

LEGISLATIVE REFERENCE BUREAU

Regulating Wisconsin's Hemp Industry

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In 2018, Wisconsin farmers grew hemp legally for the first time in 60 years. These farmers are participants in Wisconsin's industrial hemp pilot program, which the state established in November 2017. Wisconsin created its hemp program following the passage of federal legislation in 2014 that allowed states to create pilot programs to harvest and process hemp. In December 2018, the federal government passed additional legislation that created a permanent federal hemp program that will replace Wisconsin's current pilot program unless the Wisconsin Legislature acts to establish its own permanent program. Several states have already passed legislation to establish their own permanent programs. This paper aims to provide information about the hemp industry and hemp laws, including ongoing legal issues that the state will need to consider if it chooses to create a permanent program of its own.

What is hemp?

Hemp¹ belongs to the cannabis sativa plant species and, botanically, is the same as marijuana.² Legally, the two plants are distinguished by the level of delta-9 tetrahydrocannabinol (THC)³ they contain. THC is the chemical in cannabis that provides the psychoactive effect that people associate with the "high" sensation. Hemp has a significantly lower concentration of THC, typically less than 1 percent, as compared to marijuana, which has an average THC concentration of 10 percent and a maximum concentration of 30 percent.⁴ A THC concentration of around 1 percent is the generally accepted threshold for the plant to have a psychoactive effect.⁵ Under federal law, hemp is defined as having a THC concentration of "not more than 0.3 percent on a dry weight basis."⁶

Hemp originated in China thousands of years ago and has a long history of being cultivated for agricultural and industrial purposes. As a highly versatile crop, hemp is harvested to produce over 25,000 products today.⁷ There are three main parts of the plant that are harvested by farmers: the stalk, the seeds, and the flowers.⁸ The stalk is harvested for its fiber, which is used to make products such as rope, textiles, yarn, paper, construction materials, plastics, and car parts. Hemp has long been an attractive source of fiber

1. "Hemp" is also often referred to as "industrial hemp," including in the Wisconsin statutes. For consistency in this paper and with federal law, this paper will use the term "hemp."

2. Renée Johnson, "[Hemp as an Agricultural Commodity](https://fas.org/)," Congressional Research Service, June 22, 2018, <https://fas.org/>.

3. This paper will refer to delta-9 tetrahydrocannabinol as "THC" throughout. Note that there are other types of THC present in cannabis, but delta-9 THC is the variety of interest to policymakers due to its psychoactive effect.

4. Renée Johnson, "[Defining Hemp: A Fact Sheet](https://fas.org/)," Congressional Research Service, March 22, 2019, <https://fas.org/>.

5. Johnson, "Defining Hemp: A Fact Sheet."

6. Hemp is defined in federal law in [7 U.S.C. § 5940\(a\)\(2\)](#) as "the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis."

7. Johnson, "Hemp as an Agricultural Commodity."

8. Christopher Booker, "[Why Kentucky Farmers Are Quitting Tobacco and Turning to an Unlikely New Crop](https://www.pbs.org/)," *PBS News-Hour*, October 17, 2015, <https://www.pbs.org/>.

because of its strength, malleability, and resistance to wear and water.⁹ Hemp seed is used in food, cooking oil, dietary supplements, hygienic products like shampoo and lotion, and medicinal and pharmaceutical products.¹⁰ Recently, hemp farmers have begun harvesting hemp flowers to extract cannabidiol (CBD)—a non-psychoactive chemical compound that has garnered consumer interest for its purported medicinal and therapeutic benefits.

Physical characteristics of hemp plants, such as height, the number of branches they have, and the number of flowers they produce, can vary substantially. Each physical characteristic provides different benefits depending on the intended use of the plant. These physical differences are a result of the cannabis plant being selectively bred over thousands of years to optimize different uses.¹¹ Hemp grown for fiber or seeds tends to be taller with fewer branches, ranging from six to fifteen feet in height. The hemp plant's height and lack of branches make it ideal for extracting fiber. Hemp grown for CBD is typically shorter and bushier, consisting of more leaves and branches, which is optimal for harvesting flowers to extract CBD.¹²

The physical attributes of the plants are also affected by the reproductive nature of the cannabis species. Male plants are typically used to produce fiber or seeds because they tend to grow taller and have fewer branches if they do not flower.¹³ Alternatively, female plants are primarily used for CBD production because they grow more flowers.¹⁴ It is vital that a hemp crop consist of only one plant gender, because cross-pollination affects the characteristics of the plants and the quality of the desired harvestable component. For example, cross-pollination of a hemp crop grown for CBD can result in lower CBD levels.¹⁵

The cultivation techniques for hemp also vary depending on which part of the plant a farmer is harvesting. Hemp grown for fiber or seeds is typically grown close together to prevent branching and flowering. Hemp plants used for CBD production are planted with more space between them, which allows for more branches and flowers to grow. Growing and harvesting hemp for CBD is more time-consuming and labor-intensive than harvesting hemp for fiber or seeds.¹⁶ Fiber and seeds can be harvested efficiently using machinery, but harvesting CBD from flowers requires manual labor. As a result, hemp grown for CBD tends to be grown in small plots.

9. Albert Hazen Wright, "Wisconsin's Hemp Industry," Wisconsin Bulletin 293, Madison: Agricultural Experiment Station of the University of Wisconsin, 1918, <https://babel.hathitrust.org/>.

10. Johnson, "Hemp as an Agricultural Commodity."

11. Johnson, "Defining Hemp: A Fact Sheet."

12. Johnson, "Defining Hemp: A Fact Sheet."

13. Johnson, "Hemp as an Agricultural Commodity."

14. Jennifer Lu, "High Risks, High Rewards: Interest in Industrial Hemp Surges as Wisconsin Enters Second Year of Legal Production," *La Crosse Tribune*, February 24, 2019, <https://lacrossetribune.com/>.

15. Lu, "High Risks, High Rewards."

16. Johnson, "Defining Hemp: A Fact Sheet."

Background of hemp production in the United States

The United States has a rich history of growing hemp for industrial and agricultural purposes, dating back to the colonial period. Hemp was brought to the American colonies by the Puritans in 1645 as a source of fiber to make cloth, paper, canvas, and rope.¹⁷ Hemp fiber was especially important during the colonial period when it was used to make products such as rope and canvas for ships.¹⁸ Hemp production prospered in the United States, particularly in Kentucky, Illinois, and Missouri, until the Civil War. Following the Civil War, Kentucky remained the sole state with a substantial hemp industry due in part to cotton becoming a more popular source of fiber.¹⁹ Kentucky's dominance in the hemp market started to dwindle in the early 1900s when several other states, including Wisconsin, started their own hemp industries.

