



PUNITIVE/ADMINISTRATIVE ACTION FOR USE OF DELTA-8 TETRAHYDROCANNABINOL

BLUF

Hemp-derived Δ 8-THC is not a controlled substance, but its use is nevertheless an orders violation and may subject a Marine or Sailor to adverse punitive or administrative action, including mandatory separation processing.

Background

Both marijuana and tetrahydrocannabinols (THC) are listed under Schedule I of the Controlled Substances Act (CSA)¹ and are included in the scope of Article 112a, UCMJ.² However, Congress recently excepted hemp from the definition of marijuana and excepted hemp-derived THCs from Schedule I of the CSA.³ One such hemp-derived THC is delta-8 THC (Δ 8-THC), which has a similar pharmacological effect as that of delta-9 THC (Δ 9-THC) (the form found in marijuana).⁴ The Department of the Navy now screens for both Δ 8-THC and Δ 9-THC in standard urinalysis tests. This Practice Advisory addresses the appropriate response to use of Δ 8-THC.

Under the CSA, as amended, the scheduling of marijuana excludes hemp⁵ and the scheduling of THCs excludes “[THCs] in hemp.”⁶ Hemp is defined as “the plant *Cannabis sativa* L. . . . including . . . all derivatives, [etc.], with a [Δ 9-THC] concentration of not more than 0.3 percent on a dry weight basis.”⁷ Appropriate regulatory changes were published,⁸ and the Drug Enforcement Administration (DEA) has issued interpretive guidance that “cannabinoids extracted from the cannabis plant that have a Δ 9-THC concentration of not more than 0.3 percent . . . are not controlled under the CSA.”⁹ Because hemp does not qualify as marijuana and hemp-derived Δ 8-THC does not qualify as a controlled THC, use of hemp or hemp-derived Δ 8-THC does **not** constitute a violation of Article 112a, UCMJ.

¹ 21 U.S.C. § 812.

² 10 U.S.C. § 912a.

³ See Agricultural Improvement Act of 2018, P.L. 115-334, 132 Stat. 5018.

⁴ *AK Futures v. Boyd St. Distro*, 35 F.4th 682, 686 (9th Cir. 2022)

⁵ 21 U.S.C. § 802(16)(B)(i) (2022).

⁶ 21 U.S.C. § 812, Schedule I, subsection (c)(17) (2022).

⁷ 7 U.S.C. § 1639o(1) (2022).

⁸ 21 CFR § 1308.11(d)(31)(ii) (2022).

⁹ Letter of Terrence L. Boos, Drug & Chem. Evaluation Section Chief, Drug Enf't Admin., U.S. Dep't of Justice, to Donna C. Yeatman, Exec. Sec'y, Ala. Bd. of Pharmacy (Sept. 15, 2021), <https://albop.com/ooodoardu/2021/10/ALBOP-synthetic-delta8-THC-21-7520-signed.pdf>. This determination is entitled to substantial deference. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Skidmore v. Swift*, 323 U.S. 134 (1944). This is especially true where it is “apparent . . . that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute” *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001). The DEA operates under the aegis of the Attorney General’s explicitly delegable statutory rulemaking authority regarding the Controlled Substances Act. 21 U.S.C. § 871; 28 CFR, Chapter I, Part 0, Subpart R. Federal appellate courts have treated Δ 8-THC accordingly. See *AK Futures v. Boyd St. Distro*, 35 F.4th 682 (9th Cir. 2022).

Use of Hemp-Derived Δ8-THC is Prohibited by Lawful General Order

Addressing the change in the law, the Secretary of the Navy issued ALNAV 074/20, which **prohibits** Sailors and Marines “from using any product made or derived from hemp . . . including CBD, regardless of the product's THC concentration . . . and regardless of whether such product may lawfully be bought, sold, and used under the law applicable to civilians.”¹⁰ Use of hemp or hemp-derived Δ8-THC violates this general order and is therefore a violation of Article 92, UCMJ.

Mandatory Separation Processing Still Applies

Separation processing is mandatory for officers and enlisted personnel “for illegal, wrongful, or improper use . . . of any . . . dangerous or illicit drug or other forms of substance abuse.”¹¹ Under ALNAV 074/20, hemp-derived Δ8-THC products remain prohibited (and therefore illicit¹²) for Marines and sailors. A substantiated incident of knowing use of hemp-derived Δ8-THC products therefore still requires mandatory processing for administrative separation, either by notification procedures or via an administrative board. Whether for officers or enlisted members, mandatory processing does not mean mandatory separation.¹³ That decision continues to rest with administrative boards (where applicable) and with separation authorities.

