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DELTA 8* RETAIL SALES IN MASSACHUSETTS

Amended 4/11/22

From the Massachusetts Department of Agricultural Resources FAQ page on hemp:

Is it legal to manufacture delta-8 THC from hemp?

Because delta-8 THC is not naturally occurring in hemp (except for possible trace amounts), to produce delta-8 THC in commercial quantities it must be derived from hemp synthetically. While the Farm Bill did remove hemp from the Controlled Substances Act, it did not impact the control status of synthetically derived cannabinoids, thus delta-8 THC remains a controlled substance, regardless of the source. As a result, we do not allow hemp-derived delta-8 THC products to be processed or sold in Massachusetts.

<https://www.mass.gov/guides/hemp-in-massachusetts-faqs>

The current "Tobacco Products" definition, found in state law (MGL Ch. 270, §6), the DPH regulation (105 CMR 665.005), and now in the latest municipal sales sample regulation requires either tobacco or nicotine be part of a product that we would consider a "conventional" tobacco product. But for vape products, the definition is extremely broad, and states "regardless of nicotine content" in the definition. With that, delta-8 flavored vape products are covered, but not any delta-8 flavored non-vape products (food, drink, etc.). The other forms of delta-8 are covered by other areas of federal and state law.

The Commonwealth's department most likely to take notice about delta-8 distributors is the Department of Revenue. They have ramped up enforcement since this new state law became effective. Their primary purpose is to make sure the correct tax has been paid. For example, if they inspect a store and find Newport Menthols with a Massachusetts tax stamp, they will leave it right there. Only if there is no tax stamp or an out-of-state tax stamp will they confiscate. The same is true for delta-8 distributors. If it is a vape product, and the excise tax on those vapes has been paid, then they consider the distributor to be in compliance.

The issue then moves beyond DOR and DPH because the federal government still considers this a controlled substance. It then becomes a police issue. Delta-8 is popular because it is a cheap alternative to marijuana. Additionally, it is the state's Department of Agricultural Resources (MDAR) that is assigned to be enforcing hemp products, flavored or not. However, MDAR's enforcement capacity is limited.

In summary:

- Delta-8 flavored vape – tobacco control enforces;

- Delta-8 (hemp) in its entirety - MDAR;
- Delta-8 in its entirety – police departments.

Recommended strategies:

- Provide the retailer with the “Tobacco Product” definition to indicate delta-8 vapes are included;
- Provide the distributor with the “Tobacco Product” definition and a statement to the effect "check with your company's attorney as you may be providing products to retailers that are illegal to sell pursuant to state law".
- Provide the name and address of the retailer to your police department and list what delta-8 products you found that were for sale.

* Applies to any configuration of Delta.