Wisconsin harvested its first hemp crop in 1908 when the Wisconsin Experiment Station and the United States Department of Agriculture (USDA) planted nine acres of hemp for research purposes.²⁰ Wisconsin proved particularly well-suited for cultivating hemp, due to its humid and temperate climate and fertile soil. Wisconsin's suitability for growing hemp led to a rapid growth in hemp production in the state, which was further buoyed by advances in technology at the time. In 1917, machinery was invented with the help of scientists at UW–Madison that more efficiently harvested and processed hemp.²¹ Hemp mills were then built in Wisconsin to process hemp stalks into fiber, and Wisconsin became the nation's hub for producing hemp fibers. As a result of Wisconsin's suitability to grow hemp and technological advancements, Wisconsin became the top hemp producing state in the country by 1920 and remained the top producer until the 1950s.²²

Nationally, hemp production began declining in the 1930s due to several factors. Hemp fiber faced competition from cheaper fibers, including cotton and imported fibers like jute, sisal, and Manila hemp.²³ Additionally, in 1937 the federal government passed the Marijuana Tax Act, which taxed all forms of marijuana, including hemp, and put in place restrictions that made it significantly more difficult to grow hemp.²⁴ In effect, the act created a ban on hemp due to its onerous restrictions and bureaucracy. However, World War II caused the federal government to temporarily loosen its restrictions on

17. Economic Research Service, "[Industrial Hemp in the United States: Status and Market Potential](https://www.ers.usda.gov/)," U.S. Department of Agriculture, January 2000, <https://www.ers.usda.gov/>, 3.

18. Carey Reed, "[8 Things You Didn't Know about Hemp](https://www.pbs.org/news-hour)," *PBS NewsHour*, October 17, 2015, <https://www.pbs.org/news-hour>.

19. Wright, "Wisconsin's Hemp Industry."

20. Wright, "Wisconsin's Hemp Industry."

21. Jerry Apps, *Wisconsin Agriculture: A History*, Wisconsin Historical Society Press, 2015, p. 176.

22. Marisa Wojcik, "[Fast Facts: Hemp in Wisconsin](https://wpt4.org/)," *Wisconsin Public Television*, May 4, 2018, <https://wpt4.org/>.

23. Wright, "Wisconsin's Hemp Industry."

24. Gerald J. McKenna, "[The Current Status of Medical Marijuana in the United States](https://www.ncbi.nlm.nih.gov/)," *Hawai'i Journal of Medicine & Public Health* 73, no. 4 (April 2014): 105–8, <https://www.ncbi.nlm.nih.gov/>.

hemp production as the war caused a shortage of imported fibers from Asia and increased domestic demand for fibers.²⁵ In response, the federal government embraced and promoted domestic production of hemp and created the program, “Hemp for Victory!” that included a film to educate U.S. farmers on growing hemp.²⁶ Hemp fiber was pivotal in the production of materials needed for the war effort including thread for sewing shoes, rope, and materials for building ships and calking vessels.²⁷ Hemp production was at a peak during the war, with the United States cultivating more than 400,000 acres of hemp from 1942 to 1945.²⁸

After the war, U.S. hemp production quickly declined as the federal government resumed enforcement of its strict regulations and demand for hemp fiber decreased due to increased competition from cheaper imported fiber and newly developed synthetic fibers.²⁹ By the 1950s, the hemp fiber industry was largely diminished and lingered in Wisconsin until 1957, when the last hemp crop was harvested in the state and country.³⁰ The hemp industry was outlawed entirely in 1970 when the federal government passed the Controlled Substances Act (CSA), which identified “marihuana,” including hemp, as a Schedule I³¹ drug. The designation of hemp as a controlled substance prohibited its production and use in any capacity, ending hemp production for the foreseeable future.

The reemergence of hemp in the United States

In 2014, the federal government passed legislation that legalized the production of hemp for the first time since it was prohibited in 1970. The Agricultural Act of 2014, also known as the 2014 Farm Bill, allowed states to create agricultural pilot programs to “study the growth, cultivation, or marketing of industrial hemp.”³² Under the pilot programs, hemp can be grown, processed, and sold on a limited basis under the purview of universities and state departments of agriculture. The law did not change hemp’s classification as a Schedule I drug and thus hemp remained illegal for all other purposes. The law also defined “industrial hemp” as “the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”³³

25. Reed, “8 Things You Didn’t Know about Hemp.”

26. Deb Kozel, “Industrial Hemp Update,” Iowa Legislative Services Agency, February 1, 2019.

27. Wright, “Wisconsin’s Hemp Industry.”

28. Kozel, “Industrial Hemp Update.”

29. Economic Research Service, “Industrial Hemp in the United States: Status and Market Potential.”

30. Carol Spaeth-Bauer, “Looking at an Exciting Future for Industrial Hemp,” *Wisconsin State Farmer*, December 19, 2018, <https://www.wisfarmer.com/>.

31. There are five schedules of drugs. The federal government defines Schedule I drugs as substances that have a high potential for abuse, have no currently accepted medical use in treatment, and lack accepted safety for use.

32. Agricultural Act of 2014, Pub. L. 113-79, section 7606.

33. Agricultural Act of 2014, Pub. L. 113-79, section 7606.

In August 2016, the USDA, the Drug Enforcement Administration (DEA), and U.S. Food and Drug Administration (FDA) released the “Statement of Principles on Industrial Hemp” to clarify policies relating to activities involving hemp that were not addressed in the 2014 Farm Bill. According to the statement, since the farm bill did not remove hemp from the list of controlled substances, hemp remained illegal for all purposes not specified in the bill. The agencies clarified their policies on several key activities. First, hemp products could be sold only “for purposes of marketing research” and could not be sold in states that did not have hemp pilot programs. Second, hemp seeds and plants could not be transported over state lines. Third, individuals had to be registered with the DEA to import viable cannabis seeds. Finally, rules applying to controlled substances still applied to products containing hemp, meaning products could not be manufactured or distributed unless approved by the FDA.³⁴ This policy also prohibited the transportation of hemp products across state lines.³⁵ Collectively, these policy clarifications formalized barriers to growing and processing hemp and limited how hemp could be used and sold.

