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# Wisconsin Legislative Council

## ACT MEMO

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**2019 Wisconsin Act 68**  
[2019 Senate Bill 188]

**Hemp Regulation**

## BACKGROUND

### Hemp Regulation in Wisconsin

The Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP) administers the state's industrial hemp program, consistent with the authorization under the federal Agricultural Act of 2014 (2014 Farm Bill) that allowed states to operate research-based pilot programs to study the growth, cultivation, or marketing of industrial hemp.

Wisconsin law generally allows persons to engage in activities relating to industrial hemp to the greatest extent authorized under federal law and subject to regulations promulgated by DATCP. Such rules must regulate the authorized activities to the extent required under federal law, and in a manner that gives the greatest opportunity to engage in these activities. Wisconsin law contains various safe harbor protections for a person acting in accordance with DATCP rules pertaining to the industrial hemp program, which generally exempt such persons from criminal prosecution under the state Controlled Substances Act (CSA) and municipal prosecutions for certain activities.

### Recent Changes to Federal Law in the 2018 Farm Bill

The Agriculture Improvement Act of 2018 (2018 Farm Bill), enacted on December 20, 2018, reduced regulation of the production and possession of hemp under federal law. Very generally, the 2018 Farm Bill legalized hemp and shifted the federal regulation of hemp production from research-based pilot programs to a regulatory scheme that authorizes hemp production without limitations on its purpose. The 2018 Farm Bill's key provisions relating to hemp include: a new definition for hemp; removal of hemp from the federal CSA; and creation of a regulatory structure in which states may apply to the U.S. Department of Agriculture (USDA) for primary regulatory control over hemp production.<sup>1</sup>

Under the 2018 Farm Bill, states must specify certain information when seeking primary regulatory control, enforce violations of certain requirements by hemp producers, and determine the eligibility of prospective hemp producers with certain felony convictions related to controlled substances. If a state does not seek primary regulatory authority or is not approved to have such authority, hemp production in that state will be governed by a federal plan that was promulgated by the USDA on October 31, 2019.

The 2018 Farm Bill repealed states' authority to operate hemp pilot programs, with a delayed effective date of one year after the USDA establishes its plan for regulating hemp production for states without primary regulatory authority. Under the 2018 Farm Bill, states may not prohibit transportation or shipment of hemp or hemp products. Finally, the 2018 Farm Bill specifies that it does not affect the

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<sup>1</sup> For a detailed discussion of the 2018 Farm Bill's provisions, see Legislative Council Issue Brief, [2018 Farm Bill Provisions Related to Hemp](#) (October 2019).

authority of the U.S. Food and Drug Administration (FDA), meaning that the federal laws and regulations related to food and drug safety remain applicable, depending on the circumstances.

## **2019 WISCONSIN ACT 68**

2019 Wisconsin Act 68 modifies state law in accordance with the 2018 Farm Bill and makes numerous other changes regarding hemp-related activities in Wisconsin. The act also clarifies the relationship between hemp products and certain cannabidiol (CBD) products, expands and repeals certain requirements of the state's Controlled Substances Board (CSB), and sets a threshold level of delta-9-tetrahydrocannabinol (THC) for purposes of certain offenses that prohibit a restricted controlled substance in a person's blood.

### **State Law Changes in Accordance With the 2018 Farm Bill**

#### **Definition of Hemp**

Act 68 modifies the definition of hemp under state law to conform to the definition created under the 2018 Farm Bill. Specifically, under the act, hemp is defined 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-[THC] concentration of not 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, as tested using post-decarboxylation or other similarly reliable methods."

#### **Removal of Hemp From the Controlled Substances Act**

Under the state CSA, THC is a Schedule I controlled substance, meaning its possession, distribution, and manufacture is generally prohibited. Act 68 removes hemp from the state CSA by creating an exception for THC contained in hemp, similar to the changes to the federal CSA by the 2018 Farm Bill. Act 68 also clarifies that the definition of marijuana does not include hemp.<sup>2</sup>

#### **Primary Regulation of Hemp Production**

Under Act 68, DATCP is required to promulgate rules as it determines necessary to ensure that the state's hemp program complies with federal law and to obtain and maintain any required federal approval of the state's hemp program. The act authorizes DATCP to establish the procedures necessary to apply for primary regulatory authority of hemp production. Under the act, the statutory authority for Wisconsin's hemp pilot program is repealed one year after the date on which the USDA establishes a federal plan for regulating hemp production.<sup>3</sup>

The act allows DATCP to establish the following procedures necessary to apply for primary regulatory authority of hemp production:

- A practice to maintain relevant information regarding land on which hemp is produced.
- A procedure for testing delta-9-THC concentration levels of hemp, using post-decarboxylation or other similarly reliable methods.

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<sup>2</sup> Under the federal CSA, both marijuana and THC are Schedule I controlled substances. In contrast, the state CSA lists only THC as a Schedule I controlled substance, and not marijuana, though Act 68 further clarifies that marijuana does not include hemp.

<sup>3</sup> The USDA promulgated rules creating a federal plan for regulating hemp production on October 31, 2019. Therefore, the statutory authority for the Wisconsin's pilot program will be repealed on October 31, 2020. [See, Wis. Admin. Register, No. 769A3, [Public Notice: LRB Notice Regarding Effective Date of Repeal](#) (Jan. 21, 2020.)]

