

WEED IS LEGAL NOW, ISN'T IT?:
HOW TO ADVISE CLIENTS ON
THE EDGES OF VIRGINIA'S NEW
CANNABIS LAWS

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TOPICS TO DISCUSS

What cannabis-related scenarios are defense attorneys currently dealing with?

- Discussing Virginia's "Grey Market" of Cannabis: What is going through your mind when walking into a "Hemp" store?
- The current landscape of VA's cannabis laws & refresher on the Controlled Substances Act (CSA)
- Putting it all together: How does VA's Cannabis Control Act intersect with VA Criminal Code 18.2-250 et seq?
- New laws passed July 2023 – what happened there?
- What laws impact growers? Probationers? the "Grey Market"? VA's Hemp industry?
- Specifically understanding lines between the hemp and THC/cannabis rules
- What's next for VA cannabis regulations and what should criminal defense lawyers be aware of?

GETTING STARTED: WALKING INTO A “HEMP” STORE...

A friend recently visited an Arlington, Virginia strip mall where a local vendor had a “pop up” store selling “legal” hemp products. On display were a number of products, including Delta-8 spray on hemp flower, Delta-8 gummy packages, some cannabis flower packaged in Ziploc bags with labels stating “Gelato Runtz 27% THC”, and a number of bright-colored candies with labels that stated “made with synthetic cannabinoids.” The vendor told my friend that his products were “2018 Farm Bill compliant.” My friend made a few purchases 😊 and told me all about the experience. She asked was this all “legit”?

This shopping experience raises a lot questions and concerns for criminal defense attorneys (and probably consumers! ... More on that later...)...

A COUPLE OF POINTS TO BEGIN WITH ...

- Seems pretty obvious that the vendor is at best uniformed, and at worst, maybe looking for trouble by selling *illegal* products in the mall
- The packages seem like a red-flag; don't seem detailed enough for all possible consumers and could be stated that the packages are targeted to underage consumers
- This brings us to the reality that there has been a lot of confusion and risks associated with selling hemp-derived products and the new laws enacted July 2023
- Also, this vendor is selling products labeled as synthetic, as well as flower that appears to be bonafide cannabis flower
- Without a formal marketplace for THC products, seems problematic to sell them at a pop up store

BUT, what exactly is a potential violation of the law here??

Didn't VA legalize cannabis in 2021?! What is going on?!

VA LEGALIZED CANNABIS IN 2021. WHAT DOES THAT MEAN?

Look at the full scope of VA Cannabis Control Act (CCA), VA Code ([§§ 4.1-600 — 4.1-1605](#)) (revised July 2023):

- <https://lis.virginia.gov/cgi-bin/legp604.exe?231+ful+CHAP0794+pdf> (link to most updated version that includes updates from July 2023.. more on that later 😊)

This is a regulatory statute

- This is where you find operating statutes, definitions, and ***clearly stated exceptions to most other controlled substance rules under VA Code (look at 18.2- 250 et seq)***
- The original bill proposed the framework for cultivation, manufacturing, distribution, testing, and retail sale for an adult-use market but those provisions did not pass in subsequent GA sessions.

CANNABIS CONTROL ACT

Code of Virginia

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Title 4.1. Alcoholic Beverage and Cannabis Control

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- [Chapter 14](#) Cannabis Control; Testing; Advertising (§§ 4.1-1400 through 4.1-1402)
- [Chapter 15](#) Virginia Cannabis Equity Business Loan Program and Fund (§§ 4.1-1500 through 4.1-1503)
- [Chapter 16](#) Medical Cannabis Program (§§ 4.1-1600 through 4.1-1605)

CCA VS VA CODE 18.2-250

Code of Virginia

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§ 18.2-250. Possession of controlled substances unlawful.

A. It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act (§ [54.1-3400](#) et seq.).

Upon the prosecution of a person for a violation of this section, ownership or occupancy of premises or vehicle upon or in which a controlled substance was found shall not create a presumption that such person either knowingly or intentionally possessed such controlled substance.

