



CANNABIS LAW FOR OVER 25 YEARS

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RE: Legal Opinion - The Legal Status in Arizona of Hemp derived Delta 8 THC Products Intended for Vaping

To Whom It May Concern:

This memorandum is intended to provide guidance regarding the legal status of hemp derived Delta 8 tetrahydrocannabinol (THC) products. Please note that there are no Arizona appellate cases that directly address this topic and the legal opinion reached in this memorandum does not guarantee exactly how a Court might decide the issue. Moreover, this letter addresses the *current* legal status of Delta-8 THC products, and my opinion could change should the legislature choose to amend Arizona's hemp laws in the future. As it stands, under both federal and Arizona law, Delta-8 THC products which are not intended for ingestion in food or drink products are lawful to possess, consume, and sell in Arizona without a license provided that the substance was legally derived/extracted/processed from a hemp plant.

1. Introduction:

Delta-8 THC is a naturally occurring part of Cannabis sativa L plant, along with over 100 other cannabinoids, including Delta-9 THC which is the primary psychoactive constituent of marijuana. Although naturally occurring in the plant, it is typically found in insufficient amounts. The level of Delta-8 THC is typically increased through a process of chemical conversion, usually converting CBD, another naturally occurring cannabinoid, to reach a sufficient level of Delta-8 THC to be of benefit in a given hemp product.

Pursuant to the federal Agriculture Improvement Act of 2018 (2018 Farm Bill), hemp products are legal to sell if they do not contain more than .3% Delta-9 THC by dry weight. There are no restrictions on the amount of any other cannabinoids a hemp product may contain, including Delta-8 THC, and countless hemp derived cannabinoid products are being sold throughout the United States every day. According to Forbes, Delta-8 THC sales alone reached

\$2 billion last year.

Every state that has legalized hemp has done so in its own unique way and some have chosen to restrict Delta-8 THC products. In Arizona, however, no such restriction exists. The following is a brief explanation of the federal and state laws as they pertain to Delta-8 THC and why Delta-8 THC products that are not intended for ingestion in food or drink products are lawful in Arizona.

2. Federal Law:

The federal Controlled Substance Act (CSA) classifies all varieties of THC, including Delta-8 THC, as a Schedule 1 Drug. This makes it illegal to possess, use, produce, manufacture, transport, distribute, and sell the substance. The CSA was modified by the 2018 Farm Bill, however, and it is now essentially undisputed that hemp derived Delta-8 THC from legally cultivated hemp is lawful. The 2018 Farm Bill's definition of "hemp" includes all cannabinoids with a Delta-9 THC concentration that does not exceed 0.3% on a dry weight basis. Specifically, section 297A(1) of the Farm Bill defines "hemp" as follows: "[t]he term 'hemp' means 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*" (emphasis added).

Under this legal definition, Delta-8 THC is treated no differently than CBD or any of the more than 100 other cannabinoids that may be extracted from the hemp plant. Only Delta 9 THC is limited. Thus, all other hemp derived cannabinoids have been removed from regulation under the Controlled Substances Act (CSA), including Delta-8 THC, and states are allowed to legalize the sale of hemp derived cannabinoids in whatever way they choose providing that hemp products cannot contain more than .3% Delta-9 THC.

The Latin axiom *expressio unius est exclusio alterius* means the expression of one thing excludes others (or the other way around, as well). This concept is long accepted by Arizona courts as an essential rule of statutory construction. In the context of hemp derived Delta-8, it means that by restricting the level of Delta-9 THC, the federal (and as we will see, Arizona) statute should be interpreted as having no restriction on the amount of any other naturally occurring cannabinoid.

The Federal Drug Administration (FDA) has issued multiple press announcements, consumer updates, and warning letters that take the position that that food and beverages may not contain any cannabinoids, including CBD and Delta-8 THC. The FDA has also determined that food products that contain certain cannabinoids are adulterated within the meaning of 21 U.S.C. 342(a)(1)(C)(i), because they contain an unsafe food additive. In a public statement issued concurrently with the warning letters, FDA Principal Deputy

Commissioner Janet Woodcock, M.D. stated: “The FDA is very concerned about the growing popularity of Delta-8 THC products being sold online and in stores nationwide. These products often include claims that they treat or alleviate the side effects related to a wide variety of diseases or medical disorders, such as cancer, multiple sclerosis, chronic pain, nausea and anxiety.” The takeaway is that the FDA only has concerns about Delta-8 THC in food products and possibly other products if they claim to treat specific medical conditions.