Since the passage of the 2014 Farm Bill, 47 states, including Wisconsin, have established hemp pilot programs.³⁶ Several states moved quickly to implement hemp programs, but it has taken several years for most states to launch them. As a result, hemp production has grown rapidly in recent years. From 2016 to 2017, hemp production more than doubled, increasing from 9,770 acres to 25,500 acres.³⁷ Colorado is currently the leading state for hemp production, growing 9,700 acres in 2017. In addition to a surge in hemp production, sales of hemp products continue to grow, increasing 10–20 percent annually since 2011 and totaling \$688 million in 2016.³⁸ The U.S. market currently relies heavily on imported hemp goods, mostly from Canada, and global hemp production dwarfs U.S. production. In 2016, global production of hemp totaled 225,000 acres in 2016, which was more than 20 times what the United States produced.³⁹ This suggests that there is great potential for growth of domestic hemp production and a growing market in the United States for hemp products.

Wisconsin established a hemp pilot program in November 2017 via 2017 Wisconsin Act 100. Similar to the vast majority of other states that have created pilot programs, Wisconsin defines hemp as “a variety of cannabis with a THC concentration of not more than 0.3 percent.”⁴⁰ West Virginia is the only state that defines hemp differently, defining hemp

34. “Statement of Principles on Industrial Hemp,” 81 Fed. Reg. 156, August 12, 2016.

35. Matthew DeFour, “DOJ Issues Warning on Sale and Possession of CBD Oil, Upsetting Hemp Farmers,” *Wisconsin State Journal*, May 5, 2018, <https://madison.com/wsj/>.

36. “State Industrial Hemp Statutes,” National Conference of State Legislatures, February 1, 2019, <http://www.ncsl.org/>.

37. Johnson, “Hemp as an Agricultural Commodity.”

38. Johnson, “Hemp as an Agricultural Commodity.”

39. Johnson, “Hemp as an Agricultural Commodity.”

40. “Industrial hemp” as defined under Wis. Stat § 94.55(1) also provides that “‘industrial hemp’ includes a substance, material, or product only if it is designated as a controlled substance under the federal Controlled Substances Act under 21 USC 801 to 971 or the Uniform Controlled Substances Act under ch. 961 or both.”

as having a THC concentration that is less than 1 percent.⁴¹ In the Wisconsin act, the legislature directed DATCP to create a pilot program and promulgate emergency rules⁴² to operate the program. Similar to federal law, the act did not remove hemp from the state list of controlled substances,⁴³ meaning the use of hemp outside the program is still illegal. The act also established protections from prosecution for program participants who use hemp as allowed under the program. People who grow or process hemp outside the program or use hemp in ways not approved under program regulations are still subject to prosecution under the state's controlled substances laws.

DATCP officially launched the state pilot program in 2018 in time for the growing season. 2017 Wisconsin Act 100 established several specific requirements for the program. First, an entity must have a license to grow or process hemp.⁴⁴ Second, licensed hemp growers or processors must be registered with DATCP.⁴⁵ Finally, the law requires that a form accompany any harvested hemp being processed and transported to ensure it complies with the THC concentration requirement.⁴⁶ As required by law, DATCP developed regulations for the operation of the pilot program including licensing requirements, program fees, protocols for sampling and testing hemp for its THC concentration, and reporting requirements.⁴⁷ For more details on Wisconsin's hemp pilot program, see the appendix.

In the first year of Wisconsin's program, 347 people applied for licenses to grow or process hemp.⁴⁸ Of the 247 licenses issued to grow hemp, 135 individuals grew a total of 1,872 acres of hemp.⁴⁹ For the 2019 season, DATCP saw a significant increase in applications, receiving 2,227 applications to grow or process hemp. DATCP has issued 1,308 licenses to grow hemp and 618 licenses to process hemp.⁵⁰ The significant increase in applications and licenses issued for the 2019 season suggests strong enthusiasm to grow hemp and participate in the hemp industry.

In the first year of the program, hemp farmers in Wisconsin experienced several issues that resulted in low yields.⁵¹ These issues included poor weather and mistakes due

41. National Conference of State Legislatures, "State Industrial Hemp Statutes."

42. As required by the act, DATCP promulgated Emergency Rule 1808 in March 2018, which created ATCP Chapter 22, establishing the industrial hemp pilot program. These rules remain in place until July 1, 2020, unless permanent rules are enacted prior to that date.

43. Wis. Stat. § 961.14(4)(t) identifies THC contained in marijuana as a Schedule I controlled substance. Hemp is included in the definition for marijuana as defined in Wis. Stat. § 961.01(14). However, Wis. Stat. § 961.14(4)(t)2, exempts THC contained in fiber from stalks or compounds made from the seeds of hemp plants.

44. Wis. Stat § 94.55(3)(a).

45. Wis. Stat § 94.55(3)(b).

46. Wis. Stat § 94.55(3)(c).

47. Wis. Admin. Code § ATCP 22, EmR1808.

48. Angela James, written testimony for Senate Committee on Agriculture, Revenue and Financial Institutions hearing on SB 188, Wisconsin Department of Agriculture, Trade and Consumer Protection, May 30, 2019.

49. *Ibid.*

50. *Ibid.*

51. Spaeth-Bauer, "Looking at an Exciting Future for Industrial Hemp."

to inexperience in growing the crop. Rainy weather during the planting and harvesting stages of the season led to poor germination because hemp grows poorly in saturated soil and rain makes harvesting difficult.⁵² Some farmers also made mistakes due to a lack of knowledge or experience growing the crop; for example, some farmers planted seeds too deep in the soil.⁵³ Other farmers lost their crop due to the THC level being too high, as was the case for 21 crops out of 303 sampled.⁵⁴ Mistakes are to be expected with any new or reintroduced crop and are one of the main motivations for conducting a pilot program.

