



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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LEGAL UPDATE

May 30, 2019

To: Superintendents, Member School Districts (K-12)
From: Jennifer E. Nix, Associate General Counsel *JEN*
Subject: Everything You Never Wanted to Know About CBD
Memo No. 13-2019

Our office has gotten a number of questions lately about cannabidiol (CBD) and products containing CBD. This Legal Update is intended to provide a general overview of the legal landscape. Specific questions should be directed to legal counsel.

CBD is a non-intoxicating molecule found in industrial hemp and marijuana.¹ CBD oil² is extracted when either plant is processed. CBD derived from industrial hemp typically is tetrahydrocannabinol (THC)-free, but CBD derived from marijuana may contain some of the compound THC, which makes users “high.”

The distinction of source is important for regulatory reasons. The California Department of Public Health (CDPH), Manufactured Cannabis Safety Branch (MCSB), regulates medicinal and adult-use manufactured cannabis products. Food products³ derived from industrial hemp fall under the jurisdiction of the CDPH, Food and Drug Branch (FDB). State law generally requires the CDPH, FDB, to incorporate into state law relevant federal law regarding food additives, dietary use products, food labeling, and good manufacturing practices for food. Currently, the U.S. Food and Drug Administration (FDA) has determined that it is prohibited to introduce or deliver for introduction into interstate commerce any food to which THC or CBD has been added, regardless of the source (i.e., regardless of whether it is derived from industrial hemp or marijuana).

¹ Under U.S. law, a cannabis plant consists of “hemp,” which is the stalks, stems, and sterilized seeds of cannabis sativa, and “marijuana,” which is the leaves, flowers, and viable seeds of cannabis sativa.

² CBD oil is different from hemp seed oil.

³ The definition of “food” includes any article used or intended for use for food, drink, condiment, or chewing gum. It does not include products containing cannabis, including cannabis edibles.



Accordingly, under California law, the manufacturing and sale of cannabis products (including edibles) is permitted,⁴ but the use of CBD derived from industrial hemp in food products is prohibited. Until the FDA rules change or California makes an independent determination of safety, CBD products are not an approved food, food ingredient, food additive, or dietary supplement. CBD derived from cannabis may only be sourced from, produced by, and sold by those with commercial cannabis licenses to persons aged 21 and older.

The CDPH, FDB, put out a Frequently Asked Questions on this subject on July 6, 2018. Since that time, state and local health officials have been requiring some small businesses to pull products that are not in compliance with federal and state law regarding CBD in food and supplements. Pending legislation (Assembly Bill 228) could amend state law on this matter.

Implications for Schools

Schools should prohibit all food and supplements containing CBD allegedly derived from industrial hemp, as those products are not permitted in California.

Schools should continue to prohibit all cannabis products on school campuses, including those containing CBD. It continues to remain unlawful under federal and state law to possess and/or use marijuana or cannabis on a school campus when children are present. Please reference Legal Update No. 41-2016 for more information on this topic.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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⁴ Please note that you must be aged 21 and older to purchase any cannabis product, and persons under age 21 must possess a medical marijuana card in order to possess any cannabis product.



FAQ – Industrial Hemp and Cannabidiol (CBD) in Food Products



California Department of Public Health (CDPH), Food and Drug Branch (FDB) has received numerous inquiries from food processors and retailers who are interested in using industrial hemp-derived cannabidiol (CBD) oil or CBD products in food since the legalization of medicinal and adult-use marijuana (cannabis) in California.

In California, the CDPH Manufactured Cannabis Safety Branch (MCSB) regulates medicinal and adult-use manufactured cannabis products. However, food products derived from industrial hemp are not covered by MCSB regulations. Instead, these products fall under the jurisdiction of CDPH-FDB.

California defines “food” as follows:

- (a) Any article used or intended for use for food, drink, confection, condiment, or chewing gum by man or other animal.
- (b) Any article used or intended for use as a component of any article designated in subdivision (a).¹

The definition of food includes pet food, but does not include products containing cannabis (which are, instead, cannabis edibles). Meat, dairy, poultry or eggs are regulated by the California Department of Food and Agriculture (CDFA).

The federal Agricultural Act of 2014, also known as the Farm Bill, only legalized the growing or cultivating of industrial hemp by state departments of agriculture and institutions of higher education (as defined in Title 20 of the United States Code section 1001) for purposes of research under a state pilot program or other agricultural or academic research. In addition, growing or cultivation is only permitted under the Farm Bill if growing or cultivating is allowed under the laws of the State in which such state department or institution is located and such research occurs. In California, the cultivation of industrial hemp is regulated by the CDFA.