The Drug Enforcement Agency (DEA) has weighed in on the legal status of Delta-8 THC and agreed that it is lawful provided that a Delta-8 product does not contain more than .3% Delta-9 THC. On September 15, 2021, the DEA determined that hemp derived Delta-8 THC is lawful under the Farm Bill if not synthetically produced from a non-cannabis material. Thus, chemical conversion from another hemp derived cannabinoid is not considered to be synthetic process. So long as Delta-8 THC is manufactured from a naturally occurring cannabis material, such as by chemical conversion from CBD, it is perfectly legal under federal law.

After the DEA opinion was published in 2021, the Ninth Circuit Court of Appeals, which has jurisdiction over Arizona, addressed the issue in a 2022 opinion, AK Futures LLC v. Boyd St. Distro, LLC, 35 F.4th 682 (9th Cir. 2022). The Court held that the “plain and unambiguous” text of the Farm Bill indicated that Delta-8 THC products were lawful. The Court further noted that the Delta-9 THC concentration level was the only statutory metric for distinguishing marijuana from hemp and that the concentration level of other cannabinoids was irrelevant to a hemp product’s legal status. Not only did the Court hold that hemp derived Delta-8 THC products are lawful to sell under federal law, but it also held that the legality of hemp derived Delta-8 THC was “unambiguous and precludes a distinction based on manufacturing method” and stated it would “afford no deference to [the DEA’s] interpretation” to the extent that it precluded synthetic production (i.e., chemical conversion from a non-cannabis material). Notably, both the Ninth Circuit and the DEA concur that producing Delta-8 via chemical conversion from another naturally occurring cannabinoid is lawful).

In conclusion, according to the DEA and the Ninth Circuit Court of Appeals, it is legal to manufacture and sell hemp derived Delta-8 THC products under federal law.

3. Arizona Law:

Like the federal Controlled Substances Act, the Arizona Controlled Substance Act lists THC as a Schedule 1 substance. In fact, it is classified under the criminal code as an illegal narcotic drug called “cannabis” which is defined to include the “resin extracted from any part of a plant of the genus cannabis, and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its resin...” (A.R.S. § 13-3401(4)). Arizona has created

multiple exceptions to this blanket prohibition, however, including the Arizona Medical Marijuana Act (AMMA) (A.R.S. § 2801, et seq), which legalized the licensed manufacture and sale of cannabinoids to registered medical marijuana patients, and the Smart and Safe Arizona Act (SSAA) (A.R.S. § 2850, et seq) which legalized the licensed manufacture and sale of marijuana cannabinoids for adult recreational use. The legal status of marijuana derived cannabinoid products under AMMA was challenged in 2014 in a case that made its way to the Arizona Supreme Court in *State v. Jones*, 246 Ariz. 452, 440 P.3d 1139 (Ariz. 2019). In *Jones*, the Supreme Court rejected the State's arguments and upheld the legal status of concentrated cannabinoid products under AMMA. It reached this decision even though THC was (and still is) listed as a Schedule 1 drug under Arizona's Controlled Substances Act.

Another legal reform came in 2018 when Arizona legalized hemp and hemp products, making it lawful for license holders to produce and manufacture hemp derived cannabinoids and for anyone to engage in the marketing and retail distribution of retail hemp derived cannabinoid products *without a license* (A.R.S. § 311, et seq). AMMA and SSAA are regulated by the Arizona Department of Health Services, while the hemp program is regulated by the Arizona Department of Agriculture. Under Arizona's hemp law "Industrial Hemp" is defined to mean "the plant *cannabis sativa* L. and *any part of such a plant*, whether growing or not, with a Delta-9 tetrahydrocannabinol concentration of not more than three-tenths percent on a dry-weight basis." (A.R.S. § 3-311(7)) (emphasis added).

