

## LEGALITY OF INDUSTRIAL HEMP PRODUCTS BACK IN LIMBO IN THE CAROLINAS

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Industrial hemp appears poised to become a significant agricultural commodity in the United States in coming years. In addition to Washington and South Carolina, states such as North Carolina have started changing – and in many cases relaxing – current regulations to allow for future production of industrial hemp and related products. However, recent developments in both North and South Carolina have added to the confusion regarding the legality of industrial hemp and hemp-derived products. The impact of these regulatory changes could prevent farmers from harvesting their crops and retailers from selling industrial hemp-derived products.

Like South Carolina [1], North Carolina currently operates a pilot program – established in 2016 – allowing licensed farmers, research institutions, and others to cultivate industrial hemp in certain regulated circumstances. [2] Licensees can cultivate industrial hemp for 11 authorized research purposes, including conducting research on the costs, benefits, and potential opportunities of using industrial hemp in new energy technologies, and investigating and studying which types of industrial hemp seeds are best suited for cultivation in the state. [3]

In response to market opportunities and changing legal landscapes, North and South Carolina residents continue to demonstrate an interest in cultivating industrial hemp. In fact, farmers in both states have planted extensive hemp crops in reliance on, and pursuant to, the licenses afforded by these types of pilot programs. However, new regulatory frameworks built around a rapidly growing industry have confused farmers, retailers, and even law enforcement regarding which products are lawful or not.

### **NORTH CAROLINA UPDATE**

In North Carolina, the debate over the North Carolina Farm Act of 2019 (Senate Bill 315) has been ongoing for months. The original version of the bill sought to ban smokable hemp effective December 2019, but the version approved by the Senate, and most recently, the House Judiciary Committee, delayed the start of the ban to December 2020. Ahead of the House Judiciary Committee's July vote, the North Carolina Industrial Hemp Commission held an emergency public meeting to consider a resolution on the bill. Lawyers from K&L Gates participated in the public meeting, during which farmers and law enforcement debated both sides. Ultimately, the Industrial Hemp Commission voted to pass the resolution, which opposed legislation classifying hemp or any legally produced hemp product as marijuana, and opposed the original proposal to ban industrial hemp as of December 2019.

At the same time, there has been extensive debate as to whether smokable hemp should be classified as a controlled substance. North Carolina Senate Bill 352 was rewritten by a House Subcommittee in July 2019 to change the definition of "marijuana" to include smokable hemp, a change that could have a ripple effect

throughout the state. For example, as the Industrial Hemp Commission's resolution stated, "the 2019 hemp crop in North Carolina was planted under a statutory and regulatory framework in which all products of hemp legally cultivated in the program have never been previously questioned ... [a] shift in the law now ... will create market instability and leave North Carolina farmers insufficient time to find new markets for their crops."

## SOUTH CAROLINA UPDATE

In South Carolina, the hemp industry has been thrown into disarray by a July 10, 2019 opinion (the "Opinion") issued by the Office of the Attorney General of the State of South Carolina in response to a request by the South Carolina Law Enforcement Division. [4] In the Opinion, South Carolina Solicitor General Robert D. Cook concluded that the possession of unprocessed or raw hemp plant material without the necessary license from the South Carolina Department of Agriculture constitutes a criminal offense punishable by up to 10 years' imprisonment. However, the Department of Agriculture does not license retailers of industrial hemp, only hemp farmers, [5] leaving hemp retailers potentially exposed to criminal liability for the possession or sale of raw or unprocessed hemp material. The Attorney General's opinion also opined that hemp cannot be processed into a "hemp product" by merely packaging unprocessed or raw hemp material for sale and concluded that unprocessed hemp in the possession of an individual or entity without a Department of Agriculture license would be contraband per se and potentially subject to seizure.

Cannabidoil, or "CBD" oil, was the original hemp product money-maker, but some South Carolina hemp farmers have begun to focus their crops on smokable hemp flowers, which can be sold at a higher price per pound. [6] Following the Opinion, law enforcement across the state has seized hemp flowers and other unprocessed hemp from several CBD and tobacco retailers, and retailers have begun to pull these products from their shelves. [7] Adding to the confusion in the wake of the Opinion, a spokesperson for the Attorney General's Office wrote that nothing in the Opinion addresses "CBD Hemp Flower specifically," noting that "whether that's illegal without a license is a question of fact that would have to be determined by law enforcement." [8] Although the Opinion is not legally binding, it has muddied the waters of an already ambiguous regulatory and legal landscape governing the burgeoning South Carolina hemp industry.

Our regional offices will continue to monitor the legal and policy changes taking place at the state level, including in North and South Carolina.

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[1] We previously reported on South Carolina's pilot program here.

[2] N.C. GEN. STAT. § 106-568.53(2) (2018).

[3] *Id.* at §§ 106-568.55; 105-568.54(4) (2018).

[4] Alan Wilson, S.C. Att'y Gen., Opinion (July 10, 2019).

[5] Paul Rivera, 'We're not being given the proper direction': CBD store employees want answers after AG opinion, WIS News (July 24, 2019).

[6] Conor Hughes, S. Carolina CBD stores left confused amid raids, new opinion, The Herald (Aug. 2, 2019); Anjali Patel, Is 'smokable hemp' legal in South Carolina? It's not clear, ABC 15 News (July 31, 2019).

[7] Conor Hughes, S. Carolina CBD stores left confused amid raids, new opinion, The Herald (Aug. 2, 2019).

[8] *Id.*

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