US Food and Drug Administration Commissioner Scott Gottlieb, M.D., released a statement outlining the FDA's continued regulatory oversight.

- Despite the removal of hemp from the Controlled Substances Act in the 2018 Farm Bill, the FDA maintains regulatory oversight of CBD in interstate commerce. The FDA stated that it is unlawful to introduce food containing added CBD into interstate commerce or to market dietary supplements containing CBD:¹³
- The FDA plans to hold a public meeting in the near future with stakeholders to receive input relevant to the lawful pathways by which products containing cannabis or cannabis-derived compounds can be marketed.
- Foods derived from parts of the hemp plant that do not contain CBD or THC, including hulled hemp seeds, hemp seed protein, and hemp seed oil, may be legally marketed for use in foods, provided they do not make disease treatment claims.

Processing hemp to produce CBD

- The Wisconsin Attorney General has previously advised state and local law enforcement that CBD produced from industrial hemp grown through a state industrial hemp pilot program is allowed and should not be prosecuted.¹⁴
- The Wisconsin Attorney General also has stated that it is permissible for retailers to sell CBD that is certified to be in compliance with a state industrial hemp program and the exemptions to the Controlled Substances Act.¹⁵
- The DATCP emergency rules require THC testing of hemp plants, but do not specify whether testing standards apply after hemp is processed. The rules allow processors to "convert industrial hemp into a marketable form under Wisconsin law," but do not clarify what a "marketable form" may include.

¹³ FDA Statement, *Statement from FDA Commissioner Scott Gottlieb, M.D., on signing of the Agriculture Improvement Act and the agency's regulation of products containing cannabis and cannabis-derived compounds*, December 20, 2018.

¹⁴ Statement of the Wisconsin Attorney General, *AG Schimel and Stakeholders Resolve Questions Surrounding DATCP Industrial Hemp Research Pilot Program*, May 10, 2018.

¹⁵ *Id.*

What Wisconsin retailers need to know

Wisconsin law currently does not allow the retail sale of CBD to consumers unless either of the following circumstances is present:

- The CBD was produced from industrial hemp that was certified by DATCP as “fit for commerce” or from industrial hemp in another state if it was certified to be in compliance with that state’s industrial hemp pilot program.¹⁶
- The CBD is without psychoactive effect and is being sold pursuant to an investigational drug permit issued by the U.S. Food and Drug Administration, and subject to approval by the Wisconsin Controlled Substances Board.¹⁷

These exceptions reflect the Wisconsin Attorney General’s current interpretation of state and federal law and the guidance that has been issued to state and local law enforcement.

Conclusion

In sum:

- The deadline for new industrial hemp growers and processors to apply for 2019 licenses is March 1, 2019. Current licensees do not need to reapply, but do need to register with DATCP for 2019.
- Wisconsin program rules require applicant background checks, regular licensee reporting, and plant testing for allowable THC concentration pre-harvest.
- Only industrial hemp that passes DATCP testing standards may be certified as “fit for commerce” and enter the processing stream.
- The 2018 Farm Bill legalized hemp at the federal level. While not much should change in 2019, expect future modifications to Wisconsin law as the state elects whether to adopt a Wisconsin specific regulatory structure and the existing pilot program is repealed.
- Processing industrial hemp into CBD is currently allowed in Wisconsin, but licensees should carefully monitor ongoing legal developments and any relevant changes to Wisconsin regulations or law enforcement practices.
- Although hemp and derivative products, including CBD, are no longer regulated as controlled substances, the FDA regulates, and currently prohibits, the inclusion of CBD in food or dietary supplements sold in interstate commerce.

Please contact us with any further questions regarding the Wisconsin industrial hemp program and issues relating to the production and sale of CBD.

¹⁶ Statement of the Wisconsin Attorney General, AG Schimel and Stakeholders Resolve Questions Surrounding DATCP Industrial Hemp Research Pilot Program, May 10, 2018; See Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53,395 (Aug. 12, 2016).

¹⁷ Wis. Stat. §§ 961.34, 961.38(1n) (2019).