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# Wisconsin Legislative Council

## AMENDMENT MEMO

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**2019 Senate Bill 188**

**Senate Amendment 1**

## BACKGROUND

### Current Wisconsin Law

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

Under Wisconsin law, a person may generally 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.

### Recently Enacted Federal Law

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.

The 2018 Farm Bill defined “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.” The 2018 Farm Bill removed hemp from the federal CSA by clarifying that marijuana does not include hemp and creating an exception for tetrahydrocannabinol (THC) contained in hemp.<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

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<sup>1</sup> Marijuana and THC are both Schedule I controlled substances under the federal CSA.

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 to be promulgated by the USDA.

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 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 SENATE BILL 188**

Senate Bill 188 modifies state law in accordance with the 2018 Farm Bill and clarifies certain activities related to hemp under state law, including the relationship between hemp products and certain cannabidiol (CBD) products. The bill also removes delta-9-THC from the definition of "restricted controlled substance" for purposes of certain crimes prohibiting any detectable amount of a restricted controlled substance in a person's blood. In addition, the bill creates an appropriation for DATCP to fund three staff positions and purchase machinery for the hemp program.

### **2018 Farm Bill Related Changes**

The bill modifies the definition of hemp under state law to conform to the definition created under the 2018 Farm Bill, and removes hemp from the state CSA. The bill requires DATCP to promulgate rules 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 bill creates various provisions that provide DATCP the authority to establish the procedures necessary to apply for primary regulatory authority of hemp production. The bill also adopts other provisions similar to those set forth in the 2018 Farm Bill, such as provisions governing certain negligent violations, the reporting of violations, and eligibility of hemp producers with certain felony convictions. Under the bill, 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.

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

The bill authorizes DATCP to establish fees for hemp licenses, set criteria for and approve persons to sample and test hemp, and release information regarding licensees upon election by the licensee. The bill clarifies certain aspects of testing hemp and requires DATCP to issue a certificate of compliance that hemp has been tested or is otherwise exempt from testing requirements.

The bill prohibits a person from: mislabeling hemp or 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. The bill clarifies certain safe harbor provisions in current law, and creates additional safe harbor protections.

The bill also contains various provisions that treat hemp similarly to other agricultural commodities. For example, the bill requires payment under contracts with hemp growers within a specified period of time and adds hemp to the list of agricultural products subject to current law restrictions related to land owned by large corporations or trusts.

### **CBD Products**

The bill clarifies that hemp does not include FDA-approved prescription drug products and 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,” 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 bill also reorganizes certain provisions of Lydia’s Law for clarity.<sup>2</sup>

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

Current 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 (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 (RCS track). The bill removes delta-9-THC from the definition of a “restricted controlled substance” for purposes of the RCS track.

## **SENATE AMENDMENT 1**

Senate Amendment 1 modifies the bill concerning the following issues:

- Delta-9-THC as a restricted controlled substance under the RCS track.
- Background checks and the eligibility of hemp producers with certain felony convictions.
- The practice of chiropractic and pharmacy.
- Certain requirements of the Controlled Substances Board.
- The appropriation to DATCP.

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

The amendment maintains delta-9-THC as a restricted controlled substance for purposes of the RCS track of prosecution. However, the amendment 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 amendment addresses the admissibility of certain evidence under RCS track cases. Under current law, a chemical analysis of a sample of the person’s blood that shows that the person had a detectable amount of a restricted controlled substance in his or her blood is treated as prima facie evidence without requiring any expert testimony, though introduction of other forms of evidence bearing on the question of whether or not a person had a detectable amount of a restricted controlled substance in his or her blood is not limited. Under the amendment, 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.

## **Eligibility of Hemp Producers**

Under the bill, no person may produce hemp in this state for 10 years following any felony conviction relating to a controlled substance under state or federal law. The bill includes an exception for a person that holds a valid license to produce hemp under any state’s pilot program on the effective date of the bill. In accordance with the 2018 Farm Bill, the amendment narrows this exception to any person that

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<sup>2</sup> [2013 Wisconsin Act 267](#) and [2017 Wisconsin Act 4](#), together, are commonly referred to as “Lydia’s Law.”

held a valid license to produce hemp on December 20, 2018, the effective date of the 2018 Farm Bill, and the felony conviction occurred prior to that date.

The amendment requires DATCP, if required for federal authorization of Wisconsin's hemp program, to conduct a background investigation of any person who applies to produce hemp, which must include requiring the person to be fingerprinted to verify the person's identity and obtain records of his or her criminal arrest and convictions from the Federal Bureau of Investigation (FBI).

## **Practice of Chiropractic and Pharmacy**

The amendment creates an exception to the definition of "practice of chiropractic." Under current law, the "practice of chiropractic" means, in relevant part, to treat without the use of drugs. For chiropractors, treating with the use of drugs is outside the scope of practice. The amendment clarifies that the "practice of chiropractic" means to treat without the use of drugs, other than hemp.

The amendment also creates an exception to the general requirement that a person be licensed by the Pharmacy Examining Board to engage in the practice of pharmacy or to sell, give away, or barter drugs. Specifically, under the amendment, the licensure requirement does not apply to a person who sells, gives away, or barter hemp, or takes any of the actions constituting the practice of pharmacy in relation to hemp. Similarly, under the amendment, a manufacturer's license issued by the Pharmacy Examining Board is not required for a person to engage in the manufacturing of hemp.

## **Controlled Substances Board**

The amendment requires the Controlled Substances Board to treat nabixomols in the same manner that it is required to treat CBD if nabixomols is rescheduled or deleted as a controlled substance under federal law. Specifically, the amendment requires the Controlled Substances Board, 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 of publication in the federal register of the federal order.

The amendment also repeals certain requirements of the Controlled Substances Board. Specifically, the amendment repeals requirements that the Controlled Substances Board 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.

## **Appropriation to DATCP**

The amendment deletes the appropriation to DATCP created under the bill.

## **BILL HISTORY**

Senators Testin and Taylor introduced Senate Amendment 1 on August 12, 2019. The Senate Committee on Agriculture, Revenue and Financial Institutions voted on August 20, 2019 to recommend adoption of the amendment and passage of the bill, as amended, on votes of Ayes, 9; Noes, 0.

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