



ABCs on CBD

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In what feels like the blink of an eye, one can now find countless products containing CBD being sold everywhere throughout the state. Municipal employees may be wondering about the substance, its legality, and whether villages, towns, and cities can and should take any steps to regulate retail sales within their territory. This article provides a big-picture overview for those who may not be familiar with the topic.

CBD is one of the chemical compounds found in cannabis. CBD does not appear to have any psychotropic effects associated with THC found in marijuana (that is, it does not cause a “high”), but it may offer relief for patients suffering from a range of maladies, including epilepsy, PTSD, and insomnia. Indeed, in 2018 the FTC approved the drug Epidiolex, which is a CBD oral solution for the treatment of rare seizure disorders.

The Agriculture Improvement Act of 2018 (better known as the “2018 Farm Bill”) removed hemp and its byproducts from the Controlled Substances Act, as long as the hemp-based product contains no more than 0.3 percent THC on a dry-weight basis. But that does not mean the legal status of CBD is clear. To the contrary, the Food and Drug Administration maintains that the federal Food, Drug, and Cosmetic Act prohibits the addition of CBD to food products or dietary supplements sold in interstate commerce, and the Alcohol and Tobacco Tax and Trade Bureau of the U.S. Department of the Treasury has recently announced that it will not currently approve the use of CBD as an

ingredient in wine, beer, or liquor. That said, the FDA is actively exploring the issue in rulemaking proceedings and may provide greater clarity soon regarding federal law.

Products containing THC are not legal to sell or possess in Wisconsin, but possession of CBD is legal with a certification from a physician that the CBD is being used to treat a medical condition. And once the state follows the lead of the federal government and removes hemp-derived CBD from the list of controlled substances, anyone may then possess and use CBD products under state law. See Wis. Stat. § 961.11(4g) (stating that “if cannabidiol is rescheduled or deleted as a controlled substance under federal law, the controlled substances board shall similarly treat cannabidiol under this chapter as soon as practically possible . . .”) The state has created an “industrial hemp” program to be administered by the Wisconsin Department of Agriculture, Trade, and Consumer Protection (“DATCP”), requiring DATCP to promulgate rules “to maximize opportunity for a person to plant, grow, cultivate, harvest, sample, test, process, transport, transfer, take possession of, sell, import, and export industrial hemp to the greatest extent authorized by federal law.” Wis. Stat. § 94.55(2). Former Attorney Brad Schimel issued a statement indicating that the sale of products made from industrial hemp are lawful and will not be subject to prosecution, and current Attorney General Josh Kaul has not given any indication that he intends to take the opposite view.

This confusing legal landscape may make it difficult for municipalities to determine the best way to proceed in order to promote the public health and safety of its residents. Local public nuisance and zoning laws might be available tools that could restrict where retail stores selling CBD may be located and place other reasonable regulations on the business, but municipalities should consult with an attorney to determine the best course for their individual needs and circumstances. And this area is likely to see lots of development and change in the coming years. Rest assured, though, if the CBD craze has not landed in your home town yet, it is likely just a matter of time.

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About the Author:

Barry Blonien is an attorney with Boardman Clark. Barry has substantial experience at all stages of litigation, from case analysis before filing a complaint all the way through trial and, if necessary, an appeal. He has worked on complex litigation matters involving constitutional law, civil rights, environmental justice, consumer rights, antitrust, false claims, class actions and collective actions, administrative law, and intellectual property. Contact Barry at bblonien@boardmanclark.com