



The Legality and Availability of CBD Oil in Virginia

The popularity and use of cannabidiol oil, otherwise known as CBD oil, is rapidly increasing in Virginia and across the country. Since marijuana remains illegal in Virginia and under federal law, consumers are often confused by the widespread availability of CBD oil products. The purpose of this issue brief is to highlight the difference between hemp and marijuana and the CBD oil manufactured from each, briefly summarize the current status of Virginia and federal law regarding CBD oil, and provide an overview of related Virginia legislation passed during the 2019 Session of the General Assembly.

Summary

There are two types of CBD oil: hemp-derived CBD oil and marijuana-derived CBD oil. The manufacture and sale of hemp-derived CBD oil is legal under federal law in all fifty states under the 2018 Farm Bill.¹ States may choose to impose more stringent regulations on hemp products. The manufacture and sale of marijuana-derived CBD oil remains illegal under federal law, although some states have either fully legalized this type of CBD oil, legalized it through the state's medical marijuana program, or decriminalized possession of the substance. Marijuana-derived CBD oil may only be possessed in Virginia, under the protection of an affirmative defense, through the Commonwealth's medical marijuana program.² Hemp-derived CBD oil may be manufactured, sold, purchased, and consumed without restriction in the Commonwealth.

The Differences between Hemp and Marijuana

Hemp and marijuana are two different species within the cannabis family of plants.³ Both hemp and marijuana plants contain CBD, which can be extracted to manufacture CBD oil products. The important distinction between hemp and marijuana is the level of tetrahydrocannabinol, otherwise known as THC, found in the plants. THC is responsible for the majority of marijuana's psychological effects.⁴ The THC levels in marijuana plants often exceed 15 percent, while hemp plants usually contain less than 0.3 percent THC.⁵ The negligible level of THC found in hemp plants is not enough to create a psychoactive effect on users.⁶

¹ The Agriculture Improvement Act of 2018, P.L. 115-334, Sections 10113 and 12619.

² Virginia Department of Health Professions: Board of Pharmacy, "Pharmaceutical Processors," <https://www.dhp.virginia.gov/pharmacy/PharmaceuticalProcessing/>.

³ Harold B. Hilborn, "2018 Farm Bill Legalizes Hemp, but Obstacles to Sale of CBD Products Remain," *The National Law Review*, March 5, 2019, <https://www.natlawreview.com/article/2018-farm-bill-legalizes-hemp-obstacles-to-sale-cbd-products-remain/>.

⁴ Alina Bradford, "What is THC?" *Live Science*, May 18, 2017, <https://www.livescience.com/24553-what-is-thc.html/>.

⁵ Hilborn, "2018 Farm Bill Legalizes Hemp," March 5, 2019.

⁶ Hilborn, "2018 Farm Bill Legalizes Hemp," March 5, 2019.

Availability of CBD Oil in Virginia

Hemp-Derived CBD Oil

As explained above, hemp-derived CBD oil is legal in all fifty states. Virginia consumers are now regularly coming into contact with these products in brick-and-mortar establishments as well as online marketplaces. These products do not have any psychoactive effect on users. It is important to note that no over-the-counter CBD products are approved by the U.S. Food & Drug Administration.⁷

Marijuana-Derived CBD Oil

Virginia licenses a finite number of pharmaceutical processors that are permitted to cultivate and distribute marijuana-derived CBD oil. The number of pharmaceutical processors that may be licensed in Virginia is currently limited to five, one per health service area established by the Board of Health.⁸ These pharmaceutical processors are permitted to distribute marijuana-derived CBD oil to individuals who have obtained a valid written certification from a physician registered with the Board of Pharmacy. Registered physicians may issue certifications to patients if they determine the patient will medically benefit from such use. Effective July 1, 2019, registered physician assistants and nurse practitioners may also issue certifications. Virginia law does not make possession of marijuana-derived CBD oil in Virginia legal for individuals with valid written certifications. Rather, the law provides an affirmative defense for these individuals if they are criminally charged with possession of the substance.⁹ An affirmative defense in this circumstance would require the defendant to produce evidence that they have a valid written certification. All products classified as marijuana remain illegal under federal law.

Summaries of Relevant 2019 Virginia Legislation

The following bills related to CBD oil were introduced and passed by the Virginia General Assembly during the 2019 session and will become effective on July 1, 2019:

HB 1720 (Delegate Hurst)/SB 1632 (Senator Sturtevant)

Possession or distribution of cannabidiol oil or THC-A oil; public schools. Provides that no school nurse employed by a local school board, person employed by a local health department who is assigned to the public school pursuant to an agreement between the local health department and the school board, or other person employed by or contracted with a local school board to deliver health-related services shall be prosecuted for possession or distribution of cannabidiol oil or THC-A oil for storing, dispensing, or administering cannabidiol oil or THC-A oil, in accordance with a policy adopted by the local school board, to a student who has been issued a valid written certification for the use of cannabidiol oil or THC-A oil. The bill also

⁷ U.S. Food & Drug Administration, "FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers," April 2, 2019, <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-questions-and-answers#farmbill/>.

⁸ Virginia Department of Health Professions: Board of Pharmacy, "Frequently Asked Questions," <https://www.dhp.virginia.gov/Pharmacy/PharmaceuticalProcessing/FAQ.htm>.

