

Hemp: The Legal Landscape Emerging Around the Production of Hemp and CBD Products

There is a lot of legislative movement in the burgeoning field of hemp production and related cannabidiol (CBD) products. This is partly due to the 2018 Farm Bill which kicked things off by removing hemp from the federal list of controlled substances. Though they derive from the same plant—*Cannabis sativa* L.—the key distinction between hemp and marijuana is the concentration of the psychoactive compound, delta-9 tetrahydrocannabinol (THC). The [2018 Farm Bill](#) defines hemp as any part of the *Cannabis sativa* L. plant with a THC concentration of less than 0.3%. Anything having a higher concentration is marijuana. Thanks to this new distinction, hemp is now considered an agricultural product, rather than a controlled substance.

Hemp may be lawfully grown under state or federal supervision. As required by the 2018 Farm Bill, the U.S. Department of Agriculture (USDA) recently came out with an interim final rule—[Establishment of a Domestic Hemp Production Program](#)—which implements new regulations for the lawful production of hemp. Though the final version is not due for another two years, the interim rule provides highly anticipated guidance in this area. It provides the framework for hemp production nationally, while leaving states room for individuality by allowing the implementation of state specific licensing schemes subject to USDA approval. The only lawful way to grow or process hemp in the United States is pursuant to a permit or license issued by a state operating under a USDA-approved plan, or in states without such a plan, issued by the USDA itself.

In New York, hemp is emerging as a significant agricultural commodity. Though hemp has not been removed from New York's list of controlled substances, it may be lawfully grown in New York through participation in the state's [Industrial Hemp Agricultural Research Pilot Program](#) (the "pilot program") which is authorized under the 2014 Farm Bill. The New York Department of Agriculture is the agency charged with operating and implementing the pilot program. The pilot program authorizes licensed businesses and individuals to grow and process hemp in New York. Updates to New York's program are anticipated in light of the 2018 Farm Bill and the USDA's interim rule.

Though highly anticipated, the interim rule does not answer all questions surrounding the legality of hemp production or the sale of CBD products. Things remain in flux while states continue to grapple with their own positions on hemp and related CBD products. The U.S. Food & Drug Administration's (FDA) position on hemp and CBD does not help to clarify matters either. For example, FDA guidance is clear that neither cannabis nor cannabis-derived products, such as hemp, which contain THC or CBD, can be marketed for the treatment, cure, or prevention of any disease or condition. Under the FDA's position these products cannot be marketed as dietary supplements either. In conflict with this guidance is New York's position that CBD may be manufactured and sold as a dietary supplement. Until the FDA issues specific guidance, the legal consequences of this conflict remain unknown.

In addition, despite the fact that hemp and CBD products are filling shelves across New York, CBD as an additive to food or beverages is prohibited. This is true under guidance from the FDA and New York's Department of Agriculture. Producers of these products currently face enforcement action by the [FDA and/or Federal Trade Commission \(FTC\)](#) for false advertising in addition to consumer lawsuits.

If you have any questions about how to comply with state and federal regulations related to hemp production or CBD products or any of the matters discussed in this Information Memo, please contact [Sarah M. Harvey](#), any of the [attorneys](#) in our [Environmental and Energy Practice](#), or the attorney in the firm with whom you are regularly in contact.

A special thank you to Associate Trainee Hannah K. Redmond for contributing to this Information Memo.



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