(a) Any person who violates this section with respect to any controlled substance classified in Schedule I or II of the Drug Control Act shall be guilty of a Class 5 felony, except that any person other than an inmate of a penal institution as defined in § [53.1-1](#) or in the custody of an employee thereof who violates this section with respect to a cannabimimetic agent is guilty of a Class 1 misdemeanor.

DEFINITIONS - § 4.1-1600. (EFFECTIVE JANUARY 1, 2024)

DEFINITIONS.

§ 4.1-1600. (Effective January 1, 2024) Definitions.

As used in this chapter, unless the context requires a different meaning:

"Botanical cannabis" means cannabis that is composed wholly of usable cannabis from the same parts of the same chemovar of cannabis plant.

"Cannabis dispensing facility" means a facility that (i) has obtained a permit from the Board pursuant to § 4.1-1602; (ii) is owned, at least in part, by a pharmaceutical processor; (iii) is owned, at least in part, by a pharmaceutical processor; and (iii) dispenses cannabis products produced by a pharmaceutical processor to a patient, his registered agent, or, if such patient is a minor or a vulnerable adult as defined in § 18.2-369, such patient's parent or legal guardian.

"Cannabis oil" means any formulation of processed Cannabis plant extract, which may include industrial hemp extracts, including isolates and distillates, acquired by a pharmaceutical processor pursuant to § 4.1-1602, or a dilution of the resin of the Cannabis plant that contains, except as otherwise provided in this chapter, no more than 10 milligrams of tetrahydrocannabinol per dose. "Cannabis oil" does not include industrial hemp, as defined in § 3.2-4112, that is grown, handled, or processed in compliance with state or federal law, unless it has been grown and processed in the Commonwealth by a registered industrial hemp processor and acquired and formulated by a pharmaceutical processor.

"Cannabis product" means a product that (i) is formulated with cannabis oil or botanical cannabis; (ii) is produced by a pharmaceutical processor and sold by a pharmaceutical processor or cannabis dispensing facility; (iii) is registered with the Board; (iv) contains, except as otherwise provided in this chapter, no more than 10 milligrams of tetrahydrocannabinol per dose; and (v) is compliant with testing requirements.

"Designated caregiver facility" means any hospice or hospice facility licensed pursuant to § 32.1-162.3, or home care organization as defined in § 32.1-162.7 that provides pharmaceutical services or home health services, private provider licensed by the Department of Behavioral Health and Developmental Services pursuant to Article 2 (§ 37.2-403 et seq.) of Chapter 4 of Title 37.2, assisted living facility licensed pursuant to § 63.2-1701,

"Dispense" means the same as that term is defined in § 54.1-3300.

"Pharmaceutical processor" means a facility that (i) has obtained a permit from the Board pursuant to § 4.1-1602 and (ii) cultivates Cannabis plants intended only for the production of cannabis oil, botanical cannabis, and usable cannabis, produces cannabis products, and dispenses cannabis products to a patient pursuant to a written certification, his registered agent, or, if such patient is a minor or a vulnerable adult as defined in § 18.2-369, such patient's parent or legal guardian.

"Pharmacist" means the same as that term is defined in § 54.1-3300.

"Pharmacy intern" means the same as that term is defined in § 54.1-3300.

"Pharmacy technician" means the same as that term is defined in § 54.1-3300.

"Pharmacy technician trainee" means the same as that term is defined in § 54.1-3300.

"Practitioner" means a practitioner of medicine or osteopathy licensed by the Board of Medicine, a physician assistant licensed by the Board of Medicine, or a nurse practitioner jointly licensed by the Boards of Nursing and Medicine.

"Registered agent" means an individual designated by a patient who has been issued a written certification, or, if such patient is a minor or a vulnerable adult as defined in § 18.2-369, designated by such patient's parent or legal guardian, and registered with the Board pursuant to subsection F of § 4.1-1601.

