

Cannabis in Massachusetts: Review, Updates and Trends

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Massachusetts Association of Health Boards

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Quick Review of Role of Municipalities

Chapter 94G

- May implement a local licensing process and other regulations.
 - Providing they are not “unreasonably impracticable.”
- May restrict number of marijuana establishments (ME) to 20% or more of the number of retail liquor licenses.
 - Ordinance, bylaw, regulation.
 - To further restrict, must do it at municipal election.
- May not increase buffer zone of 500 feet from public or private school K-12.
- May authorize on-premises Social Consumption Establishment through city ordinance, town bylaw or local voter initiative petition.

An Act Relative to Equity in the Cannabis Industry

July 31, 2022

- **Industry is not nearly as diverse and equitable as originally intended.**
 - In January 2022, of the 346 cannabis businesses, only 20 (**less than 6%**) were led by economic empowerment entrepreneurs or were connected to participants in the CCC's social equity program. (*Rep. Dan Donahue – Cannabis Policy Committee*).
 - Law was intended to provide economic opportunities for diverse communities and for those previously harmed by harsh drug laws inequitably enforced.
- **Municipalities have, in some cases, taken advantage of the leverage they can hold over cannabis businesses in Host Community Agreements and Community Impact Fees.**
- **Social consumption establishments have been stalled.**

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Summary of New Law's Key Provisions

Challenges with Original Host Community Agreements

- **ORIGINAL HOST COMMUNITY AGREEMENT LAW**

- Commission won't consider application until host agreement is in place.
- Allegations that municipalities are receiving larger community impact fees than actually necessary.
 - “voluntary donations”
 - Encourages “big” marijuana.
 - Discourages small cultivators and minority businesses.
- Commission voted 4 – 1 to not to review the agreements.
 - Law unclear and they don't have the authority to review agreements.

Amended Host Community Agreements (HCAs)

- More oversight of HCAs.
- Revamps rules surrounding HCAs and Community Impact Fees (CIFs).
- CIF (part of HCA) – Must be **reasonably related** to costs on municipality.
 - Must document costs imposed as a result of the operation of the business.
 - Cannot exceed 3% of business's gross sales.
 - Cannot mandate payment of certain percentage (see above documentation requirement).
 - Cannot extend past 8th year of business's operation.
 - First annual payment not due prior to the 1st annual license renewal.
 - Must not include any additional required payments or obligations.
- CCC must review and approve HCA.

CCC will require Host Community Standards and Policies for Social Equity

- Existing host communities must establish policies to promote equity no later than July 1, 2023.
- New host communities must establish policies before entering into a new HCA.
- Penalties for noncompliance.

Social Equity Businesses (SEB)

- ME with a majority ownership of persons eligible for the **Social Equity Program** or persons who qualify as an **Economic Empowerment Applicant**.
- **Social Equity Program**
 - Free, statewide technical assistance and training program to create sustainable pathways into the industry for persons most impacted by the War on Drugs.
 - Disproportionate arrests and incarceration from cannabis.
- **Economic Empowerment Applicant**
 - Majority of ownership belongs to persons who have lived in Areas of Disproportionate Impact for 5 or the last 10 years.
- Municipalities with one or more Social Equity Businesses will receive quarterly distributions of 1% of total sales of the SEB.

Cannabis Social Equity Trust Fund

- Provide grants and loans to social equity program participants and economic empowerment priority applicants.
- Marijuana Regulation Fund
 - Receives all revenue derived from marijuana excise tax, application and licensing fees, and industry penalties.
- 15% of revenues in the Marijuana Regulation Fund are now directed to Cannabis Social Equity Trust Fund.

New Social Consumption Law



- Municipalities can authorize on-premises establishments by adopting a city ordinance, town bylaw or by a local voter initiative petition.
 - Municipal election no longer required.
- Operators of Social Consumption Establishment limited to Social Equity Program participants and Certified Economic Empowerment Priority applicants.
- CCC will be amending its current regulation on social consumption establishments.
 - Listening sessions held this summer.
 - Lots of speakers in favor of combustible cannabis.
 - One-time event permits for weddings, etc.
- Current regulation prohibits smoking tobacco and tobacco vaping products inside.

