



New Jersey's Intoxicating Hemp Industry Evolves Amid Legal Uncertainty

By John D. Williams



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This article provides an overview of the origins of the legalization of cannabis-hemp, the ensuing emergence of an industry nationwide in intoxicating hemp products, and the status of the related law in New Jersey. Notably, industry participants and legal practitioners await legislation that is expected to be introduced in the late summer or early fall resolving the pending legal issues discussed below.

The 2018 Farm Bill

The 2018 Farm Bill decriminalized hemp and established a legal framework for the development of a national hemp and hemp products industry. (Agriculture Improvement Act of 2018, Pub. L. 115-334.) The federal bill's impact was immediate and significant.

Principally, it removed hemp from the federal Controlled Substances Act (CSA). This allowed an "industrial hemp" industry to develop (e.g., hemp building supplies, clothing and textiles, animal bedding and feed, etc.).

The cannabidiol (CBD) industry also arose and quickly flourished. CBD is a cannabinoid (chemical compound) found in the cannabis plant and is not psychoactive; it does not alter the mind or mental processes. Although CBD products are labelled as dietary supplements, they are used by consumers for a variety of human (and domestic pet) wellness purposes. The products are sold in a wide variety of forms for ingestion or topical use.

The 2018 Farm Bill also exempted hemp-derived tetrahydrocannabinols (THC) from the CSA. Cannabinoids can be derived from either the hemp or marijuana strains of the cannabis plant. Among the many cannabinoids found in cannabis, THC is the primary psychoactive compound. Other psychoactive cannabinoids are present in cannabis (delta-8-THC and delta-10-THC), and still others can be obtained from the plant (delta-11-THC, THCA and HHC). Delta-9-THC is widely known as the most prevalent psychoactive cannabinoid in cannabis-marijuana.

Lawful hemp is defined in the 2018 Farm Bill 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.” (7 U.S.C. §1639o(1).) The bill does not include in the 0.3% limit any other of the variety of THC cannabinoids, and it does not define any distinction between “naturally occurring” or “synthetic” THC cannabinoids.

Finally, the 2018 Farm Bill prohibited individual states from interfering with the transportation and shipment of hemp and hemp products through interstate commerce. (2018 Farm Bill Sec. 10114 “Interstate Commerce”; 7 U.S.C. §1639o “Note”).

The Intoxicating Hemp Industry Emerges and Flourishes

Cannabis industry participants are indeed knowledgeable and industrious. Soon after the CBD industry established itself via retail stores, itinerant sales (festivals, concerts and other such public events) and online sales of hemp and hemp products, the cannabis-hemp industry began to extract from lawful hemp (containing less than .03% delta-9-THC) from intoxicating hemp products. The first was delta-8-THC, but others soon followed.

Proponents of intoxicating hemp products rely upon the plain language of the 2018 Farm Bill and its 0.3% delta-9-THC limit, as well as the assertion that the products are derived in a manner consistent with the bill’s definition of hemp. Opponents argue that Congress did *not* intend to allow for the development of intoxicating hemp products, and that in contravention of the bill’s terms these products are not derived naturally but synthetically. The fundamental legal dispute regarding intoxicating hemp products became whether they are lawful, adhering to strict statutory compliance, or are they improperly exploiting a loophole?

The legal debate intensified as the intoxicating hemp products industry developed and flourished. Most notably as sales of these products increased in existing CBD stores, as well as with the proliferation of “smoke shops” that sell intoxicating hemp products in many municipalities throughout the state. These retailers do not require Cannabis Regulatory Commission licensing or regulation, like the cannabis-marijuana industry. Moreover, some of the storefront retailers of intoxicating hemp products began to sell indisputably unlawful product—marijuana diverted from lawful out-of-state markets and “traditional” illicit cannabis.

Despite some federal court attention to the Farm Bill Compliant vs. Unlawful Loophole debate,¹ judicial resolution of the issue was not decisive. Nationally, some states adopted legislation regulating intoxicating hemp products to foster the market, particularly beverages. Other states legislatively banned the products outright. In New Jersey both state and municipal enforcement actions against unregulated retailers produced mixed results. Ultimately, New Jersey sought to resolve the issue with legislation allowing very-low-limit hemp products (effectively, not intoxicating) to continue to be marketed, while placing intoxicating

hemp products under the auspices of the Cannabis Regulatory Commission, to be licensed and regulated like cannabis-marijuana.

Legislation, Litigation, and a Stay of Enforcement

On Sept. 12, 2024, New Jersey enacted Senate Bill 3235 (L.2024, C.73) regulating “intoxicating hemp products” by prohibiting sales to individuals under 21 years of age (immediately), and by modifying the state’s law as to the production and sale of hemp and hemp products (effective 30 days later). The New Jersey Hemp Amendments Act (NJHAA), as Senate Bill 3235 came to be known, created a new definition of “hemp” that fixed the maximum concentration of THC, (the psychoactive compounds in cannabis, as not more than 0.3%, accounting for *all* THC compounds, rather than only delta-9 THC. In addition to this restrictive “total THC” threshold for hemp, any finished “hemp product” (pre-rolls or joints, vapes, gummies and, notably, beverages) was limited to “not more than .5 milligrams of total THC per serving and 2.5 milligrams of total THC per package.” The act also sought to distinguish and allow only naturally occurring “chemical constituents,” implicitly banning synthetically derived cannabinoids.