"Usable cannabis" means any cannabis plant material, including seeds, but not (i) resin that has been extracted from any part of the cannabis plant, its seeds, or its resin; (ii) the mature stalks, fiber produced from the stalks, or any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks; or (iii) oil or cake made from the seeds of the plant.

§ 4.1-1602. (EFFECTIVE JANUARY 1, 2024) PERMIT TO OPERATE PHARMACEUTICAL PROCESSOR OR CANNABIS DISPENSING FACILITY.

§ 4.1-1602. (Effective January 1, 2024) Permit to operate pharmaceutical processor or cannabis dispensing facility.

A. No person shall operate a pharmaceutical processor or a cannabis dispensing facility without first obtaining a permit from the Board. The application for such permit shall be made on a form provided by the Authority and signed by a pharmacist who will be in full and actual charge of the pharmaceutical processor's dispensing area or cannabis dispensing facility. The Board shall establish an application fee and other general requirements for such application.

§ 4.1-1603. (EFFECTIVE JANUARY 1, 2024) DISPENSING CANNABIS PRODUCTS; REPORT.

§ 4.1-1603. (Effective January 1, 2024) Dispensing cannabis products; report.

A. A pharmaceutical processor or cannabis dispensing facility shall dispense or deliver cannabis products only in person to (i) a patient who is a Virginia resident or temporarily resides in Virginia and has been issued a valid written certification; (ii) such patient's registered agent; or (iii) if such patient is a minor or a vulnerable adult as defined in § [18.2-369](#), such patient's parent or legal guardian who is a Virginia resident or temporarily resides in Virginia. A companion may accompany a patient into a pharmaceutical processor's dispensing area or cannabis dispensing facility. Prior to the initial dispensing of cannabis products pursuant to each written certification, a pharmacist or pharmacy technician employed by the pharmaceutical processor or cannabis dispensing facility

§ 4.1-1604. (EFFECTIVE JANUARY 1, 2024) CRIMINAL LIABILITY; EXCEPTIONS.

§ 4.1-1604. (Effective January 1, 2024) Criminal liability; exceptions.

No agent or employee of a pharmaceutical processor or cannabis dispensing facility shall be prosecuted under Chapter 11 (§ [4.1-1100](#) et seq.) or § [18.2-248](#), [18.2-248.1](#), or [18.2-250](#) for possession or manufacture of marijuana or for possession, manufacture, or distribution of cannabis products, subject to any civil penalty, denied any right or privilege, or subject to any disciplinary action by a professional licensing board if such agent or employee (i) possessed or manufactured such marijuana for the purposes of producing cannabis products in accordance with the provisions of this chapter and Board regulations or (ii) possessed, manufactured, or distributed such cannabis products that are consistent with generally accepted cannabis industry standards in accordance with the provisions of this chapter and Board regulations.

WHAT ARE THE CURRENT RULES ON POSSESSION?

- Possession for personal use by adults 21+ at their residence
- Adults 21+ can publicly possess up to 1 oz
- Personal cultivation of up to 4 plants per household by adults 21+ at their primary residence
- Participation in medical cannabis program which allows purchase at VA dispensaries
- A person caught with more than 1 ounce but less than 4 ounces can receive a \$25 civil fine

WHAT EXACTLY IS ILLEGAL?

- Marijuana remains illegal at the federal level.
- Controlled Substance Act informs every federal issue in Cannabis law
- Cannabis remains Schedule I substance

CONTROLLED SUBSTANCE ACT

CONTROLLED SUBSTANCE ACT 18 USC §§ 801 ET SEQ

- Regulates and makes illegal (in certain instances) the manufacture, importation, possession, use, and distribution of certain substances
- Places substances on five “schedules” (classifications), with varying qualifications as determined by the DEA and FDA
 - Potential for abuse: How likely is this drug to be abused?
 - Accepted medical use: Is this drug used as a treatment in the United States?
 - Safety and potential for addiction: Is this drug safe? How likely is this drug to cause addiction? What kinds of addiction?
- Schedule I – high potential for abuse, no accepted medical use and not safe to use under medical supervision
 - heroin, MDMA, cannabis, psychedelics
- Schedule II – high potential for abuse, some accepted medical use
 - cocaine, fentanyl, amphetamines
- Schedule III
- Schedule IV
- Schedule V

WHAT IS NOT LEGAL?

