

Law Bulletin



THE OHIO STATE UNIVERSITY

COLLEGE OF FOOD, AGRICULTURAL,
AND ENVIRONMENTAL SCIENCES*Law you need to know from OSU Extension's Farm Office**September 2019*

Legal or Not?

Growing Industrial Hemp in Ohio

*Ellen Essman, Senior Research Associate**Peggy Kirk Hall, Assoc. Professor**OSU Extension Agricultural & Resource Law Program*

Hemp has gotten a lot of attention from farmers lately. You likely know about the legalization of hemp in the 2018 Farm Bill and Ohio's new law that paves the way for hemp to be grown and processed in the state. What you might not know is how the federal and state laws interact with one another, and whether or not you can grow and process industrial hemp *right now*. In this law bulletin, we trace the development of the federal and state hemp laws, explain how they work together, and discuss when and how Ohioans will be able to cultivate and process hemp in Ohio.

What is hemp?

Before we get into the nitty gritty details of hemp law, it's important to understand that both hemp and marijuana are species of cannabis, but they have different properties. Of note is the fact that marijuana contains much more tetrahydrocannabinol (THC) than hemp. THC is the part of a cannabis plant that can cause a psychoactive effect in certain concentrations, but hemp plants generally do not contain enough THC to produce a "high." Even so, federal and state laws have historically treated hemp and marijuana as controlled substances for purposes of criminal laws.

Hemp has many uses—it can be used for construction materials, fabrics and clothing, and animal bedding. Cannabidiol, or CBD, is a very popular extract from the hemp plant that is alleged to help with anxiety, pain, and other ailments. Hemp also holds promise as a

potential cover crop due to its rapid growth rate and nitrogen fixing capabilities.

The 2014 Farm Bill and hemp pilot programs

Even though federal law defined hemp as a controlled substance, the 2014 Farm Bill created the opportunity for states to research hemp as a potential commercial crop. The law allowed states to establish pilot programs for cultivating, marketing, and studying hemp and to certify and register producers that could grow hemp for the pilot programs. The new 2018 Farm Bill tasks the Secretary of Agriculture with reviewing the pilot programs and submitting a report on its findings to Congress within a year. The 2018 Farm Bill also repeals the state hemp pilot programs, but not until one year after USDA publishes final regulations on hemp production under the new Farm Bill, which we explain below. Ohio did not establish a pilot program under the 2014 Farm Bill, but has since authorized hemp research, as we also explain later in this bulletin.

Legalization of hemp under the 2018 Farm Bill

The 2018 Farm Bill made a significant change in federal law by removing hemp from the definition of "marijuana", which means that hemp is no longer considered a controlled substance for purposes of criminal law. In the 2018 Farm Bill, Congress redefined 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." Thus, hemp must contain less than 0.3 percent THC to fall under the new legal definition of hemp; anything over that amount would be "marijuana" under federal law.

In addition to redefining hemp, the 2018 Farm Bill included provisions for state and federal regulatory programs, violations of hemp regulations, crop insurance, and interstate commerce of hemp.

Regulation of hemp production

The 2018 Farm Bill did not allow farmers to immediately grow the plant. Instead, the Farm Bill detailed the two situations under which a producer can legally grow hemp. First, the states or Indian tribes may take charge of the regulation of hemp production within their boundaries by legalizing hemp and establishing a state regulatory program. However, a state's department of agriculture must first have its regulatory program approved by the USDA. To do so, the state must submit for approval a program that includes the following requirements, at a minimum:

1. A way to keep track of land where hemp is produced within the state;
2. Methods the state will use to test how much THC is in hemp plants;
3. A way to dispose of plants or products that have a higher THC concentration than is legally allowed;
4. A procedure for inspecting hemp producers;
5. A plan for enforcing the law;
6. A system for dissemination of a hemp producer's information to the USDA; and,
7. Assurances that the state has the resources to carry out the plan.

A producer who wants to cultivate hemp in a state with an approved hemp production plan must first comply with the state's regulatory program before beginning to grow hemp.

The second situation for growing hemp under the 2018 Farm Bill comes into play if a state or tribe *does not* submit a hemp plan to USDA. In this case, as long as the state has not limited the regulation or production of hemp under state law, the USDA may establish its own plan "to monitor and regulate" hemp production within that state. A plan established by the USDA must meet the same criteria as a plan written by a state, and the law also requires the USDA to establish a licensing procedure for producers. Thus, a producer in a state that doesn't have a hemp plan could legally grow hemp

by obtaining a USDA hemp license through the hemp regulations that the USDA develops, unless the state has prohibited hemp cultivation.

Violations of regulatory programs

The 2018 Farm Bill also describes how violations of the hemp law will be handled. If a hemp producer negligently violates a state or USDA hemp production plan, the producer could be subject to enforcement. One negligent violation of the plan would not trigger criminal punishment, but the violator would have to comply with a corrective action plan prescribed by the state or USDA. However, if a producer negligently violates a plan three times in five years, the producer will be banned from producing hemp for five years. Examples of negligent violations in the law include: not providing a legal description of the land where hemp is produced, growing hemp without obtaining a license "or other required authorization" from the state, tribe, or USDA, or producing hemp with a THC concentration higher than 0.3 percent. If a producer violates a state or USDA plan "with a culpable mental state greater than negligence" (that is, purposely, knowingly, or recklessly), then the state or USDA must report the violation to law enforcement authorities. Persons convicted of a felony relating to a controlled substance under state or federal law are generally barred from hemp production for ten years following the date of their conviction, with the exception of persons convicted of a controlled substances felony but lawfully participating in a pilot program under the 2014 Farm Bill. If a person falsifies an application to participate in hemp production, that person will be totally barred from producing hemp.