⁹ Virginia Department of Health Professions: Board of Pharmacy, "Pharmaceutical Processors."



provides that the Department of Health Professions, in coordination with the Department of Education, shall develop and make available to school boards a standardized form that is to be completed by the practitioner who issues a written certification and a pharmaceutical processor that dispenses the cannabidiol oil or THC-A oil to a student. The bill also provides that no school board shall be required to suspend or expel any student who holds a valid written certification for the use of cannabidiol oil or THC-A oil issued by a practitioner for the possession or use of such oil in accordance with the student's individualized health plan and in compliance with a policy adopted by the school board. The bills are Chapters 573 and 574 of the Acts of Assembly of 2019.

HB 1826 (Delegate Orrock)

Health care professionals; advertising. Prohibits a health care professional from including in any advertisement a reference to marijuana, unless such advertisement is for the treatment of addiction or substance abuse. However, a person registered with the Board of Pharmacy to issue written certifications for the use of cannabidiol or THC-A oil may include such information in an advertisement. The bill is Chapter 656 of the Acts of Assembly of 2019.

HB 1839 (Delegate Marshall)/ SB 1692 (Senator Ruff)

Industrial hemp; federal Farm Bill; emergency. Conforms Virginia law to the provisions of the federal 2018 Farm Bill by amending the definitions of cannabidiol oil, marijuana, and tetrahydrocannabinol (THC) to exclude industrial hemp in the possession of a registered person, hemp products, or an oil containing no more than 0.3% THC. The bill defines "industrial hemp" as any part of the plant *Cannabis sativa* that has a concentration of THC that is no greater than that allowed by federal law, and it defines "hemp product" as any finished product that is otherwise lawful and that contains industrial hemp. The bill adds the category of "dealer" in industrial hemp to the existing registration categories of grower and processor.

The bill requires any registered grower, dealer, or processor who negligently violates the law to comply with a corrective action plan established by the Commissioner of Agriculture and Consumer Services (the Commissioner). The plan must identify a date by which the person is required to correct the violation and requires the person to report periodically for not less than two calendar years on his compliance with the law. No person who negligently violates the industrial hemp law three times in a five-year period is eligible to grow, deal in, or process industrial hemp for a period of five years beginning on the date of the third violation.

The bill directs the Commissioner to (i) revoke the registration of any registered grower, dealer, or processor who violates the law with a culpable mental state greater than negligence and (ii) advise the Attorney General of the United States and the Superintendent of State Police, or the chief law-enforcement officer of the county or city, when such person grows, deals in, or processes any *Cannabis sativa* with a concentration of THC that is greater than that allowed by federal law with a culpable mental state greater than negligence.

The bill authorizes the Department of Agriculture and Consumer Services (the Department), if it obtains the approval of the U.S. Secretary of Agriculture, to refrain from requiring destruction of



industrial hemp until the THC level is greater than 0.6%, and it authorizes the Department at that point to allow a re-test of the industrial hemp if the THC level is no greater than one percent.

The bill abolishes the higher education and Virginia industrial hemp research programs, along with the requirement that a grower or processor act exclusively within such a program. The bill authorizes the Commissioner to charge a fee for certain THC testing. Finally, the bill directs the Department to report by December 1, 2019, (a) to the General Assembly on the fiscal impact of the growth of the industrial hemp industry upon the Department's registration program and the existence of any need to alter the registration fee and (b) to the Chairmen of the House and Senate Agriculture Committees on the viability of markets for Virginia industrial hemp growers, the types of products made from industrial hemp that can be produced in Virginia, and the economic benefits and costs of production of such products. The bill also directs the Secretary of Agriculture and Forestry and the Secretary of Health and Human Resources to report by November 1, 2019, on the appropriate standards, if any, for the production of an oil with a THC concentration of no greater than 0.3 percent that is derived from industrial hemp. The bill contains an emergency clause. The bills are Chapters 653 and 654 of the Acts of Assembly of 2019.

SB 1557 (Senator Dunnavant)

Board of Pharmacy; cannabidiol oil and tetrahydrocannabinol oil; regulation of pharmaceutical processors. Authorizes licensed physician assistants and licensed nurse practitioners to issue a written certification for use of cannabidiol oil and THC-A oil. The bill requires the Board to promulgate regulations establishing dosage limitations, which shall require that each dispensed dose of cannabidiol oil or THC-A oil not exceed 10 milligrams of tetrahydrocannabinol. The bill requires the Secretary of Health and Human Resources and the Secretary of Agriculture and Forestry to convene a work group to review and recommend an appropriate structure for an oversight organization in Virginia and report its findings and recommendations to the Chairmen of the Senate Committees on Agriculture, Conservation and Natural Resources and Education and Health and the House Committees on Agriculture, Chesapeake and Natural Resources and Health, Welfare and Institutions by November 1, 2019. The bill is Chapter 681 of the Acts of Assembly of 2019.

Conclusion

While the 2018 Farm Bill clarified all questions related to the legality of hemp-derived products throughout the United States, questions still exist with regard to the legality of products containing marijuana-derived CBD oil or THC-A oil due to the conflict between federal and state law. As a result, additional activity on the topic of regulation of marijuana-derived CBD oil and THC-A oil may be expected.



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