- From VA NORML

What is NOT legal?

- X Possession with intent to distribute
- X Public consumption
- X Public possession over 1 ounce
- X Possession or consumption by anyone under 21
- X Possession on school grounds or school bus
- X Consumption in a motor vehicle while being driven (passenger or driver)
- X Open container in a vehicle
- X Sharing or offering in public
- X Selling or purchasing cannabis outside of the medical program
- X Selling or purchasing cannabis seeds or cannabis products
- X Gifting schemes (gift with purchase, public giveaway events, paid entry consumption events)

WHAT LIMITATIONS HAS VIRGINIA PLACED ON POSSESSION AND SALES OF CANNABIS?

- GA Assembly specifically banned gifting marijuana in conjunction with the sale of goods or services.
- The only legal ways to obtain cannabis in Virginia are to grow it yourself, share it with a friend or obtain a prescription for medical marijuana and purchase it from a licensed distributor, (e.g. GLeaf).

"GIFTING" SCHEMES AND § 4.1-1101.1. ADULT SHARING OF MARIJUANA.

§ 4.1-1101.1. Adult sharing of marijuana.

A. For the purposes of this section, "adult sharing" means transferring marijuana between persons who are 21 years of age or older without remuneration. "Adult sharing" does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services.

B. Notwithstanding the provisions of § [18.2-248.1](#), no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or of an equivalent amount of marijuana products.

THE "ILLICIT" MARKET IN VIRGINIA AND BEYOND

What is the impact of the illicit market on VA cannabis industry overall?

- New Frontier projects that \$2.4 billion worth of marijuana will be sold in the state this year, and all but 1% will be sold illegally.
- Unclear if this business model will remain uninterrupted. Police have raided, and authorities have indicted, unlicensed sellers in other parts of the country.
- EDVA prosecutors have stated that they primarily concerned with large-scale, interstate distributors.

WHAT CRIMINAL DEFENSE ATTORNEYS NEED TO KNOW ABOUT VIRGINIA'S LAWS ON GROWING CANNABIS.

Personal cultivation guidelines

- Four plants per household
- Cultivation is only permitted at the individual's primary residence
- Tag each plant with owner's name, driver's license/state ID number, and for personal use
- Plants must not be visible from a public way without the use of aircraft, binoculars, or other optical aids
- Prevent access by those under 21
- Cultivation is permitted indoors or outdoors, but may be restricted in rental housing

§ 4.1-1101. HOME CULTIVATION OF MARIJUANA FOR PERSONAL USE; PENALTIES.

§ 4.1-1101. Home cultivation of marijuana for personal use; penalties.

A. Notwithstanding the provisions of subdivision (c) of § 18.2-248.1, a person 21 years of age or older may cultivate up to four marijuana plants for personal use at their place of residence; however, at no point shall a household contain more than four marijuana plants. For purposes of this section, a "household" means those individuals, whether related or not, who live in the same house or other place of residence.

A person may only cultivate marijuana plants pursuant to this section at such person's main place of residence.

A violation of this subsection shall be punishable as follows:

1. For possession of more than four marijuana plants but no more than 10 marijuana plants, (i) a civil penalty of \$250 for a first offense, (ii) a Class 3 misdemeanor for a second offense, and (iii) a Class 2 misdemeanor for a third and any subsequent offense;
2. For possession of more than 10 but no more than 49 marijuana plants, a Class 1 misdemeanor;
3. For possession of more than 49 but no more than 100 marijuana plants, a Class 6 felony; and
4. For possession of more than 100 marijuana plants, a felony punishable by a term of imprisonment of not less than one year nor more than 10 years or a fine of not more than \$250,000, or both.