Wisconsin hemp farmers also faced challenges in growing or selling their crops due to barriers in the hemp industry and market. Some farmers struggled to find viable seeds or were overcharged by seed dealers.⁵⁵ Hemp seeds can be expensive, ranging from \$1 to \$5 per seed.⁵⁶ Additionally, hemp seedlings have a high mortality rate with approximately 25 percent of seeds failing to grow into mature plants.⁵⁷ The high cost of seeds coupled with a high seedling mortality rate poses a serious financial risk to farmers who experience particularly poor germination. A number of states, including Wisconsin, have acted to regulate seeds and create hemp seed certification programs⁵⁸ to ensure that viable hemp seeds that meet THC concentration requirements are available.⁵⁹ Seed certification may help improve uniformity of hemp crops and compliance with THC requirements, but may also pose challenges to farmers by limiting the hemp seed varieties they can buy and plant. In addition to the seed issue, a number of farmers were unable to find buyers for their crops.⁶⁰ Hemp is a relatively new and undeveloped industry, meaning the current market for hemp is unpredictable and unstable. At this time, it is difficult to predict how the market will develop and whether growing hemp will become lucrative.

The 2018 Farm Bill

In December 2018, the federal government made significant changes to its hemp laws as part of the Agriculture Improvement Act of 2018, also known as the 2018 Farm Bill. Perhaps most significantly, the farm bill removed hemp from the list of controlled substances.⁶¹ The farm bill also defined hemp as an agricultural commodity, but still required it

52. Spaeth-Bauer, “Looking at an Exciting Future for Industrial Hemp.”

53. Molly Stentz, “The Comeback Crop,” *Isthmus*, February 21, 2019, <https://isthmus.com/>.

54. Shamane Mills, “DATCP Takes Nearly 2.1K Hemp Grower, Producer Applications,” *WPR*, March 4, 2019, <https://www.wpr.org>.

55. Stentz, “The Comeback Crop.”

56. Lu, “High Risks, High Rewards.”

57. Lu, “High Risks, High Rewards.”

58. Wis. Stat. § 94.55(2)(c) requires DATCP or a specified organization to administer a seed certification program. DATCP established specific rules for hemp seeds and hemp seed certification in Wis. Admin. Code § ATCP 22.07.

59. National Conference of State Legislatures, “State Industrial Hemp Statutes.”

60. Rick Romell, “CBD ‘gold Rush’ Could Mean Big Business for Wisconsin’s Hemp Industry,” *Milwaukee Journal Sentinel*, November 12, 2018, <https://www.jsonline.com/>.

61. The act exempted hemp under the definition for “marihuana” under 21 U.S.C. § 802(16)(B)(i).

to be regulated. Specifically, the farm bill directed the USDA to establish a permanent federal hemp program. The farm bill phases out these state pilot programs, terminating them one year after the USDA secretary releases regulations for the federal program.⁶² The USDA is planning on issuing regulations in the fall of 2019 that would go into effect for the 2020 growing season.⁶³ However, states and Indian tribes have the option of establishing their own permanent programs in lieu of the federal program as long as the programs include specific requirements as established in the farm bill. These requirements include procedures for testing THC levels, annual inspections of hemp producers, protocols for disposing of plants that violate standards, and enforcement procedures for program violations.⁶⁴ Several states, including Michigan, Virginia, and Texas, have already passed legislation to establish permanent programs. States planning to establish their own programs must do so before the pilot programs expire, which occurs twelve months after regulations are issued for the federal program.

The farm bill addressed several other issues relating to hemp, most notably the issue of interstate commerce and the transportation of hemp. The law addressed the transportation restrictions established in the 2016 USDA statement by preventing states from prohibiting the transportation of hemp or hemp products.⁶⁵ Hemp and hemp products can now be transported across all state lines—even in states that do not have hemp programs. Additionally, the act defined hemp as an agricultural commodity, making it eligible for crop insurance.⁶⁶ Collectively, these changes make it easier to grow and sell hemp and help provide stability and legitimacy to the hemp industry.

Wisconsin must pass legislation to establish a permanent hemp program or its current pilot program will cease to exist and hemp producers in the state will be regulated under the federal program. Wisconsin's program would need to be approved by the USDA before it could go into effect. The Wisconsin Legislature has introduced legislation, 2019 SB 188 and 2019 AB 206, or the "Growing Opportunities Act" or "Hemp 2.0" as it is commonly known, to make changes to Wisconsin's hemp laws. Senators Testin and Taylor, who are leading the senate bill, state that the legislation is mostly a clean-up bill to bring Wisconsin law into compliance with federal laws and to establish a permanent state program.

The proposed legislation seeks to make additional changes to Wisconsin's hemp program that are not required by federal law. These changes include increasing legal protections for persons possessing hemp with a THC concentration above 0.3 percent, establishing labeling requirements for hemp and hemp products, clarifying that CBD is

62. Pub. L. 115-334, section 7605.

63. "Hemp Production Program," United States Department of Agriculture, February 27, 2019, <https://www.ams.usda.gov/>.

64. Pub. L. 115-334, section 297B.

65. Pub. L. 115-334, section 10114.

66. Agriculture Improvement Act of 2018, Pub. L. 115-334, section 11106.

not a controlled substance, and making changes to the administration of the program. As other states move to establish their own permanent hemp programs, Wisconsin has an incentive to adopt policies that will make its program attractive to farmers and hemp processors and that will result in a competitive and prosperous hemp industry in the state.

Outstanding issues pertaining to hemp

The legalization of hemp has resulted in complications and legal uncertainty for certain hemp products and activities. The most prevalent issue that has been the subject of several state and federal policy clarifications is the legal status of CBD and CBD-based products. Also at issue is how legal hemp products that contain trace amounts of THC intersect with laws on operating a motor vehicle while intoxicated (OWI). Finally, there has been an issue of hemp businesses experiencing difficulty in obtaining financial services. This section will explain these ongoing legal issues pertaining to hemp.

Legal status of CBD

CBD, which lacks a psychoactive effect from THC, is one of more than 80 chemical compounds found in hemp.⁶⁷ CBD is purported to have therapeutic and medical benefits including treating pain, anxiety, inflammation, and seizures.⁶⁸ As a result, interest in CBD has soared in recent years and a wide variety of CBD-based products including oil, food, dietary supplements, and vaporizers have entered the U.S. market. While the manufacturers of many of these products claim their products have medical benefits, the FDA has approved the use of CBD in only one drug, Epidiolex, which was approved in June 2018 to treat severe seizures.⁶⁹ CBD's potential to treat other medical conditions is still unknown and is the subject of ongoing scientific studies.⁷⁰

Since the 2014 farm bill, the CBD industry has proliferated and CBD products can be seen on shelves in establishments ranging from hair salons to video rental stores. Many farmers are interested in producing hemp for CBD due to the rapid expansion of the CBD market and the potential to earn a higher profit from CBD compared to other parts of the hemp plant like fiber or seeds.⁷¹ The market for CBD is expected to continue

67. Sheila Kaplan, "Cannabis Companies Push F.D.A. to Ease Rules on CBD Products," *The New York Times*, May 31, 2019, <https://www.nytimes.com/>.