Crop insurance for hemp production

Importantly, the 2018 Farm Bill also addresses hemp production risk by amending the Federal Crop Insurance Act. The law included hemp in the definition of "agricultural commodities" that can be insured under the federal crop insurance program, including after harvest. USDA recently used this authority to allow growers participating in the 2014 Farm Bill pilot programs to obtain crop insurance, beginning with crops harvested in 2020.

Interstate commerce of hemp

The 2018 Farm Bill also allows for the interstate commerce of legally produced hemp and hemp products by providing that a state or Indian tribe cannot prevent the transportation or shipment of legally produced hemp through its state or territory. While a state may ban the sale of hemp or hemp products solely within its borders, it must allow hemp products to move freely through the state.

An ongoing case in Idaho illustrates the already controversial impact of the Farm Bill's transportation restriction. Idaho has not legalized hemp within its jurisdiction. In January of this year, Idaho state police stopped a driver transporting hemp grown in Oregon across the state of Idaho for delivery to a processing facility in Colorado. The state police seized the cargo and arrested the driver for drug trafficking. Even though the 2018 Farm Bill clearly states that interstate commerce of legally produced hemp and hemp products through states is completely legal, Idaho argues that since no federal regulations have yet been created to carry out the law and no state plans have yet been adopted, the hemp was not grown legally, and the interstate commerce language in the Farm Bill does not yet apply.

Following the Idaho arrest and seizure of hemp, the USDA released a memo stating that the language decriminalizing hemp in the 2018 Farm Bill was "self-executing," so it is no longer illegal to possess hemp or THC from hemp. USDA further asserts that hemp grown under pilot programs allowed under the 2014 Farm Bill can be legally transported across state lines because the 2018 Farm Bill did not immediately repeal the pilot programs. USDA argues that this means that the hemp grown under 2014 pilot programs is legally produced, can be legally possessed, and therefore can be legally transported across state lines under the new Farm Bill.

It is important to note that USDA's memo is meant as guidance to the states and is legally persuasive, but is not legally binding. Currently, this means a person could be arrested for transporting hemp through a state. A court may or may not uphold a conviction. After the federal regulations under the 2018 Farm Bill are in place, however, there will be less leeway for states

to carry out their own interpretations, which will likely put an end to this interstate transportation controversy.

Ohio's hemp law

In response to the 2018 Farm Bill, the Ohio legislature passed its law legalizing hemp and the cultivation and processing of hemp. Ohio's law requires those who cultivate hemp to obtain a license from the Ohio Department of Agriculture (ODA) under forthcoming regulations that the USDA must first approve. A separate hemp processing license from ODA will be required for people who want to process hemp into other products.

Ohio's hemp law also added legally cultivated hemp to the list of agricultural uses permitted under Ohio's current agricultural use valuation (CAUV) program, which means that land used to grow hemp will qualify for CAUV's reduced property tax assessment. The new law also created a Hemp Marketing Program that will fall under the same laws and regulations as the grain and soybean marketing programs.

Still waiting on state and federal regulations

While Ohio's hemp bill immediately decriminalized possession of hemp and hemp products, it did not immediately allow for the cultivation and processing of hemp. Before cultivation and processing licenses can be issued by ODA, Ohio must write administrative rules to accompany the law. The federal government, acting through USDA, must also write its hemp regulations. Once the Ohio and USDA regulations are in place, the USDA must review and accept or reject Ohio's hemp program. Farmers and processors will only be able to obtain hemp licenses in Ohio *after* USDA approves of the state program.

Ohio's hemp bill gave some insight into what its regulations will entail, although it is not necessarily an exhaustive list of what will be included. The new law tasks ODA with adding conditions for persons seeking hemp cultivation licenses, such as experience, and procurement of equipment, facilities, and a sufficient amount of land, and financial responsibility requirements. ODA must also establish a compulsory setback distance between hemp cultivation and

medical marijuana cultivation. A person with a license to cultivate or process marijuana will not be permitted to obtain a hemp license. ODA must also establish recordkeeping and reporting requirements for hemp licensees. The hemp regulations must also include grounds for denying, suspending, or revoking licenses, procedures for testing the amount of THC in plants, rules for the annual licensee inspection process, and standards for transporting, storing, producing and manufacturing of hemp and hemp products.

When can I grow or process hemp in Ohio?

Ohioans who want to legally cultivate or process hemp under state and federal law will have to wait for state and federal hemp regulations to be finalized and then for USDA to accept Ohio's hemp program. Barring any roadblocks, all indications suggest that state and federal regulators hope to have the programs in place in time for the 2020 growing season.

Stay tuned for updates

Watch for our updates on state and federal hemp regulations and other legal issues with hemp, which we'll post in the Ohio Ag Law Blog and on our Farm Office website at farmoffice.osu.edu.

Where to find information on hemp laws

Ohio Department of Agriculture Hemp Program
<https://agri.ohio.gov/wps/portal/gov/oda/divisions/administration/resources/hemp-facts3>.

Ohio's hemp law, Senate Bill 57, 133rd Gen. Assembly
<https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA133-SB-57>

2018 Farm Bill, H.R. 2, 115th Congress
<https://www.govtrack.us/congress/bills/115/hr2/text>

USDA Memorandum, Executive Summary of New Hemp Authorities
<https://www.ams.usda.gov/sites/default/files/HempExecSumandLegalOpinion.pdf>

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