§ 4.1-1101. HOME CULTIVATION OF MARIJUANA FOR PERSONAL USE; PENALTIES.

B. A person who cultivates marijuana for personal use pursuant to this section shall:

1. Ensure that no marijuana plant is visible from a public way without the use of aircraft, binoculars, or other optical aids;
2. Take precautions to prevent unauthorized access by persons younger than 21 years of age; and
3. Attach to each marijuana plant a legible tag that includes the person's name, driver's license or identification number, and a notation that the marijuana plant is being grown for personal use as authorized under this section.

Any person who violates this subsection is subject to a civil penalty of no more than \$25. The penalty for any violations of this section by an adult shall be prepayable according to the procedures in § [16.1-69.40:2](#).

C. A person shall not manufacture marijuana concentrate from home-cultivated marijuana. The owner of a property or parcel or tract of land may not intentionally or knowingly allow another person to manufacture marijuana concentrate from home-cultivated marijuana within or on that property or land.

CASE ISSUE: WHAT IS DIFFERENCE BETWEEN POSSESSION OF FLOWER VS. EDIBLES AND CONCENTRATES?

- Up to one ounce of cannabis *flower* may be possessed in public by adults 21+.
- Until the Cannabis Control Authority promulgates equivalent possession amounts for edibles and concentrates, all cannabis products are defined as marijuana.
- Look at § 4.1-600. Definitions.

§ 4.1-600. DEFINITION OF MARIJUANA.

"Marijuana" means any part of a plant of the genus *Cannabis*, whether growing or not, its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, its resin, or any extract containing one or more cannabinoids. "Marijuana" does not include (i) the mature stalks of such plant, fiber produced from such stalk, or oil or cake made from the seed of such plant, unless such stalks, fiber, oil, or cake is combined with other parts of plants of the genus *Cannabis*; (ii) industrial hemp, as defined in § 3.2-4112, that is possessed by a person registered pursuant to subsection A of § 3.2-4115 or his agent; (iii) industrial hemp, as defined in § 3.2-4112, that is possessed by a person who holds a hemp producer license issued by the U.S. Department of Agriculture pursuant to 7 C.F.R. Part 990; (iv) a hemp product, as defined in § 3.2-4112; (v) an industrial hemp extract, as defined in § 3.2-5145.1; or (vi) any substance containing a tetrahydrocannabinol isomer, ester, ether, salt, or salts of such isomer, ester, or ether that has been placed by the Board of Pharmacy into one of the schedules set forth in the Drug Control Act (§ 54.1-3400 et seq.) pursuant to § 54.1-3443.

ANOTHER CASE ISSUE: PRODUCT LIABILITY

- Civil liability for any damages incurred due to illegal sales of cannabis
- So, after you resolve any criminal charges, need to look at any civil liability

VA HEMP LAWS – UNDERSTANDING 2023 HEMP PRODUCT REGULATIONS THAT TOOK EFFECT JULY 1, 2023

- GA made several changes to the VA Hemp industry as of July 1, 2023
- Tightened requirements for hemp-derived products
 - What are hemp-derived products?!
- A lot of the recent legislative action is about limiting the amount of THC that is naturally found in hemp-derived products
- Why? Because THC is the psychoactive component of all cannabis products, and the basis for prohibition at every level
- If a product has a questionable amount of THC, it makes it more valuable and more susceptible to prohibition

WHAT ARE THE CHANGES?