Moreover, "Hemp Products" are defined to mean "*all products made from industrial hemp*, including cloth, cordage, fiber, fuel, grain, paint, paper, construction materials, plastics and by-products derived from sterile hemp seed or hemp seed oil. *Hemp products excludes any product made to be ingested except food made from sterile hemp seed or hemp seed oil.*" (A.R.S. § 3-311(5)). Thus, food and drink products containing any cannabinoids, including Delta-8 THC or CBD would be unlawful given the fact that they may only be derived from hemp seeds, which are devoid of cannabinoids. This exclusion of food and beverage products is likely because of concerns expressed by the FDA prior to Arizona's enactment of its hemp laws. The FDA had issued multiple press announcements, consumer updates, and warning letters that take the position that that food and beverages may not contain any cannabinoids, including CBD and Delta-8 THC. The FDA has also determined that food products that contain certain cannabinoids are adulterated within the meaning of 21 U.S.C. 342(a)(1)(C)(i), because they bear or contain an unsafe food additive. Thus, it would appear that the Arizona Legislature was trying to avoid coming into conflict with federal regulatory laws governing food and beverage products (i.e., products intended for ingestion).

Inhalation, however, is a completely different method of consumption than ingestion. The Cambridge Dictionary, for example, defines "ingestion" as

"[t]he process of absorbing nutrients or medications into the body by eating or drinking them." Merriam-Webster's Legal Dictionary defines the term "ingest" to mean "to take in for or as if for digestion." Inhalation, on the other hand, refers to the act of inhaling. The word "inhale," according to Merriam-Webster, is "to draw in by breathing."

As discussed above under the Federal Law section, the Latin axiom *expressio unius est exclusio alterius* means that expression of one thing excludes others (or the other way around, as well). This means that the Arizona hemp statute (A.R.S. § 3-311(5)) that requires products intended for ingestion to come only from the seeds (which are devoid of cannabinoids) indicates that products intended for other kinds of consumption (inhalation, transdermal, etc.) may come from all other parts of the plant (which contain cannabinoids, including CBD and Delta-8 THC).

Not just anyone may manufacture Delta-8 THC, however. Under Arizona law, one must be a hemp "processor," which means an individual, partnership, company or corporation that is licensed by the department to receive industrial hemp for processing into hemp products. A.R.S. § 3-311(11).

Accordingly, because Delta-9 THC is a naturally occurring "part" of and is "made from" the "industrial hemp" plant, the unlicensed retail sale of lawfully produced hemp derived Delta-8 THC products not intended for ingestion are lawful in Arizona.

To the extent that the Attorney General's Office may be of the opinion that Arizona's statutes are not clear regarding the legality of Delta-8 THC, deference should be given to federal law interpretations because, pursuant to A.R.S. § 3-312(E), "[i]f authorized under federal law, the commercial production, processing, manufacturing, distribution and commerce of industrial hemp in this state is allowed outside of the agricultural pilot program." (emphasis added).

4. Conclusion:

Based on the foregoing discussion of Federal and Arizona laws, legally produced hemp derived Delta-8 THC products that are not intended for ingestion in food or drink products are lawful in the state of Arizona to manufacture with a hemp processor license and to sell without a license, provided that the Delta-9 THC content is no more than 0.3%.

Sincerely,



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About the Author

Tom Dean has been a leading attorney in cannabis law and policy for over 25 years. In 1998 Tom moved to Washington, DC to accept the position of Legal Director for the National Organization for the Reform of Marijuana Laws (NORML). In that capacity he initiated, managed, and litigated important cannabis related cases of national importance to the cannabis community. He also coordinated the efforts of the NORML Legal Committee and NORML Amicus Committee (former chair) in key cases throughout the U.S. He remains an active member of the NORML Legal Committee. Among many other initiatives, while at NORML, Tom formed the NORML Hemp Alliance, which became at that time the largest association of hemp business owners in America.

Tom moved back to Phoenix in 2009 and established his current practice which provides representation in cannabis related administrative, commercial, and criminal matters. In 2014, Tom co-founded the Arizona Cannabis Bar Association (ACBA), an organization that seeks to educate lawyers and the public of the many unique aspects of cannabis law and cannabis related areas of practice. He currently serves as Vice President and Board Member of that organization.

In 2015, Tom was inducted into NORML's Distinguished Counsel's Circle. In 2016, Tom received a President's Commendation award from the Arizona Attorneys for Criminal Justice (AACJ) for his work in cannabis law. In 2021, Tom received Mikel Weiser Lifetime Achievement Award from Arizona's Marijuana Industry Trade Association (MITA). Most recently, in 2023, Tom was honored again by NORML with its Al Horn Award, which is given to one attorney in the United States each year in "recognition of a lifetime of ceaseless work to advance the cause of justice" in cannabis law.

Outside of his practice, Tom enjoys presenting at cannabis related seminar and conferences for lawyers and the public.