68. Romell, "CBD 'gold Rush' Could Mean Big Business for Wisconsin's Hemp Industry."

69. "FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy," U.S. Food & Drug Administration, June 26, 2018, <https://www.fda.gov/>. Epidiolex uses CBD that is created synthetically rather than from cannabis plants.

70. Moises Velasquez-Manoff, "Can CBD Really Do All That?," *The New York Times Magazine*, May 14, 2019, <https://www.nytimes.com/>.

71. Tom Still, "InsideWis: Industrial Hemp May Be Agriculture's next Big Thing, but Wisconsin Can't Dawdle," Wisconsin Technology Council, February 27, 2019, <https://wisconsintechcouncil.com/>.

growing with CBD sales in the United States estimated to reach \$16 billion annually by 2025.⁷² Revenue estimates for CBD vary widely, from \$40,000 an acre to \$100,000 an acre, raising doubts about the profitability of CBD.⁷³ Despite the uncertainty over CBD's profitability, hemp farmers will likely continue prioritizing CBD over seeds or fiber due to its market potential and promise for higher profits.

While the CBD market prospers, the legal status of CBD remains uncertain and has been in flux over the last several years. In December 2016, the DEA issued a rule and clarification explicitly stating that CBD fell under the definition of marijuana under the Controlled Substances Act.⁷⁴ Using the DEA rule as guidance, former Wisconsin Attorney General Brad Schimel released a memo⁷⁵ on April 27, 2018, stating that CBD oil produced from hemp was illegal in the state except for approved medical purposes as allowed under state law.⁷⁶ Facing backlash from state hemp farmers, Attorney General Schimel released another memo on May 10, 2018, effectively reversing the decision. This memo stated: "Farmers who participate in [the hemp pilot program] and follow the rules are exempt from criminal prosecution, and products made from hemp, including CBD, are lawful."⁷⁷ The memo did not address whether CBD-based products made from a plant other than hemp are legal.

The 2018 Farm Bill greatly clarified the legal status of CBD by removing hemp from the federal list of controlled substances. This change effectively legalized hemp products, including CBD, that contain a THC concentration of 0.3 percent or less.

A Wisconsin law commonly known as "Lydia's Law"⁷⁸ allows for the use or possession of products that contain CBD with a THC concentration greater than 0.3 percent, under specified conditions, as long as it does not have a psychoactive effect. However, state law does not specify the THC concentration level needed to cause a psychoactive effect. Under Lydia's Law, CBD must be dispensed by a pharmacy or physician for a medical condition and individuals are allowed to possess CBD if they have a certification issued by a physician that allows for the possession of CBD to treat a medical condition.⁷⁹ In effect, Lydia's Law allows certain individuals to possess CBD with a THC concentration higher than what is allowed under federal law. The current proposed legislation (SB 188

72. Kaplan, "Cannabis Companies Push F.D.A. to Ease Rules on CBD Products."

73. Romell, "CBD 'gold Rush' Could Mean Big Business for Wisconsin's Hemp Industry."

74. "Clarification of the New Drug Code (7350) for Marijuana Extract," Drug Enforcement Administration, <https://www.deadiversion.usdoj.gov/>.

75. The memo is not available as it was removed from the DATCP website.

76. Wisconsin State Farmer, "Schimel Issues Guidance on CBD Oil, Industrial Hemp Production," *Wisconsin State Farmer*, May 4, 2018, <https://www.wisfarmer.com/>.

77. John P. Koremenos, Jr., "AG Schimel and Stakeholders Resolve Questions Surrounding DATCP Hemp Research Pilot Program," Wisconsin Department of Justice, May 10, 2018.

78. Lydia's Law was passed in 2014 as 2013 Wisconsin Act 267. The act exempted CBD from the definition of THC under Wisconsin's Controlled Substances Act and allowed for CBD to be dispensed by physicians and pharmacists and possessed by individuals with a medical certificate. The law's language was amended by 2017 Wisconsin Act 4.

79. Wis. Stat. § 961.38(1n)(a); Wis. Stat. § 961.32(2m)(b).

and AB 206) would have state law match federal law in removing hemp, including CBD, from the state list of controlled substances if it has a THC concentration of 0.3 percent or less. However, the bill does not make any changes to Lydia's Law, meaning a person with a medical certificate could still possess and use CBD that contains a higher THC concentration than is currently allowed under federal law.

Even though the 2018 Farm Bill clarified the legality of CBD generally, FDA regulations have continued to cause confusion. The farm bill explicitly preserved the FDA's authority to regulate hemp and CBD under the Federal Food, Drug, and Cosmetic Act (FD&C Act)⁸⁰ and the Public Health Service Act.⁸¹ Because CBD is the active ingredient in the FDA-approved drug Epidiolex, the FDA's position is that, under the FD&C Act, CBD may not be added to food or dietary supplements.⁸² Federal law prohibits the introduction of food that contains an active ingredient in an FDA-approved drug into interstate commerce.⁸³ In addition, the FDA considers any product that is marketed or sold for use in curing, treating, or preventing a disease to be a "drug" that must be approved by the FDA before it can be marketed for human or animal use.⁸⁴ In a public hearing held on May 31, 2019, the FDA suggested that it may be open to issuing regulations that would allow CBD to be added to food and dietary supplements.⁸⁵ The FDA has previously approved the use of hemp seeds and seed extract in food products.⁸⁶ A change in FDA policy to allow the use of CBD in dietary supplements and food would put CBD in line with other hemp components that can be used in any product.