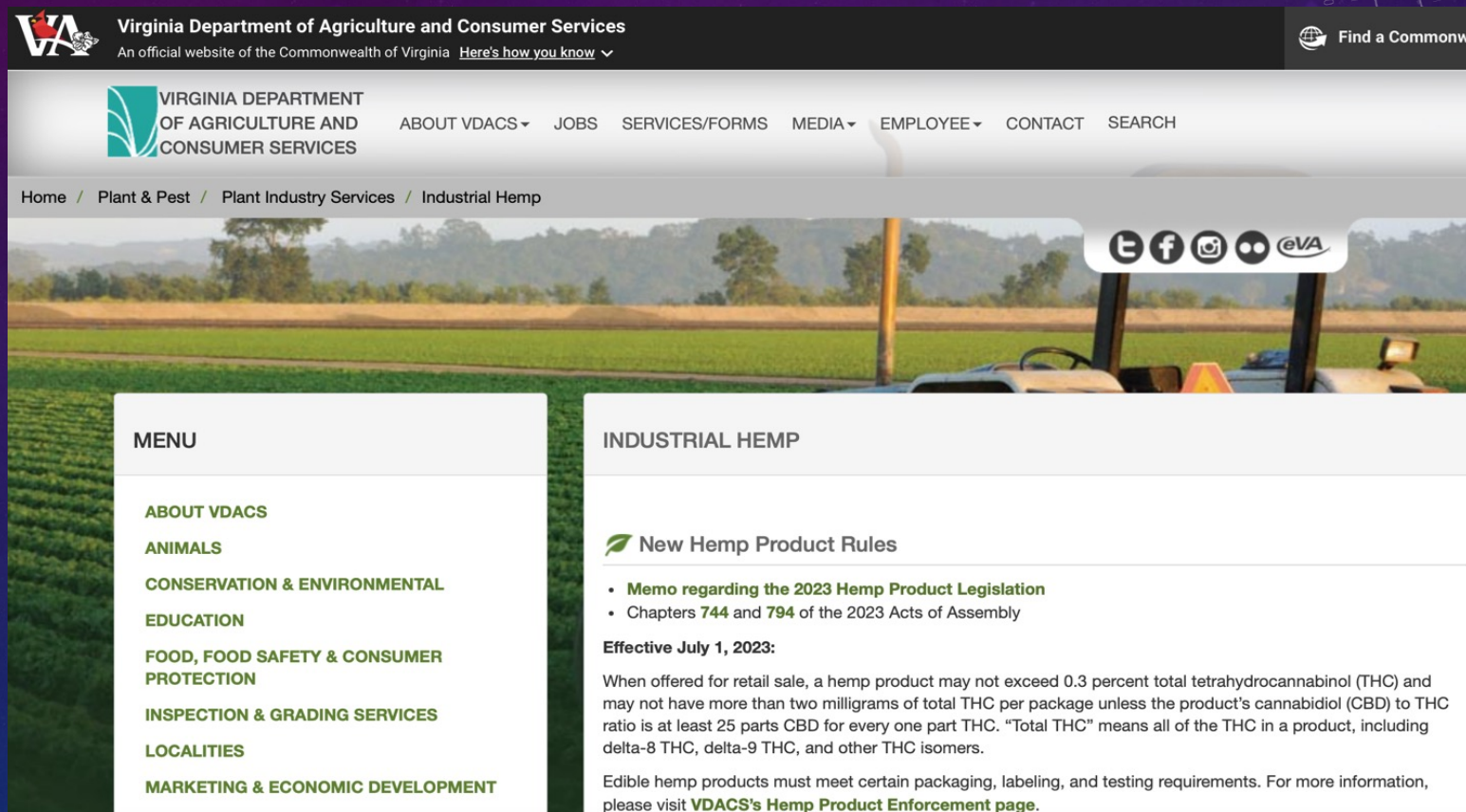
- Products may not have higher than 2 milligrams of total THC per package
- Products may exceed the 2 mg limit if the product adheres to a 25:1 CBD to THC ratio
- What does this mean?!
- Substances containing a "synthetic derivative" of THC are prohibited
- Edible hemp products must be in child-resistant packaging

SOME IMPORTANT UPDATES AND DEFINITIONS TO KNOW:

