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Wisconsin's Industrial Hemp Pilot Program – CBD Processing

Wisconsin recently authorized the creation of a state industrial hemp pilot program to be administered by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP).¹ Under the new law, DATCP is authorized to issue permits to Wisconsin growers and processors of industrial hemp.²

On April 27, 2018, just days before the May 1st deadline for industrial hemp applications, the Wisconsin Department of Justice (DOJ) issued an Analytical Note concluding that cannabidiol (CBD) – one of many possible end-products of processed industrial hemp – is illegal to possess or distribute under state and federal law in virtually all circumstances. As a result of the DOJ guidance, DATCP posted a statement on its website warning that, “[h]olding a DATCP license does not authorize you to produce or sell CBD oil or CBD products.”

This was a surprise to Wisconsin farmers and processors who had planned on processing industrial hemp into CBD under the new state program. And, on May 10, 2018, in response to concerns raised by farmers, industry, and the legislative authors of Act 100, Wisconsin Attorney General Brad Schimel issued a statement revising DOJ’s position and instead concluding that those who “participate in [the industrial hemp pilot program] and follow the rules are exempt from criminal prosecution, and products made from industrial hemp, including CBD, are lawful.”³ The May 10th clarification from DOJ correctly acknowledges the safe harbor protections that exist under both federal and state law for those engaging in activities that are authorized in connection with a state industrial hemp pilot program, including processing CBD.

Federal Law Exemption under the Agricultural Act of 2014

The federal Agricultural Act of 2014 includes specific exemptions to the Controlled Substances Act. It expressly permits the growing, cultivation and marketing of industrial hemp for research purposes when done in connection with a state agricultural pilot

¹ See 2017 Wisconsin Act 100 (Act 100).

² The law defines “industrial hemp” as “the plant *Cannabis sativa*, or any part of the plant including the seeds, having a delta-9-tetrahydrocannabinol concentration of no more than 0.3 percent on a dry weight basis or the maximum concentration allowed under federal law up to 1 percent, whichever is greater. ‘Industrial hemp’ includes a substance, material, or product only if it is designated as a controlled substance under the federal Controlled Substances Act under 21 USC 801 to 971 or the Uniform Controlled Substances Act under ch. 961 or both.” Wis. Stat. § 94.55(1). Note that this definition specifies “on a dry weight basis,” which refers to the plant matter after all water is dried.

³ Statement of the Wisconsin Attorney General, *AG Schimel and Stakeholders Resolve Questions Surrounding DATCP Industrial Hemp Research Pilot Program*, May 10, 2018

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.

program.⁴ In August 2016, the U.S. Department of Agriculture (in consultation with the Drug Enforcement Administration and Food and Drug Administration) released a “Statement of Principles on Industrial Hemp,” to provide more information on how federal law applies to activities associated with industrial hemp growing and cultivation.⁵ The statement provides in part:

Section 7606 of the Agricultural Act of 2014 legalized the growing and cultivating of industrial hemp for research purposes in States where such growth and cultivation is legal under State law, notwithstanding existing Federal statutes that would otherwise criminalize such conduct. The statutorily sanctioned conduct, however, was limited to growth and cultivation by an institution of higher education or State department of agriculture for purposes of agricultural or other academic research or under the auspices of a State agricultural pilot program for the growth, cultivation, or marketing of industrial hemp

For purposes of marketing research by institutions of higher education or State departments of agriculture ..., but not for the purpose of general commercial activity, industrial hemp products may be sold in a State with an agricultural pilot program or among States with agricultural pilot programs but may not be sold in States where such sale is prohibited.⁶

Further, “persons licensed, registered, or otherwise authorized by [State departments of agriculture] ... may grow or cultivate industrial hemp as part of the agricultural pilot program.”⁷ Even if certain industrial hemp derivatives such as CBD are regulated as controlled substances under federal law, CBD processing under an authorized state agricultural pilot program is exempt from prosecution.

State Law Exemption under Act 100

Through the enactment of Act 100, Wisconsin elected to come within the Agricultural Act of 2014 exception to the Controlled Substances Act. Act 100 also includes specific exemptions from state drug law prosecution:

A person who is acting in accordance with the rules promulgated by [DATCP] ... may not be prosecuted for a criminal offense under this chapter, or under any municipal ordinance that prohibits conduct that is the same as that prohibited under this chapter, for ... [p]lanting, growing, cultivating, harvesting, processing, or transporting hemp⁸

Further:

[A] person may plant, grow, cultivate, harvest, sample, test, process, transport, transfer, take possession of, sell, import, and export industrial hemp in this state to the greatest extent allowed under federal law.⁹

Act 100 also explicitly references CBD in its legislative findings, providing “[t]hat cannabidiol and hemp seed oil have the ability to provide relief for maladies, without psychotropic effect.”¹⁰ The intent and effect of Act 100 is to exempt from state

⁴ See 7 U.S.C. § 5940.

⁵ See Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53,395 (Aug. 12, 2016).

⁶ *Id.*

⁷ *Id.*; see also *Hemp Indus. Ass’n v. U.S. Drug Enf’t Admin.*, No. 17-70162, 2018 WL 2000087 (9th Cir. Apr. 30, 2018) (noting how the Agricultural Act of 2014 “preempts” the federal Controlled Substances Act).

⁸ Wis. Stat. § 961.32(3)(b); see also Wisconsin Legislative Council Act 100 Memo, p. 4. (December 4, 2017).

⁹ Wis. Stat. § 94.55(2)(a).

¹⁰ Act 100, Section 15(1)(d).

and local prosecution the growing and processing of industrial hemp – including into CBD – where it is done pursuant to, and consistent with, the DATCP pilot program.

Conclusion

In sum:

- Through Act 100, Wisconsin has authorized the creation of a State industrial hemp pilot program;
- Federal and state law both exempt from prosecution the growing and processing of industrial hemp – including into CBD – when it is done in connection with a State industrial hemp pilot program; and,
- As recently confirmed by the Wisconsin Attorney General, those acting under permits issued by DATCP, and consistent with program rules established by DATCP, may not be prosecuted for drug offenses under state or federal law.

Please contact us with any further questions regarding Wisconsin’s Industrial Hemp Pilot Program.