Since 2015, the FDA has issued warning letters to companies making egregious claims about the medical or therapeutic benefits of CBD, such as curing cancer or Alzheimer's.⁸⁷ However, to date, the FDA has not initiated any enforcement actions against any company that is selling or marketing CBD or CBD products that violate FDA regulations. There is also currently a lack of consumer protection provisions in place at the state and federal levels to ensure that CBD products that are sold are safe for consumption and meet set standards, such as the amount of CBD that can be present in a product. Some companies make false claims about the amount of CBD a product contains, with products often containing less CBD than claimed or no CBD at all.⁸⁸ Some CBD products have also

80. 21 U.S.C. § 301.

81. 42 U.S.C. § 262.

82. Scott Gottlieb, "Statement from FDA Commissioner Scott Gottlieb, M.D., on Signing of the Agriculture Improvement Act and the Agency's Regulation of Products Containing Cannabis and Cannabis-Derived Compounds," U.S. Food & Drug Administration, December 20, 2018, <https://www.fda.gov/>.

83. 21 U.S.C. § 331(l).

84. Gottlieb, "Statement from FDA Commissioner Scott Gottlieb, M.D."

85. "Scientific Data and Information About Products Containing Cannabis or Cannabis-Derived Compounds; Public Hearing; Request for Comments," Federal Register, Vol. 84, No. 64, April 3, 2019, <https://www.federalregister.gov/>.

86. "FDA Responds to Three GRAS Notices for Hemp Seed-Derived Ingredients for Use in Human Food," U.S. Food & Drug Administration, December 20, 2018, <https://www.fda.gov/>.

87. Kaplan, "Cannabis Companies Push F.D.A. to Ease Rules on CBD Products."

88. Velasquez-Manoff, "Can CBD Really Do All That?"

been shown to contain harmful substances including lead and pesticides.⁸⁹ Proposed SB 188 and AB 206 address some of these issues at the state level by requiring products to be labeled properly and prohibiting companies from making inaccurate claims about their products. The legislation does not require specific standards for products or quality control measures, but current law does require DATCP to promulgate rules to ensure the safety of hemp products.

Laws on operating a motor vehicle while intoxicated

An individual who ingests CBD and drives may be at risk of violating the law against operating a motor vehicle while intoxicated (OWI). OWI law prohibits operation of a motor vehicle with a detectable amount of a restricted controlled substance in one's blood.⁹⁰ Currently, the list of restricted controlled substances includes THC, regardless of the source.⁹¹ CBD products commonly contain a small amount of THC, putting people who consume CBD at risk of committing an OWI. State law provides an affirmative defense to an OWI charge that, at the time of the incident, the operator of the motor vehicle had a valid prescription for THC.⁹² However, this defense does not apply to individuals who consume CBD without a valid medical certificate.

OWI law also prohibits operation of a motor vehicle while impaired; however, determining whether a person is impaired from THC is not straightforward. Unlike alcohol, which has a set standard of a blood alcohol concentration of 0.8 percent to determine intoxication, there is currently no accepted standard amount of THC that is used to determine impairment from THC.⁹³ Several states have attempted to set THC levels to determine impairment, but these levels are not supported by scientific evidence. Using the standard of any amount of THC, like Wisconsin currently does, is also problematic because THC can remain in a person's body for up to a month after consumption—well beyond the period of experiencing a psychoactive effect.⁹⁴ Based on these properties, a person can have THC present in his or her system and not be experiencing a psychoactive effect that would make him or her impaired to drive. This makes it difficult to set a standard for determining impairment from THC.

State lawmakers and law enforcement personnel are wrestling with how to address this issue. SB 188 and AB 206 include a provision that would remove THC from the definition of “restricted controlled substance” as it pertains to operating a motorized vehicle and other motorized modes of transportation. Under this proposal, a person could not be

89. Kaplan, “Cannabis Companies Push F.D.A. to Ease Rules on CBD Products.”

90. *Wis. Stat. § 346.63 (1) (am)*.

91. *Wis. Stat. § 340.01 (50m) (e)*.

92. *Wis. Stat. § 346.63 (1) (d)*.

93. Eric Westervelt, “The Pot Breathalyzer is Here. Maybe,” *NPR*, August 4, 2018, <https://www.npr.org>.

94. Westervelt, “The Pot Breathalyzer is Here. Maybe.”

charged under OWI laws for having THC in his or her blood, as is the case under current law. Law enforcement would need to prove that an individual is impaired, but cannot rely solely on the presence of THC to support that claim. At a committee hearing on the bill on May 31, 2019, several law enforcement officers expressed opposition to the proposal, suggesting that it would make it more difficult to enforce OWI laws for people driving while high. Under a proposed amendment to the senate and assembly bills, THC would remain a restricted controlled substance but only at a concentration of one or more nanograms per milliliter of a person's blood.⁹⁵

Financial barriers for hemp businesses

Hemp businesses have experienced difficulty in securing loans or bank accounts due to federal laws. Previously, when hemp was listed as a controlled substance, financial institutions were at risk of being prosecuted for serving hemp businesses under federal money laundering laws and other banking laws.⁹⁶ In February 2014, the U.S. Treasury Department provided guidance in accordance with a memo issued by the U.S. Department of Justice (DOJ) that allowed financial institutions to individually decide whether to serve marijuana-based businesses, at their own risk.⁹⁷ This memo was an extension of the Cole Memo⁹⁸ issued by DOJ in August 2013 that effectively limited enforcement of federal marijuana laws in states that legalized marijuana with strong enforcement mechanisms. Many financial institutions still refused to serve hemp businesses and the Small Business Administration (SBA) even established a policy in April 2018 forbidding banks from providing loans to any “hemp-related business” unless the business could prove it was legal.⁹⁹ The statement specifically mentioned “paper, clothing and rope” as legal products, but it did not specify what other activities or products are considered legal.¹⁰⁰

The issue of hemp businesses being denied financial services appeared to be resolved when the 2018 Farm Bill removed hemp from the federal list of controlled substances. In accordance with the farm bill, the SBA reversed its policy in February 2019 and allowed loans to be made to hemp businesses.¹⁰¹ Despite the change made by the farm bill, many hemp businesses are still being refused financial services. As recently as May 2019, hemp

95. Senate Amendment 1 to Senate Bill 188 and Assembly Amendment 1 to Assembly Bill 206.

96. Banks are subject to prosecution under federal money laundering laws (18 U.S.C. § 1956 and 18 U.S.C. § 1957), unlicensed money transmitter laws (18 U.S.C. § 1960), and the Bank Secrecy Act (31 U.S.C. § 5311).

