

California Splits from the FDA: CBD Now Permitted in Food, Beverages and More

On Wednesday, October 6, 2021, California Governor Gavin Newsom signed into law Assembly Bill 45 (AB-45) that “prohibit[s] restrictions on the sale of dietary supplements, food, beverages, cosmetics, or pet food that include industrial hemp or cannabinoids, extracts, or derivatives from industrial hemp based solely on the inclusion of those substances.” AB-45 is highly significant amongst the cannabis regulatory landscape because it constitutes a departure from the U.S. Food and Drug Administration’s (FDA) guidance that CBD cannot be introduced to food products or dietary supplements sold in interstate commerce.

That is not to say, however, that the inclusion of CBD in “industrial hemp products,” a term that encompasses cosmetics, food, food additives, dietary supplements, or herbs for human or animal consumption that contain industrial hemp, is totally unregulated in California. Rather, AB-45 prohibits industrial hemp products from being distributed or sold in the state, absent documentation that they were produced from industrial hemp regulated by the California Department of Food and Agriculture or otherwise meet the requirements of the U.S. Department of Agriculture (if sourced from outside California). Additionally, manufacturers who create certain types of industrial hemp products will be required to register with the California Department of Public Health. As demonstrated by the recent success of the state’s Campaign Against Marijuana Planting (CAMP) program, industrial hemp producers in California should anticipate significant cooperation between the Department of Public Health and the California Attorney General in enforcing these new regulations.

Accompanying the registration requirements are rigorous testing and labeling requirements, marketing and advertising restrictions, and consumer protection provisions. For example, manufacturers must obtain a certificate from an independent laboratory that states: “(1) The industrial hemp raw extract, in its final form, does not exceed THC concentration of an amount determined allowable by the department in regulation, or the mass of the industrial hemp extract used in the final form product does not exceed a THC concentration of 0.3 percent” and “(2) The industrial hemp product was tested for any hemp derivatives identified on the product label or in associated advertising in accordance with Section 111926.2.” AB-45 also provides the government with the ability to punish any unlicensed manufacturers attempting to sell unregulated products within the state. Over the next several months, the Department of Public Health will create additional regulations before the law fully goes into effect.

California’s refusal to follow the FDA’s lead in prohibiting the sale of industrial hemp products is but the most recent example of the push to keep cannabis legalization and oversight in the hands of the states, rather than the federal government. It remains to be seen whether the relatively new California Attorney General Rob Bonta will prioritize strict enforcement of these regulations as the cannabis industry adjusts to the new legal regime. Many in the cannabis industry welcomed his appointment as a staunch ally of marijuana legalization but California is in uncharted territory and AG Bonta could make it a bumpy ride for those companies seizing on the new law as an impetus to innovate.



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