Rationale for Social Consumption Establishments

- Chapter 94G, Section 13: “**No person shall consume marijuana in a public place . . .**”
 - Includes smoking bars and adult-only retail tobacco stores because these places are ***public places***.
- Effectively bans smoking of marijuana everywhere except in a private home and maybe private clubs.
 - The Summit Lodge, Worcester
- **Public housing is smoke-free (HUD).**
 - ***Social equity issue.***



Massachusetts Municipal Lawyers Association (MMLA)

1. Will serving limits be implemented and how will they be enforced?
2. Will search procedures be required to assure patrons are not bringing in their own products?
3. Can municipalities implement compliance checks?
4. Will there be fines for serving persons under 21 or for overserving?
5. Will odor control mechanisms be used to mitigate nuisance complaints from abutters?
6. Will local health inspectors be permitted to inspect edibles?
7. Will edibles be considered “food” and thereby subject to the Food Code?



- Will edibles be expanded to include pizza, pasta, etc.?
- Can patrons package items to go?
- Will establishment have to provide funding for roadside impairment training?

Conundrum

- **Boards of Health can enact local regulations that are stricter than state law (not preemptive).**
- **BUT they cannot be “unreasonably impracticable.”**
 - “. . .subject licensees to unreasonable risk or require such a high investment of risk, money, time or any other resource or asset that a reasonably prudent businessperson would not operate a marijuana establishment.”
 - ***What does this mean?***

Conundrum

- Statewide smokefree workplace law (G.L. c. 270, §22).
 - Amended definition of smoking (2018).
 - Removed “or non-tobacco product designed to be combusted or inhaled.”
 - Only addresses smoking of “tobacco products”.
 - 94G prohibits consumption of marijuana in public places, but not private places.
- Local secondhand smoke law can define “smoking” more broadly.
 - Would prevent “smoking” marijuana, but not edible marijuana.
 - Would a local regulation that defines smoking more broadly be unreasonably impracticable?

Conundrum

- **Federal Controlled Substances Act (CSA).**
 - Illegal at federal level.
 - COLE memo – Obama administration
 - DOJ won't get involved if there is compliance with state law.
 - US Attorney revoked COLE memo – Trump administration.
 - US Attorney Garland – enforcement of CSA relative to marijuana is not a constructive use of federal resources.
- Cash business
 - Safe Banking Act bill pending.
 - Social Justice bill pending.





Law Requires CCC to Amend Current Regulations to Reflect Amended Law.

- Too cumbersome and costly.
- Need to increase diversity.
- CCC approved draft amendments to regulations. (July 2023).
 - Must be done by November 9, 2023.
 - **No proposed social consumption amendments yet.**
- Hearing scheduled for September 8, 2023.

Proposed Amendments

- Opens hiring pool to those with criminal records relative to cannabis.
 - “. . . moving the legacy market to the legal market.”
 - “access to talent that brings new ideas and expertise from the legacy market.”
(Comm’r Ava Conception).
 - Employment is effective tool for reintegration and reducing recidivism.
- Convictions for distribution of a controlled substance to a minor, including cannabis can still be considered by ME employers.
- Municipalities cannot require a ME to make upfront payments as a condition for operating.
- CCC must approve the HCA within 90 days.

Proposed Amendments (cont.)

- Requires host communities to donate at least 3% of each community impact fee to the Social Equity Trust Fund.
- Any city or town can **opt-in** to hosting a social consumption establishment.
 - Through ordinance or bylaw.



Why regulate locally when the CCC already regulates cannabis?

- To enable local enforcement of state regulations.
 - Including compliance checks and inspections.
 - Assuring clean cultivation and distribution.
 - Local food code enforcement.
- To address “head shops” by regulating where “marijuana accessories” can be sold.
- To enable issuance of local Operating Permits.
- To enable local penalties for selling to someone under 21.



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Possible local strategies

- Require compliance with sanitary requirements in 105 CMR 500.000 for onsite preparation and consumption of edible marijuana products (**good manufacturing practices**).
- Require compliance with 105 CMR 590.000 for food service and retail food establishments (**minimum standards for food establishments**).
- Require an **Operating Permit** for all classifications of Marijuana Establishments and ability to suspend permit.
- Incorporate **nuisance law** (c. 111, §§ 122, 123) into local regulation.
 - Addresses odiferous smells from manufacturing, etc.
 - Might address smoking or vaping on decks.