97. “BSA Expectations Regarding Marijuana-Related Businesses,” Financial Crimes Enforcement Network, Department of the Treasury, February 14, 2014, <https://www.fincen.gov/>.

98. The Cole Memo was issued by former Deputy Attorney General James M. Cole in August 2013 and was later rescinded by a memo issued in January 2018 by former Attorney General Jeff Sessions. This memo reasserted the right of federal prosecutors to determine how to enforce and prioritize prosecution for federal marijuana offenses.

99. Linda E. McMahon, “Revised Guidance on Credit Elsewhere and Other Provisions in SOP 50 10 5(J),” Small Business Administration, April 3, 2018.

100. Ibid.

101. Dianna L. Seaborn, “Issuance of SOP 50 10 5(K),” Small Business Administration, February 15, 2019.

businesses in Wisconsin have had their bank accounts closed or were denied from opening accounts.¹⁰² Some financial institutions have cited a lack of federal regulations on hemp and CBD as the reason they are not serving hemp businesses.¹⁰³ These institutions worry that without federal regulations they run the risk of not being in compliance with existing financial regulations. Until federal regulations are developed on this subject, individual financial institutions are left to decide whether to serve hemp businesses.

Summary

Over the past several years, states have experimented with growing hemp and allowing businesses to process and sell hemp on a limited basis. The 2018 Farm Bill made hemp a permanent part of U.S. agriculture and provided stability to a new and uncertain industry. The farm bill has provided an opportunity for states to establish their own programs and develop regulations for an industry that is just starting and expected to grow quickly. There is strong enthusiasm for hemp in Wisconsin as indicated by the significant increase in applications for grower and processor licenses for the 2019 growing season. Given this enthusiasm and Wisconsin's past history and success in growing hemp, Wisconsin has an incentive to establish a hemp program that facilitates hemp production in the state while also ensuring that key legal and enforcement issues are addressed. The state legislature will need to consider several key legal, industry, and regulatory barriers as outlined in this paper to establish a program that will best meet the needs of the hemp industry in Wisconsin. ■

102. Brittany Lewis, "[CBD Store Owner Says Banks Account Closed Over Products Sold](https://www.cbs58.com/)," *CBS 58 WDJT – Milwaukee*, May 23, 2019, <https://www.cbs58.com/>.

103. Emilee Fannon, "[CBD Issue Puts Credit Union at Odds with State Officials](https://wkow.com/)," *WKOW*, April 26, 2019, <https://wkow.com/>.

Appendix: Wisconsin’s hemp pilot program

Wisconsin’s hemp pilot program is established in section [94.55](#) of the Wisconsin Statutes and is administered by DATCP. Protections from prosecution for program participants are established in section [961.32\(3\)\(b\)](#) of the Wisconsin Statutes under [Chapter 961](#), the Uniform Controlled Substances Act. The following is a detailed description of the program components.

Licensure

A person that grows or processes hemp must obtain a license.¹⁰⁴ There are two types of licenses: a grower license and a processor license.¹⁰⁵ A grower license is required to plant or harvest hemp. A processor license is required to store, transport, handle, and convert hemp to be used for retail purposes. A licensed hemp grower may process hemp without a separate processor license if the grower is processing only hemp that he or she grows. Licenses do not expire and remain valid until the pilot program ends unless a license is suspended or revoked.¹⁰⁶

There are two main requirements to obtain a grower or processor license established in Wisconsin Statutes.¹⁰⁷ First, a person applying for a grower’s license must provide the GPS coordinates for the location where hemp production will occur. Second, a person applying for either a grower or a processor license must undergo a background check. If the background check reveals that an applicant has violated any controlled substances law in any jurisdiction, the applicant will be denied a license. DATCP has the authority to determine additional license application requirements as well as authority to establish criteria for accepting, rejecting, suspending, or revoking licenses.¹⁰⁸

Registration

Licensed hemp growers and processors must register with DATCP every year they wish to grow or process hemp.¹⁰⁹ To register, DATCP currently requires each program participant to pay a registration fee and submit the GPS coordinates of hemp facilities, a

104. Under [Wis. Stat. § 94.55\(3\)\(a\)](#), DATCP must “issue licenses that authorize the planting, growing, cultivating, harvesting, sampling, testing, processing, transporting, transferring, taking possession, selling, importing, and exporting of industrial hemp.”

105. [Wis. Admin. Code § ATCP 22.03](#).

106. [Wis. Stat. § 94.55\(3\)\(a\)](#); [Wis. Admin. Code § ATCP 22.03\(1\)](#) and [22.03\(3\)](#).

107. [Wis. Stat. § 94.55\(3\)\(a\)](#).

108. Requirements for obtaining a license and policies for amending, denying, suspending, and revoking licenses are established in [Wis. Admin. Code § ATCP 22.03](#).

109. See [Wis. Stat. § 94.55\(3\)\(b\)](#): DATCP must “create a registration system that authorizes the sampling, testing, processing, transporting, transferring, taking possession, selling, importing, and exporting of industrial hemp.”

research plan, and a signed research agreement.¹¹⁰ Program participants must register by December 31 to grow or process hemp for the next season.¹¹¹

Fees

To operate the hemp pilot program, DATCP leverages license, registration, and hemp sampling and testing fees. To obtain a license to grow hemp, a person must pay a onetime fee, the amount varying based on the number of acres grown.¹¹² Hemp growers who wish to change how many acres they grow must pay a \$50 fee plus the possible cost for additional acreage.¹¹³ There is no fee for obtaining a processor license.

DATCP is authorized by state statute to charge an annual fee “in an amount not to exceed an amount sufficient to cover the costs to the department of regulating those activities.”¹¹⁴ Under this provision, DATCP currently requires an annual registration fee of \$350 for growers and \$100 for processors.¹¹⁵ DATCP also charges hemp growers a \$250 fee to sample and test the THC concentration of each hemp crop.¹¹⁶ Table 1 provides a complete breakdown of the required fees for hemp growers and table 2 provides this information for hemp processors.