The NJHAA requires licensure by the CRC pursuant to the CREAMM Act² to engage in the sale or distribution of any intoxicating hemp product, and to sell intoxicating hemp beverages requires a plenary wholesale license or a plenary distribution license, issued by the New Jersey Alcoholic Beverage Commission under Title 33 (Intoxicating Liquors).³ Intoxicating hemp products were placed on Schedule I of the New Jersey CSA, and unlicensed production, distribution or sale are subject to both criminal and civil enforcement. Hemp products not exceeding the NJHAA definition remain lawful, but for all intents and purposes the thresholds and limitations are universally

regarded by the hemp industry as untenable for sale, effectively eviscerating the industry in New Jersey. The intoxicating hemp industry promptly responded to the NJHAA with litigation seeking to enjoin and prohibit enforcement of the NJHAA. On Sept. 24, 2024, a group of hemp industry participants consisting of in-state and out-of-state cultivators, manufacturers, distributors and retailers sued in New Jersey Federal District Court.⁴ The validity and enforceability of the NJHAA was challenged as violating federal constitutional and statutory law. The plaintiffs claimed that by changing the definition of hemp and hemp products and by criminalizing their transportation through the state of New Jersey, the NJHAA contravened the 2018 Farm Bill, in violation of the Supremacy Clause. Also, the plaintiffs charged that the NJHAA favored the economic interests of in-state hemp industry participants at the expense of out-of-state participants, and criminalized out-of-state products but not the production and sale of those same products in-state, in violation of the dormant Commerce Clause. Finally, the plaintiffs alleged that the NJHAA violates constitutional protections of due process by being vague regarding both the criminal and civil-penalty enforcement provisions of the law.

Due to the impending effective date of the act, the matter proceeded as a Motion for Summary Judgment. The District Court entered its order and issued a written opinion on Oct. 10, 2024, two days before the act was to take effect.⁵ The District Court denied all of the relief sought, but did permanently enjoin the state from enforcing those provisions of the NJHAA that exempt otherwise compliant out-of-state hemp and hemp products from the definition of intoxicating hemp products. These provisions were deemed exclusionary because they effectively barred out-of-state hemp industry participants from participating in the New Jersey market. The plaintiffs filed an

appeal and the matter is pending in the Third Circuit.⁶

The NJHAA became effective on Oct. 12, 2024, intoxicating hemp products are presently unlawful, and neither the Cannabis Regulatory Commission nor the Division of Alcoholic Beverage Control have promulgated any rules regarding the licensing and regulation of either intoxicating hemp products or beverages. Yet the day before enforcement of the act, the state announced a stay of enforcement, via a notice issued by the CRC and posted on its website.

The hemp industry awaits judicial resolution or, more likely, revisions to the NJHAA. The intoxicating hemp beverage industry anticipates revisions to the act that allow it to continue uninterrupted. The remainder of the intoxicating hemp products industry await a determination whether it must license and operate under the CRC or it can continue in some modified manner in its existing framework.

Cannabis: Protean, Mutable and Mercurial

The NJHAA renders the currently existing intoxicating hemp industry to be illegal, but the law is not enforced. This is identical to the status of medical and adult-use marijuana at the federal level. Well-resourced market participants have an impact on the development of both the cannabis-marijuana and cannabis-hemp industries. As to the latter, the cannabis beverage industry is markedly ascendant. In this context, both the marijuana and hemp industries co-exist alongside the illicit cannabis industry, which is not gone, and which is a larger and older industry participant than the two of them combined.

The marijuana and hemp industries have developed differently, and they have directly divergent views on the lawfulness of intoxicating hemp products. Investments of time and money as well as personal livelihoods are at issue. The NJHAA

has declared intoxicating hemp illegal, and civil and criminal enforcement will follow. (Reminiscent of the impact of the pre-legalization “war on cannabis”). Tensions have arisen. Some speak of a “civil war” between the industries.

It is said that the only constant in the cannabis industry is change, and that all industry participants must be ready to alter course, often in unanticipated directions. These adages will soon be applicable to New Jersey Intoxicating Hemp Law. With substantial revisions to the New Jersey Hemp Amendments Act anticipated soon (if not having already occurred), practitioners in the areas of cannabis law, alcoholic beverage law, municipal law, and criminal law should be watchful and ready to respond accordingly. ■

Endnotes

1. *Anderson v. Diamondback Investment Group, LLC*, 117 F.4th 165 (4th Cir. 2024); *AK Futures LLC v. Boyd Street Distro, LLC*, 35 F.4th 682 (9th Cir. 2022).
2. The CRC regulates the sale of medicinal and recreational marijuana products in New Jersey, pursuant to the state’s marijuana legalization statute, the “New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act” (P.L. 2021 c.016, adopted February 22, 2021).
3. *N.J.S.A. 33:1-1 to 5-5*.
4. *Loki Brands, LLC, et al., Plaintiffs v. Matthew Platkin, et al., Defendants*, Civ. A. No. 24-9389 (D.N.J. Filed Sept. 24, 2024).
5. *Loki Brands, LLC v. Platkin*, Civ. A. No. 24-9389, 2024 WL 4457485 (D.N.J. Oct. 10, 2024).
6. *Loki Brands, LLC v. Platkin*, Case No. 24-3120 (3d Cir. Filed Nov. 14, 2024).