Possible local strategies (cont.)

- Incorporate tobacco control strategies:
 - Prohibit distribution of coupons for cannabis.
 - Prohibit free sampling.
 - Prohibit vending machines.
- Restrict selling of marijuana accessories to marijuana establishments and adult-only retail tobacco stores.
 - Framingham
- Prohibit marijuana establishments from selling alcohol.
 - Licensing issues with CCC.
- Prohibit marijuana establishments from holding a local tobacco sales permit.
- Does health department have the resources to regulation locally?



Hemp-Derived Cannabis Products

The Farm Act (2018)

- Removes **hemp** from the definition of **marijuana** in the Controlled Substances Act (CSA).
- Definition of **hemp**: “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** concentration of not more than 0.3 percent on a dry weight basis.”
- Plain language – all products that are **sourced** from the Cannabis plant, contain not more than 0.3 percent delta-9 THC, and are a derivative, extract, cannabinoid, or one of the other terms in the definition of hemp.



What is Delta-8?*

- One of the more than 100 cannabinoids produced in the Cannabis sativa L. plant.
- An “isomer” of Delta-9.
 - Same atoms but arranged differently.
 - Found naturally, but in **miniscule** amounts.
 - No Delta-8 product is naturally extracted. They are synthetically produced in labs.
- To produce Delta-8 naturally with the necessary isolation and purification required you would need to process about 55,000 kilos (app. **122,000 lbs.**) of hemp to produce one kilo (app. **2.2 lbs.**) of natural Delta-8. Cost would be about **\$22,000,000**.
- “Calling commercial Delta-8 THC a ‘hemp-derived’ or a ‘natural’ product is the equivalent of calling codeine a ‘poppy-derived, natural’ herbal supplement.
- Available in candy, cookies, gummies, vapes, dabs, shatter, smokable hemp sprayed with delta-8 THC extract, distillate, tinctures, and infused beverages.



PRODUCT CATEGORIES

- CBD Products
- Delta-8 Products
- Delta-9 THC Products
- Delta-10 THC Products
- Delta-11 Products
- HHC Products
- HHC-O Products
- HHC-P Products
- Mushroom Supplements
- PHC Products
- THC-B Products
- THC-H Products
- THC-JD Products
- THC-O Products
- THC-P Products
- THC-V Products
- Edibles



★★★★★ 5 Reviews

Nerdy Bears Delta 8 Gummies | 420mg

\$20.00

- 2018 Farm Bill Compliant
- 105mg Delta-8 THC and CBD Per Gummy
- 420mg Delta-8 THC And CBD Per Bag
- Assorted Flavors
- Extremely Potent

Availability: 349 in stock

Purchase now to earn 100 Loyalty Points!

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ADD TO CART

SECURE CHECKOUT POWERED BY: Bolt

Categories: Delta 8 Gummies, Delta-8 Products, Edibles
Brand: Nerdy Bears

What is Delta-8 (continued).



- Josh Swider, CEO of *Infinite CAL*, a highly respected cannabis testing lab, tested more than 2000 samples of Delta-8 products.
 - Only 6 were compliant with the legal limits of Delta-9 TCH (less than 0.3%).
 - Only 2 were pure synthetic Delta-8 THC extract.
 - The rest had added chemicals like acetic acid, bleach, and other unidentified components and solvents.
 - “Many producers making these products cannot carry [on] a chemistry conversation.”
- Delta-8 gets people high.
- *<https://medium.com/seed-stem/i-stand-corrected-the-truth-about-delta-8-thc-e8085725ed9e>

Public Health Concerns

- Health effects have not been researched extensively.
- Psychoactive and impairing.
- Some Delta-9 THC regulated products also contain Delta-8 THC without accurate labelling.
- Not regulated.
- Frequently mislabeled.
- Confused with hemp or CBD products that are not intoxicating.
- Increased reports of severe adverse effects.
- Widely available to youth in stores and online.



Public Health
Prevent. Promote. Protect.



