

# THE NATIONAL LAW REVIEW

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## USDA Clarifies Hemp Production, Use, and Transportation

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In December 2018, Congress approved the Agriculture Improvement Act of 2018 (the “Farm Bill”) which authorized the production of hemp and removed hemp and hemp seeds from the DEA’s schedule of illegal Controlled Substances. After passage of the Farm Bill, questions arose with respect to interstate hemp transportation and who could obtain a license to produce hemp. Adding to the confusion, a number of Midwestern states seized hemp traveling through their borders and charged drivers with felonies for interstate drug trafficking.

In response, on May 28, 2019, the Office of the General Counsel for the United States Department of Agriculture (“USDA”) issued a memorandum with key legal opinions meant to provide guidance and direction to the industry and local governments. The USDA confirmed that (1) hemp is no longer a Schedule 1 controlled substance under the Controlled Substances Act; and (2) following publication of USDA regulations for the new hemp production provisions, states and Indian tribes are prohibited from halting interstate transportation or shipment of hemp lawfully produced (a) under a State or Tribal plan or license issued under the USDA Plan or (b) the 2014 Farm Bill; and (3) a person with state and federal felony convictions relating to a controlled substance would be ineligible to produce hemp under the Agricultural Marketing Act of 1946, unless the person was lawfully growing hemp under the 2014 Farm Bill before December 20, 2018 and their conviction occurred before that date.

Additionally, the memo reaffirmed that hemp could be grown only (1) with a valid USDA-issued license, (2) under a USDA-approved State or Tribal plan, or (3) under the 2014 Farm Bill industrial hemp pilot authority. Authority under the pilot program is set to expire one year after the USDA announces a plan for issuing licenses under the provisions of the 2018 Farm Bill. And the memo reminded its audience that states could pass more stringent laws regarding the production of hemp than the federal government has, such as prohibiting the growing of hemp in that particular State or Tribal territory. The USDA expects to release the much-anticipated hemp production regulations by the end of 2019, which would be just in time for the 2020 planting season.

The memorandum helps clarify the status of interstate hemp transportation and should prevent the seizure of legally cultivated hemp transferred across state lines, which previously happened in states including Idaho and West Virginia. USDA’s position was announced the same week that the Transportation Security Administration confirmed that hemp-derived CBD could be transported on airplanes. Some commentators criticized the portion of the memorandum that deems persons with prior controlled substances convictions ineligible to participate in hemp production because it draws an arguably arbitrary distinction between drug convictions and violent crime convictions, like rape or robbery.

Even with this memorandum, many states and tribes are still upset about the impact the USDA’s delay in promulgating regulations has had on potential revenues from hemp production for the 2019 growing season. So far, seven states and eight tribes have submitted hemp production plans to the USDA, which will not be examined or approved until regulations are first promulgated. Some states and tribes have taken further action. For example, a South Dakota tribe sued the USDA this month alleging that the delay in releasing hemp regulations has curtailed receipt of tribal revenue from hemp production at grave cost to tribal members, putting their health, safety, and welfare at risk. Hopefully, we will have the USDA’s regulations this Fall.

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