1. *Edible Hemp Product*: Any hemp product that contains an industrial hemp extract and is intended to be consumed orally.
2. *Hemp Product*: A product that contains industrial hemp and has completed all processing stages needed for the product. When offered for retail sale, it must have a total tetrahydrocannabinol (THC) concentration of no greater than 0.3 percent and either no more than two milligrams of total THC per package or an amount of cannabidiol (CBD) that is at least 25 times greater than the amount of total THC per package.
3. *Hemp Product Intended for Smoking*: A hemp product intended to be consumed by inhalation.
4. *Industrial Hemp Extract*: An extract of industrial hemp that is intended for human consumption and contains a total THC concentration of no greater than 0.3 percent. When offered for retail sale, it must have either no more than two milligrams of total THC per package or an amount of CBD that is at least 25 times greater than the amount of total THC per package.
5. *Regulated Hemp Product*: A hemp product intended for smoking or an edible hemp product.
6. *Food and Drink Law*: The set of regulations governing the manufacturing and sale of products that contain industrial hemp extracts intended for human consumption. This includes requirements such as contaminant testing, batch identification, and labeling.
7. *Total THC*: Refers to all forms of tetrahydrocannabinol (THC) present in a product, including delta-8, delta-9 THC, and any other forms of THC.
8. *Child-Resistant Packaging*: Packaging or containers designed to be significantly difficult for a typical child under five years of age to open but not significantly difficult for a typical adult to open and reseal.
9. *Certificate of Analysis*: A document produced by an independent laboratory accredited to ISO/IEC 17025, stating the THC concentration of the hemp product or the batch from which it originates.
10. *Virginia Consumer Protection Act (VCPA)*: A set of regulations governing the sale of substances intended for human consumption that contain THC, protecting consumers from deceptive practices.
11. *Regulated Hemp Product Retail Facility Registration*: A registration required for retailers selling hemp products intended for smoking or edibles. Each location offering these products must have this registration.

GUIDE CAN BE FOUND AT VA DEPT OF AG AND CONSUMER SERVICES

[HTTPS://WWW.VDACS.VIRGINIA.GOV/PLANT-INDUSTRY-SERVICES-HEMP.SHTML](https://www.vdacs.virginia.gov/plant-industry-services-hemp.shtml)



The screenshot shows the website for the Virginia Department of Agriculture and Consumer Services (VDACS). The header includes the VA logo, the department name, and a search bar. The main navigation menu lists: ABOUT VDACS, JOBS, SERVICES/FORMS, MEDIA, EMPLOYEE, CONTACT, and SEARCH. The breadcrumb trail reads: Home / Plant & Pest / Plant Industry Services / Industrial Hemp. A social media bar contains icons for Twitter, Facebook, Instagram, YouTube, and eVA. The page is divided into two columns. The left column is a 'MENU' with links to: ABOUT VDACS, ANIMALS, CONSERVATION & ENVIRONMENTAL, EDUCATION, FOOD, FOOD SAFETY & CONSUMER PROTECTION, INSPECTION & GRADING SERVICES, LOCALITIES, and MARKETING & ECONOMIC DEVELOPMENT. The right column is titled 'INDUSTRIAL HEMP' and features a section for 'New Hemp Product Rules' with a leaf icon. This section includes a list of links: 'Memo regarding the 2023 Hemp Product Legislation' and 'Chapters 744 and 794 of the 2023 Acts of Assembly'. Below the list, it states 'Effective July 1, 2023:' and provides a paragraph of text: 'When offered for retail sale, a hemp product may not exceed 0.3 percent total tetrahydrocannabinol (THC) and may not have more than two milligrams of total THC per package unless the product's cannabidiol (CBD) to THC ratio is at least 25 parts CBD for every one part THC. "Total THC" means all of the THC in a product, including delta-8 THC, delta-9 THC, and other THC isomers.' The final paragraph states: 'Edible hemp products must meet certain packaging, labeling, and testing requirements. For more information, please visit [VDACS's Hemp Product Enforcement page](#).'

WHAT'S GOING TO HAPPEN NEXT?!

- Executive office seems to have little interest in moving towards a regulated adult market
- Which means tighter rules for the VA hemp industry, while targeting “unsafe” products and the “unregulated” marketplace
- Even less predictability on criminal prosecutions