

## Delta-8 THC Is Popular. But Is It Legal?

In the past few months, sales of Delta-8 tetrahydrocannabinol, also known as “Delta-8 THC” or “weed light,” have grown tremendously. So, it’s popular. But is it legal? At the federal level, the answer is hazy. And in Rhode Island, Delta-8 THC is still illegal.

### What exactly is Delta-8 THC?

Delta-8 THC is a psychoactive cannabinoid found in the *cannabis sativa* plant, which produces both marijuana and hemp. Under federal law, marijuana is a cannabis plant with more than 0.3 percent Delta-9 tetrahydrocannabinol (THC), which is the chemical that is responsible for most of marijuana’s physiological effects. Hemp is a cannabis plant with less than 0.3 percent Delta-9 THC. Delta-8 THC is said to have similar physiological effects on its users as Delta-9 THC, but is thought to be less potent and is said to create a more clear-headed “high” than Delta-9 THC does. Some users report that Delta-8 THC induces lower levels of anxiety and paranoia. One can find vaping cartridges, edibles, tinctures, concentrates and other products containing Delta-8 THC online and at gas stations, convenience stores and other retail locations.

Delta-8 THC usually is not found in significant concentrations in most hemp strains. As a result, it is typically manufactured from hemp-derived cannabidiol (CBD), which leads to some of the confusion around Delta-8 THC.

### Is it Legal?

The status of Delta-8 THC under federal law is not clear, due to a conflict between the law and a Drug Enforcement Administration (“DEA”) regulation. Under the federal 2018 Farm Bill, *all* hemp-derived cannabinoids, including all Delta-8 THC derived from hemp, fall within the definition of “hemp,” which is no longer a controlled substance federally, and can be legally produced and sold, subject to a complex set of federal regulations. However, in Fall 2020 the DEA issued an “Interim Final Rule” which stated that “[all] synthetically derived tetrahydrocannabinols remain schedule 1 controlled substances.” The Biden Administration has indicated that it will permit the Final Rule to go into effect later this month.

Hence the confusion: Delta-8 THC, when manufactured from hemp-derived CBD (and thus not extracted directly from the hemp plant), is a controlled substance under federal law. Until this uncertainty is addressed by Congress, the DEA or the courts, there is some risk that Delta-8 THC remains an illegal “controlled substance” under federal law, despite the hemp-derived CBD from which it is manufactured being legal at the federal level.

Products containing Delta-8 THC do not appear to be prohibited by FDA regulations, but still must receive pre-market approval. Under the 2018 Farm Bill, the FDA retains authority to regulate products that contain cannabis or cannabis derivatives under the federal Food, Drug and Cosmetic Act (FDCA). The FDA has also promulgated its Drug Exclusion Rule, which states that any substance that has been approved or investigated by the FDA as a new drug cannot also be marketed as a food or dietary supplement for humans or animals, unless the substance was sold and marketed prior to the FDA’s investigation. It is this Drug Exclusion Rule that causes the sale of products containing CBD to be of questionable legality under federal law. There do not appear to be any FDA investigations regarding Delta-8 THC, so it appears that the Drug Exclusion Rule does not apply to the sale of products that contain Delta-8 THC.

In any event, Rhode Island law prohibits the sale of products for human consumption containing Delta-8 THC. The 2019 amendments to the Industrial Hemp Growth Act, R.I.G.L. ch. 2-26, legalized in Rhode Island the production and sale of hemp products (and all derivatives and extracts with a Delta-9 THC concentration of not more than 0.3 percent), subject to federal and state regulatory schemes. This is similar to the definition of “hemp” in the federal 2018 Farm Bill. However, as Rhode Island law still prohibits products containing THC (including Delta-9 THC) for ingestion, food products and supplements containing Delta-8 THC remain illegal in

Rhode Island.

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