

# Litigation Law Alert: CBD Oil and Potential Ramifications in the New York Commercial Trucking Industry

While cannabidiol (CBD) oil is becoming an increasingly common natural alternative to typical medicines for pain and anxiety, commercial drivers and their employers should be cautioned that use of CBD oil — even if derived from hemp — could result in a positive DOT drug screen.

Pursuant to 49 CFR Part 382.303, the Federal Motor Carrier Safety Administration (FMCSA) requires an employer to have drug and alcohol testing performed as soon as practicable on the driver of a commercial motor vehicle in commerce involved in an accident on a public road that results in a fatality or injury to a person requiring medical treatment away from the accident scene. Such accidents can expose employers to significant financial liability.

CBD is one of 60 chemical compounds found exclusively in cannabis plants and the second most heavily concentrated cannabinoid after tetrahydrocannabinol (THC), the compound responsible for the “high” associated with marijuana. Unlike THC, CBD does not have psychoactive attributes, meaning it will NOT get you “high.” CBD can be derived from both hemp and marijuana plants. The difference is that hemp contains high amounts of CBD and low amounts of THC, while marijuana contains high amounts of THC and low amounts of CBD.

On December 12, 2018, Congress passed the 2018 Farm Bill. The bill allows cultivation of industrial hemp in the United States and has raised the demand for CBD hemp oil throughout the country\*. Forecasters project hemp and CBD to be a \$1 billion industry by 2020.

In New York, hemp CBD oil must contain less than 0.3% THC, a trace amount that is not capable of producing a psychoactive effect. Retailers sometimes market this product as “non-psychoactive” or “0% THC.” Hemp with a higher THC concentration will be considered marijuana, which has varying restrictions depending on the state.

From the THC concentration alone, one might assume that hemp-based CBD oil will not show up in a DOT drug panel. That assumption is not necessarily correct, since THC concentration is dependent on both the manufacturing process and how much oil the individual uses. Moreover, use of even hemp-derived CBD oil can be considered a DOT violation since use of any THC is still forbidden for a regulated driver, no matter the source. Medical and recreational marijuana and many CBD oils remain banned.

Further, the manufacturing process of CBD oils is not always precise. Low-quality products might contain more THC than advertised, or THC-containing products can be accidentally mixed with supposed non-THC products. The risk of contamination could increase as cannabis manufacturers and retailers grow and diversify their products to sell nationwide.

More and more states are allowing medical marijuana, and some permit possession and recreational use of marijuana. While the levels of THC in hemp CBD oil are so low that it is unlikely someone would test positive, it does occasionally happen. A positive test following an accident will inevitably be used

against a driver and the employer in litigation. Further, even if a test is negative, the driver can be asked about his/her use of CBD oil of any kind, and if the CBD oil contains even a trace amount of THC—even though it does not have psychoactive effects—it is still prohibited under DOT regulations.

These issues are becoming increasingly more common as the use and availability of CBD oils and recreational marijuana increases. Hancock Estabrook will continue to monitor developments in this emerging area of law and provide updates.

*\*Section 12619 of the Farm Bill removes hemp-derived products from Schedule I status under the Controlled Substances Act, but the bill does not legalize CBD generally. CBD generally remains a Schedule I substance under federal law.*

*Disclaimer: Possessing, using, distributing and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.*

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