“Industrial Hemp” is defined as follows:

“a fiber or oilseed crop, or both, that is limited to types of the plant Cannabis sativa L. having no more than three-tenths of 1 percent tetrahydrocannabinol (THC) contained in the dried flowering tops, whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin produced therefrom.”²

Please refer to the CDFA for further questions about state requirements for cultivation of industrial hemp in California in accordance with the California’s Industrial Hemp Law (Division 24 of the Food and Agricultural Code).

California incorporates federal law regarding food additives, dietary use products, food labeling, and good manufacturing practices for food. The Controlled Substances Act of 1970 classified all forms of cannabis as a Schedule I drug, making it illegal to grow it in the United States.³ Currently, the United

States Food and Drug Administration (FDA) has concluded that it is a prohibited act to introduce or deliver for introduction into interstate commerce any food (including any animal food or feed) to which tetrahydrocannabinol (THC) or CBD has been added. This is regardless of the source of the CBD – derived from industrial hemp or cannabis.

Therefore, although California currently allows the manufacturing and sales of cannabis products (including edibles), the use of industrial hemp as the source of CBD to be added to food products is prohibited. Until the FDA rules that industrial hemp-derived CBD oil and CBD products can be used as a food or California makes a determination that they are safe to use for human and animal consumption, CBD products are not an approved food, food ingredient, food additive, or dietary supplement.

¹ California Health & Safety Code section 109935.

² California Food and Agriculture Code section 81000(d) which references California Health and Safety Code (HSC) section 11018.5.

³ 21 United States Code section 802(16) “The term “marihuana” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.”

Frequently Asked Questions

1. What forms of Industrial hemp derived products will and will NOT be allowed in food in California?

Will be allowed in food (without any claim for health benefits):

- Seeds derived from Industrial hemp
- Industrial hemp seed oil or hemp seed oil derived from industrial hemp

Will NOT be allowed in food:

- Any CBD products derived from cannabis
- Any CBD products including CBD oil derived from industrial hemp
- Hemp oil that is not derived from industrial hemp seeds
- Industrial hemp seed oil enhanced with CBD or other cannabinoids

2. Is hemp seed oil the same as CBD oil?

*Industrial hemp seed oil and hemp-derived CBD oil are two different products. Industrial hemp seed oil is derived from the seeds limited to types of the *Cannabis sativa* L. plant and may contain trace amounts of CBD (naturally occurring) and other cannabinoids. Food grade Industrial hemp seed oil is available from a variety of approved sources.*

However, CBD or CBD oil derived from industrial hemp is NOT approved for human and animal consumption by the FDA as food and therefore cannot be used as food ingredient, food additive, or dietary supplement.

3. What is the difference between industrial hemp and cannabis (marijuana) derived cannabidiol (CBD/CBD oil)?

- CBD can be derived from both hemp and cannabis. CBD derived from hemp and cannabis is a federally-regulated controlled substance. CBD derived from cannabis is regulated within California as a cannabis product and may only be sourced from, produced, and sold by those with commercial cannabis licenses. CBD derived from industrial hemp is not an approved food additive, and therefore it cannot be added to human or animal foods in California.*
- CBD derived from cannabis is a prohibited food additive. Cannabis cannot be sold in food retail.*
- CBD derived from a licensed cannabis cultivator, per MCSB regulations, is an allowed additive in cannabis products only.*

4. Does California consider food products that contain CBD or CBD oil from Industrial hemp a cannabis product?

Although in California, foods containing industrial hemp are not considered cannabis products (products that are subject to Proposition 64), CBD is an unapproved food additive and NOT allowed for use in human and animal foods per the FDA, and thus it is not approved in California.

5. Can industrial hemp-derived CBD oils be approved as a food ingredient, food additive or dietary supplement to be added in food?

Currently Industrial hemp derived CBD Oil and CBD products are NOT an approved food, food ingredient, food additive or dietary supplement and therefore cannot be used in any human and animal food.

6. If CDPH, MCSB regulates and licenses cannabis (marijuana) derived product manufacturers, which agency oversees CBD oil produced from industrial hemp?

There is currently no regulatory agency that provides oversight over the production of CBD oil from industrial hemp. However, CDPH-FDB has authority oversight over food additives, dietary use products, food labeling, and good manufacturing practices for food. Industrial hemp used as a food additive or dietary supplement falls under the authority of CDPH-FDB.

7. Can industrial hemp derived CBD products be allowed for sale in California if they come from other States? For example, if industrial hemp derived CBD oil is manufactured in another state and sold to customers in California via distributors and retailers?

No, CBD is an unapproved food additive and NOT allowed for use in human and animal foods in California regardless of where the CBD products originate.