

## Insights

### Cannabis in Indiana: Where Do Things Stand Today?

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Within the past two months, there has been a flurry of activity in the cannabis space, including continued litigation over Indiana's hemp laws,<sup>1</sup> the release of **Indiana's 2021 hemp grower/handler application** by the Office of Indiana State Chemist & Seed Commissioner ("OISC"), the passage of the **Marijuana Opportunity Reinvestment and Expungement Act (MORE Act) in the U.S. House of Representatives**, and Democratic victories in the special Georgia Senate elections (making it possible that the Senate could actually vote on the MORE Act in 2021). In light of all of this, and before even considering what bills have been introduced in the current Indiana legislative session, it is worth revisiting where the State of Indiana stands on hemp, cannabidiol ("CBD") and marijuana.

#### Cannabis, Hemp, CBD and Marijuana: What's Legal (and What's the Difference)?

The terms cannabis, hemp, CBD and marijuana are often used interchangeably (and are frequently confused). While a detailed taxonomy discussion is beyond the scope of this alert, cannabis<sup>2</sup> refers to the genus of flowering plants that include both hemp and marijuana.<sup>3</sup> All cannabis plants contain tetrahydrocannabinol ("THC"), the "cannabinoid" or compound that, when present in sufficient amounts, produces the "high" users experience during consumption. Notably, "industrial hemp," as defined under both federal and state law, contains no more than 0.3% THC and, accordingly, does not generate the intoxicating effects of its cousin, marijuana. Rather, hemp has traditionally been a source of fiber and oilseed around the world to produce a variety of industrial and consumer products. Rounding out our terminology tour is "CBD," a relatively new entry into the lexicon of the everyday consumer. If you've been in almost any local convenience store or major drug store lately, you've likely seen CBD stocked on the shelves. CBD is a non-intoxicating compound (*i.e.*, another cannabinoid) which can be extracted from both hemp and marijuana plants and is increasingly used as an alternative treatment for various ailments in both people and animals, including epilepsy, anxiety, insomnia, and chronic pain.

#### Indiana's Current Hemp and CBD Regulation

In December of 2018, President Trump signed the Agriculture Improvement Act of 2018 (the "2018 Farm Bill"), which legalized industrial hemp under an expanded definition that includes low-THC hemp derivatives (like CBD) and permitted its transportation across state lines.<sup>4</sup> Earlier that year, Indiana was already responding to the shift in acceptance and consumption of CBD oil by passing Senate Enrolled Act 52 ("SEA 52"), which legalized low-THC hemp-derived CBD oil.<sup>5</sup> SEA 52 also provided what was considered, at the time, unusually robust regulations for distributing low THC hemp extract, including requiring a certificate of analysis by an independent testing laboratory<sup>6</sup> and detailed packaging requirements, such as the inclusion of a scannable QR code linked to additional information including the product name, ingredients, and specific batch details.<sup>7</sup> After

the 2018 Farm Bill was enacted, Indiana passed Senate Enrolled Act 516 (“SEA 516”) to better align Indiana’s laws with the 2018 Farm Bill and to establish a regulatory framework for hemp production in Indiana. In contrast to the 2018 Farm Bill, however, SEA 516 criminalized the manufacture, financing, delivery or possession of “smokable hemp,” defined as any industrial hemp product “in a form that allows THC to be introduced into the human body by inhalation of smoke.”<sup>8</sup>

### **Will We See Wholesale Changes to Indiana’s Smokable Hemp Ban?**

In response to SEA 516, a group of Indiana-based hemp retailers and wholesalers (“Plaintiffs”) sought a preliminary injunction to halt enforcement of SEA 516’s criminalization of smokable hemp, based, in part, on an argument that SEA 516’s restrictions were preempted by federal law (*i.e.*, the 2018 Farm Bill), which requires states to allow industrial hemp to be transported across their borders. The United States District Court of the Southern District of Indiana (“District Court”) granted the preliminary injunction. However, the State of Indiana appealed the case to the United States Court of Appeals for the Seventh Circuit (“Court of Appeals”). Before oral arguments in the appeal, Indiana passed SEA 335, which amended Indiana’s smokable hemp ban to permit the shipment of smokable hemp from a licensed producer in another state in continuous transit through Indiana to a licensed handler in any state.<sup>9</sup> In the summer of 2020, the case was reversed and remanded after the Court of Appeals found that the granted injunction was too broad, given that the 2018 Farm Bill expressly permits states to adopt rules on industrial hemp *production* that are more strict than federal law. On remand, the District Court will evaluate whether Indiana law violates the federal rules permitting interstate shipping, with specific consideration of the additional licensing requirements of SEA 335, which the Plaintiffs argue impermissibly exceed the federal law requirements.

In November of 2020, the District Court permitted the Plaintiffs to amend their complaint, in part, to add a direct challenge to SEA 335 and to add an additional (non-Indiana) plaintiff who would be impacted by SEA 335’s additional licensing requirements. The case is ongoing. However, on a related note, House Bill 1046 was introduced this month by Indiana State Representative Jim Lucas (R-Seymour). If passed, the bill would amend Indiana law to legalize all parts of the hemp plant for the purposes of agricultural production, decriminalizing smokable hemp, which would presumably end the need for continued litigation of the case. Both will be worth watching in the months ahead.

### **What You Should Know Today:**

Based on the legislative provisions and ongoing litigation described above, current and prospective Indiana hemp growers and handlers, as well as CBD wholesalers and retailers doing business in Indiana, should be aware of the following:

- The electronic application for the (required) 2021 Indiana grower/handler license is now available on the OISC’s **website**
- Consistent with federal law, Indiana limits THC content for legal hemp to no more than 0.3% by weight;
- Any hemp-derived CBD oil distributed in Indiana must also contain no more than 0.3% THC and must comply with the certificate of analysis and other packaging requirements described above;
- Currently, pending further litigation and/or legislation, Indiana prohibits the possession, delivery and transportation of hemp bud and hemp flower unless from a licensed producer in another state in continuous transit through Indiana to a licensed handler (in any state);
- In the absence of a license, any cannabis production regardless of THC level is considered marijuana production; and

- Marijuana production, including medical marijuana and unlicensed hemp (i.e., deemed marijuana), and the production of smokable hemp, remain illegal in Indiana.

If you have any questions regarding the information in this article or with any of the federal or state legal requirements related to cannabis, hemp or CBD, contact **Kendall A. Schnurpel**.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have. In addition, marijuana remains a federally illegal Class I drug. All activities related to marijuana are currently illegal under the federal laws of the United States and nothing contained on this alert is intended to assist in any way with violation of applicable law.*

**1** See: *C.Y. Wholesale, Inc., et al. v. Holcomb, et al.*, 965 F. 3d 541 (7th Cir. 2020); and *C.Y. Wholesale Inc. v. Holcomb*, Slip Copy 2020 WL 6583069.

**2** More specifically, Cannabis spp.

**3** Purdue University's Hemp Project: General Production Information (available at: <https://purduehemp.org/hemp-production/general-information/>)

**4** Note: The 2014 Farm Bill limited the definition of industrial hemp to the cannabis plant, and any part of the plant, with THC concentration of 0.3% or less and prohibited its transportation across state lines.

**5** Indiana Code 35-48-1-17.5

**6** Indiana Code 24-4-21-3

**7** Indiana Code 24-4-21-4

**8** See Indiana Code 35-48-1-26.6.

**9** See Indiana Code 35-48-4-10.1