Table 1. Fees for hemp growers

License (onetime)	Registration (annual)	Sampling and testing
\$150 (0–30 acres)	\$350	\$250 per sample/ test
\$5/acre (31–199 acres)	\$350	\$250 per sample/ test
\$1,000 (200+ acres)	\$350	\$250 per sample/ test

Table 2. Fees for hemp processors

License	Registration (annual)
No fee	\$100

110. “Frequently Asked Questions: Wisconsin’s Industrial Hemp Pilot Research Program,” Wisconsin Department of Agriculture, Trade and Consumer Protection, March 13, 2019, <https://datcp.wi.gov/>.

111. Wis. Admin. Rule § ATCP 22.04(1).

112. Wis. Stat. § 94.55(2)(b)4.

113. Wis. Admin. Code § ATCP 22.03(7).

114. Wis. Stat. § 94.55(2)(b)4.

115. Wis. Admin. Code § ATCP 22.04.

116. Wis. Admin. Code § ATCP 22.11.

Inspections, sampling, and testing

DATCP may inspect any location or facility associated with hemp activities “at any time and without notice.”¹¹⁷ State law requires that hemp grown in the state be tested for its THC concentration to ensure it does not exceed the legal amount of 0.3 percent.¹¹⁸ DATCP requires hemp growers to have a minimum of one sample tested from “each registered field and plant variety.”¹¹⁹ DATCP requires hemp growers to notify the department at least 30 days in advance of the intended harvest date. DATCP then determines when sampling and testing will occur.

Hemp samples are tested in a laboratory using a high performance liquid chromatography test.¹²⁰ A sample that produces a THC concentration of greater than 0.3 percent fails the test. If a sample fails a test, DATCP requires the entire crop where the sample originated to be destroyed.¹²¹ DATCP must then inspect the field to ensure the crop has been destroyed. If the grower fails to destroy the crop, DATCP may destroy it and charge the grower for the cost.¹²² If a test results in a THC concentration between 0.3 and 1 percent, the grower can request a re-test of the same sample or a test of a new sample.¹²³ Only one re-test can be conducted for each field or plant variety. If a sample fails the re-test, the grower must destroy the crop within ten days. A crop from a sample that passes the test must be harvested by the grower within ten days.¹²⁴

A hemp grower is charged \$250 for each sample tested.¹²⁵ Hemp growers also bear the cost for any re-sampling or re-testing. DATCP invoices the grower for the cost of sampling and testing, which the grower must pay within 30 days or face possible suspension of his or her license.¹²⁶

Fit for commerce certification

Any hemp that is being transported must be accompanied by a form, referred to as a “fit for commerce certificate.”¹²⁷ The certificate must include the following information: THC test results, the amount of hemp being transported, and a full record of the chain of custody for all transfers made.¹²⁸ DATCP may require other information on the cer-

117. [Wis. Admin. Code § ATCP 22.08.](#)

118. [Wis. Stat. § 94.55\(2\)\(a\).](#)

119. [Wis. Admin. Code § ATCP 22.09.](#)

120. [Wis. Admin. Code § ATCP 22.10.](#)

121. [Wis. Admin. Code § ATC 22.10\(5\).](#)

122. [Wis. Admin. Code § ATCP 22.10\(6\).](#)

123. [Wis. Admin. Code § ATCP 22.10\(4\).](#)

124. Wisconsin Department of Agriculture, Trade and Consumer Protection, “Frequently Asked Questions.”

125. [Wis. Admin. Code § ATCP 22.11.](#)

126. [Wis. Admin. Code § ATCP 22.11.](#)

127. [Wis. Admin. Code § ATCP 22.02\(9\).](#)

128. [Wis. Stat. § 94.55\(3\)\(c\).](#)

tificate. The certificate must accompany the crop until it is processed in such a way that no longer meets the legal definition for hemp.¹²⁹ The certificate is then submitted to DATCP. Any harvested hemp found without the certificate may be seized and destroyed by DATCP and may result in an individual's license being suspended or revoked.¹³⁰

Protections and Penalties

Since hemp is still considered a controlled substance under state law, individuals who possess or handle hemp are subject to the Uniform Controlled Substances Act. However, 2017 Wisconsin Act 100 established protections from prosecution for persons engaging in activities allowed under the pilot program.¹³¹ These protections include (1) “planting, growing, cultivating, harvesting, processing, or transporting hemp” with a THC concentration of up to 1 percent; (2) “selling, transferring, importing, exporting, or taking possession” of hemp; (3) “selling, transferring, importing, exporting, processing, transporting, harvesting, or taking possession of hemp” that is certified to be in compliance with the THC concentration limit; (4) possessing hemp with a THC level above the permissible level after it has been certified for being in compliance if the person had no reason to believe it was not in compliance; and (5) taking, transporting, or testing samples of hemp.¹³²

Pilot program participants are subject to penalties for violating hemp pilot program laws and rules. A person found in violation of program requirements is subject to a fine between \$200 and \$5,000 for the first offense and between \$400 and \$10,000 for an offense that is committed within five years of a previous offense.¹³³

Reporting and records

Hemp growers and processors are required to submit specific types of reports to DATCP and maintain records. A hemp grower is required to submit at least two types of reports to the DATCP: a planting report by July 1 or within 30 days of planting and a final production report by December 15.¹³⁴ DATCP may require a hemp grower to submit additional reports. A hemp processor is required to submit a report to DATCP by December 15 that includes information on the quantity of hemp received and the intended markets for that hemp.¹³⁵

Hemp growers and processors are also required to maintain records for at least three

129. Wis. Stat. § 94.55(3)(c).

130. Wis. Admin. Code § ATCP 22.12.

131. Wis. Stat. § 961.32(3)(b).

132. Wis. Stat. § 961.32(3)(b).

133. Wis. Stat. § 94.55(4).

134. Wis. Admin. Code § ATCP 22.05(1)(a).

135. Wis. Admin. Code § ATCP 22.05(1)(b).

years following a growing season.¹³⁶ DATCP requires hemp growers to maintain records on hemp seed sources and variety, agronomic and production information, a copy of their fit for commerce certificates, information on their processors, and a description of how their crop was disposed of, if applicable.¹³⁷ DATCP requires hemp processors to maintain records on their sources of hemp, including the quantities purchased, and information on the recipients of their product, including the quantities sold.¹³⁸

136. Wis. Admin. Code § ATCP 22.05(2)(a).

137. Wis. Admin. Code § ATCP 22.05(2)(b).

138. Wis. Admin. Code § ATCP 22.05(2)(c).