US Court of Appeals for the Ninth Circuit Decision May 2022

- AK Futures LLC, v. Boyd Street Distro, LLC
- Trademark infringement case
 - Cake-branded Delta-8 THC products.
- Question before the Court:
Does federal law prohibit the sale of Delta-8 products.



Yes, it's legal argument.

- The Farm Act used the **concentration of Delta-9** to distinguish between hemp and cannabis.
- The Act defines hemp as a product including **any part** of the Cannabis sativa L. plant, including **all** derivatives, extracts, cannabinoids whether growing or not.
 - As long as the Delta-9 THC concentration is no more than 0.3 percent on a dry weight basis.
- The Act is silent relative to Delta-8 THC.
- Plaintiff describes the product as “a hemp-derived product with less than 0.3% of the psychoactive delta-9 THC compound.”
- Plain meaning of the Act leads to the conclusion that Delta-8 products are legal. **If it has less than 0.3 % of Delta-9, it's hemp-derived and legal.**

No, it's not legal argument.

- The Drug Enforcement Agency (DEA) Delta-8 remains a schedule I substance because of its method of manufacture.
 - “All synthetically derived [THC] remain schedule I controlled substances.” (85 Fed. Reg. at 51,641).
 - Delta-8 products need to be extracted from the cannabis plant and refined through a manufacturing process.
 - It's synthetically derived because it's concentrated and flavored.
- Congressional intent of the Farm Act was to legalize only industrial hemp and not potentially psychoactive substances like Delta-8.

Court's Ruling

AK FUTURES, LLC V. BOYD STREET DISTRO, LLC, 35 F. 4th 682 (2022)

- The language in the Farm Act is “. . . unambiguous and precludes a distinction based on manufacturing method.”
- “Clear statutory text overrides a contrary agency interpretation.”
- “. . . [C]ourts will allow neither ambiguous legislative history, nor speculation about congressional intent to ‘muddy’ clear statutory language.”
- **“Regardless of the wisdom of legalizing delta-8 THC products, this Court will not substitute its own policy judgement for that of Congress... If [the defendant] is correct and Congress inadvertently created a loophole legalizing vaping products containing delta-* THC, then it is for Congress to fix its mistake.”**

Possible local strategies for hemp-derived products.

- Completely unregulated federally.
- No state regulations.
- Age-restrict products.
- Require sales permit.
- Require products be tested by approved independent laboratory.
- Exempt FDA approved medications (Epidiolex).
- Ban self-service displays.
- Ban vending machines.
- **RESOURCES?**

THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS



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FROM: Massachusetts Department of Agricultural Resources, Hemp Program

REGARDING: Delta-8 THC

DATE: December 12, 2022

The Massachusetts Department of Agricultural Resources, Hemp Program (“MDAR”) has jurisdiction over the production and processing of hemp and hemp-derived products as set forth in M.G.L.c. 128, 330 CMR 32.00 and CFR Part 990. Recently, hemp derived-products containing delta-8 THC have been seen in the marketplace.

Delta-8 THC is a psychoactive chemical found in cannabis, which includes both marijuana and hemp. Delta-8 THC can occur naturally in a cannabis plant but is not found in significant quantities. Consequently, concentrated amounts of delta-8 THC (such as those seen in consumer products) are typically manufactured synthetically from hemp-derived CBD.

While the 2018 Farm Bill did remove hemp from the Controlled Substance Act, it did not impact the control status of THC or other synthetically derived cannabinoids, thus delta-8 THC remains a controlled substance regardless of the source. M.G.L.c. 128, Section 117 specifically authorizes MDAR to determine the reasonable commercial uses for hemp. As a result, MDAR has prohibited the sale and manufacture of any hemp-derived delta-8 products within or in the Commonwealth.

Additionally, the United States Food and Drug Administration (“FDA”)¹ has provided information regarding delta-8 and that is not an approved ingredient in any product which falls under the jurisdiction of the Federal Food, Drug, and Cosmetic Act. FDA has also advised that consumers should be aware that products containing delta-8 THC have not been evaluated or approved by the FDA for safe use in any context and may be marketed in ways that put public health risk.

For more information, please visit us online at: www.mass.gov/industrial-hemp-program or email us at mahemp@mass.gov.



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