There are no Gun Control Act Implications or Notification Requirements

The Gun Control Act prohibits firearm possession by any person who is an “unlawful user of or addicted to any controlled substance.”¹⁴ Because hemp-derived Δ8-THC is not a controlled substance, commands should not issue NAVMC 118(11) counselings or any other documentation advising such service members (or requiring such service members to acknowledge) that they are prohibited from purchasing or possessing firearms (unless another, independent Gun Control Act prohibition applies, such as a general court-martial conviction resulting in a dishonorable discharge).

Conclusion

Use of hemp-derived Δ8-THC is not prohibited by federal law under the CSA. However, it violates a lawful general order. In cases with evidence of use of hemp or Δ8-THC, but without clear evidence of use of a controlled substance, practitioners should allege a violation of Article 92, UCMJ, specifically for violation of ALNAV 074/20. In cases where practitioners anticipate that evidence may be admitted that the Δ8-THC was synthetic or otherwise not hemp-derived, charging or notifying in the alternative may be appropriate.

Example language may be found in the Appendix. In cases where correction of prior administrative actions may be appropriate, please refer to MCO 5800.16-V-14, para. 011104; Manual for Courts-Martial, Part V, para. 7.f.(1); and SECNAV Instruction 5420.193. Please direct questions about this Practice Advisory to the JMJ Deputy Branch Head at (703) 693-9299.

¹⁰ ALNAV 074/20 of 24 Jul 20, superseding ALNAV 069/20 of 2 Jul 20 and ALNAV 057/19 of 7 Aug 19.

¹¹ MCO 1900.16 W/CH 2, Encl (1), para. 4103.1, 6210.5.a; *see also* SECNAVINST 1920.6D, Encl (6), para. 1.b.(2).

¹² The term “illicit” is defined as “Unlawful; illegal; prohibited or forbidden by law.” Ballantine’s Law Dictionary (online ed., 2023).

¹³ MCO 1900.16 W/CH 2, Encl (1), para. 6001.3; SECNAVINST 1920.6D, Encl (7), para. 11.b.

¹⁴ 18 U.S.C. § 922(g)(3).

APPENDIX

Sample Enlisted Administrative Separation Notification Language

General Basis: Misconduct.

Specific Basis: Commission of a Serious Offense.

Factual Basis: Violation of Article 92, UCMJ (Failure to Obey Order or Regulation). In that Private First Class Ewer. A. Marine, U.S. Marine Corps [Reserve], did, at or near [City, State], on or about [DD Month YYYY], violate a lawful general order which was his/her duty to obey, to wit: paragraph 5.a., ALNAV 074/20, by wrongfully using a product derived from hemp.

Sample Enlisted NAVMC 118(11) Counseling Language

Counseled this date pursuant to paragraph 6105 of MCO 1900.16 CH 2 concerning the following deficiencies: Violation of Article 92, UCMJ (Failure to Obey General Order). Specifically, in that you did, at or near [Marine Corps Base Camp ...][Marine Corps Air Station ...][City, State], on or about [DD Month YYYY], violate a lawful general order, which was your duty to obey, to wit: paragraph 5.a., ALNAV 074/20, by wrongfully using a product derived from hemp. On [DD Month YYYY], your urinalysis sample was reported as presumptive positive for delta-8 THC.

[For the above deficiencies, you were the subject of [battalion][company][regimental] nonjudicial punishment on [DD Month YYYY].]

Specific recommendations for corrective action are to refrain from using prohibited substances, including but not limited to hemp and CBD, and to seek assistance, which is available through the chain of command and the Substance Abuse Control Officer. I understand that failure to complete my enlistment contract with an honorable characterization of service may preclude my eligibility for benefits from the Department of Veterans Affairs or other organizations and have an adverse effect on future civilian employment. I understand that I am being processed for the following judicial or adverse administrative action: involuntary administrative separation.

I was advised that within 5 working days after acknowledging this entry I may submit a written rebuttal which will be filed in the electronic service record. I choose to ____ /not to ____ make such a statement.