- A procedure for effective disposal of plants that are produced in violation of the laws governing hemp, and products derived from those plants.
- A procedure to comply with the enforcement provisions governing negligent and greater-than-negligent violations by hemp producers.
- A procedure for conducting annual inspection of, at a minimum, a random sample of hemp producers.

Act 68 also adopts other provisions similar to those set forth in the 2018 Farm Bill with regard to violations of the laws governing hemp. For example, under the act, specific negligent acts by a hemp producer prompt a deadline for correction and certain reporting requirements, but may not be criminally prosecuted. However, if DATCP determines that a hemp producer committed a violation with a mental state greater than negligence, DATCP must report the violation to certain law enforcement officials. The act also renders a hemp producer ineligible to produce hemp for five years, if the hemp producer commits three negligent violations in any five-year period. Under the act, any person who materially falsifies information when applying to the hemp program is also ineligible.

Act 68 also requires, if necessary for federal approval of this state's hemp program, that DATCP conduct a background investigation of any person applying to produce hemp in Wisconsin. Under the act, no person may produce hemp in Wisconsin for 10 years following any felony conviction relating to a controlled substance under state or federal law, though an exception exists for those who held a valid license to produce hemp under any state's pilot program on December 20, 2018 (the effective date of the 2018 Farm Bill) and the felony conviction occurred prior to that date.

### **Certain Activities Related to Hemp**

In addition to the 2018 Farm Bill, Act 68 addresses various hemp-related activities in Wisconsin. Those provisions include:

- Authorizing DATCP to establish fees for hemp licenses, set criteria for and approve persons to sample and test hemp, and release certain confidential information regarding licensees upon election by the licensee.
- Clarifying certain aspects of testing hemp and requiring DATCP to issue a certificate of compliance that hemp has been tested or is otherwise exempt from testing requirements.
- Requiring hemp producers to notify DATCP of the variety of hemp the producer intends to grow, and allowing hemp producers to grow only the varieties of hemp that are approved by DATCP or are certified by an authorized certification program.
- Prohibiting a person from: mislabeling hemp or a hemp product; knowingly making an inaccurate claim about hemp or a hemp product in the course of transfer or sale; or knowingly selling at retail mislabeled hemp or hemp products.
- Clarifying certain safe harbor provisions and creating additional safe harbor protections that prohibit criminal prosecutions in certain circumstances.
- Requiring payment under contracts with hemp growers within a specified period of time, similar to provisions governing other agricultural commodities.
- Adding hemp to the list of agricultural products subject to current law restrictions related to land owned by large corporations or trusts.
- Narrowing the scope of what is considered the "practice of chiropractic" to mean treatment without the use of drugs, other than hemp.

- Providing that certain licenses issued by the Pharmacy Examining Board are not required for a person to: engage in the manufacturing of hemp; sell, give away, or barter hemp; or take any of the actions constituting the practice of pharmacy in relation to hemp.

## **CBD Products**

Act 68 clarifies the relationship between hemp products and certain CBD products. Specifically, the act clarifies that hemp does not include FDA-approved prescription drug products. The act further provides that the laws governing hemp may not be construed to limiting a person's access to CBD products under current law provisions commonly referred to as "Lydia's Law,"<sup>4</sup> which generally allow an individual to possess CBD in a form without a psychoactive effect, if the individual has a valid certification stating that the individual possesses CBD to treat a medical condition. The act also reorganizes certain provisions of Lydia's Law for clarity and to more accurately describe the type of CBD products that qualify under Lydia's Law.

## **Delta-9-THC as a Restricted Controlled Substance**

Act 68 sets a limit of the amount of delta-9-THC that may be present in a person's blood for purposes of certain offenses that prohibit a restricted controlled substance in a person's blood. Generally, Wisconsin law prohibits a person from driving or operating various types of vehicles while under the influence of an intoxicant, a controlled substance, or any other drug to a degree which renders a person incapable of safely driving, referred to as the "impairment track." In addition, current law also, as a separate offense, prohibits a person from driving or operating vehicles while the person has a detectable amount of a restricted controlled substance in his or her blood, referred to as the "RCS track."

Act 68 provides that, in order to be a restricted controlled substance under the RCS track, the delta-9-THC, excluding its precursors or metabolites, must be at a concentration of one or more nanograms per milliliter (1 ng/mL) of a person's blood. The act further provides that a chemical analysis of the sample of the person's blood is the only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta-9-THC at a concentration of 1.0 ng/mL or more of the person's blood.

## **Controlled Substances Board**

Act 68 requires the CSB to treat nabiximols in the same manner that it is required to treat CBD if nabiximols is rescheduled or deleted as a controlled substance under federal law. Specifically, the act requires the CSB, if nabiximols is rescheduled or deleted as a controlled substance under federal law, to similarly treat nabiximols under state law as soon as practically possible, but no later than 30 days from the date a federal order is published in the federal register.

In addition, Act 68 repeals requirements that the CSB approve pharmacies and physicians that may dispense CBD to patients, if the FDA issues an investigational drug permit or if CBD is removed from the state or federal list of controlled substances.

**Effective date:** Act 68 generally took effect on November 28, 2019, except the repeal of the statutory authority for the state's hemp pilot program takes effect on October 31, 2020. The act's provision requiring payment under contracts with hemp growers within a specified period of time first applies to a contract that is entered into, renewed, or modified on November 28, 2019.

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<sup>4</sup> [2013 Wisconsin Act 267](#) and [2017 Wisconsin Act 4](#), together, are commonly referred to as "Lydia's Law."