

This Drug Gets You High, and Is Legal (maybe) Across the County.  
Matt Richtel  
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Hemp buds at the Hometown Hero CBD manufacturing facility in Austin, Texas.Credit...Tamir Kalifa for The New York Times

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By **Matt Richtel**

- Feb. 27, 2021

Texas has one of the most restrictive medical marijuana laws in the country, with sales allowed only by prescription for a handful of conditions.

That hasn't stopped Lukas Gilkey, chief executive of [Hometown Hero CBD](#), based in Austin, Texas. His company sells joints, blunts, gummy bears, vaping devices and tinctures that offer a recreational high. In fact, business is booming online as well, where he sells to many people in other states with strict marijuana laws.

But Mr. Gilkey says that he is no outlaw, and that he's not selling marijuana, just a close relation. He's offering products with a chemical compound — Delta-8-THC — extracted from hemp. It is only slightly chemically different from Delta 9, which is the main psychoactive ingredient in marijuana.

And that small distinction, it turns out, may make a big difference in the eyes of the law. Under federal law, psychoactive Delta 9 is explicitly outlawed. But Delta-8-THC from hemp is not, a loophole that some entrepreneurs say allows them to sell it in many states where hemp possession is legal. The number of customers "coming into Delta 8 is staggering," Mr. Gilkey said.

"You have a drug that essentially gets you high, but is fully legal," he added. "The whole thing is comical."

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The rise of Delta 8 is a case study in how industrious cannabis entrepreneurs are pulling apart hemp and marijuana to create myriad new product lines with different marketing angles. They are building brands from a variety of potencies, flavors and strains of THC, the intoxicating substance in cannabis, and of CBD, the nonintoxicating compound that is often sold as a health product.

With Delta 8, entrepreneurs also believe they have found a way to take advantage of the country's fractured and convoluted laws on recreational marijuana use. It's not quite that simple, though. Federal agencies, including the Drug Enforcement Administration, are still considering their options for enforcement and regulation.

"Dealing in any way with Delta-8 THC is not without significant legal risk," said Alex Buscher, a Colorado lawyer who specializes in cannabis law.



Image



Containers of Delta 8 buds ready for distribution on the shelves of Hometown Hero CBD.Credit...Tamir Kalifa for The New York Times





Image



Lukas Gilkey, chief executive of Hometown Hero, has paid lawyers tens of thousands of dollars to parse drug regulations. Credit...Tamir Kalifa for The New York Times

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Image





Sandi Griffin, left, and Melissa Campbell weigh and package Delta 8 products at Hometown Hero. Credit... Tamir Kalifa for The New York Times



Image



Mixing Delta 8 at Hometown Hero.Credit...Tamir Kalifa for The New York Times

Still, experts in the cannabis industry said Delta 8 sales had indeed exploded. Delta 8 is “the fastest growing segment” of products derived from hemp, said Ian Laird, chief financial officer of New Leaf Data Services, which tracks the hemp and cannabis markets. He estimated consumer sales of at least \$10 million, adding, “Delta 8 has really come out of nowhere over the past year.”

Marijuana and hemp are essentially the same plant, but marijuana has higher concentrations of Delta-9 THC — and, as a source of intoxication, it has been a main focus of entrepreneurs, as well as state and federal lawmakers. Delta 8, if discussed at all, was an esoteric, less potent byproduct of both plants.

That changed with the [2018 Farm Bill](#), an enormous piece of federal legislation that, among other things, [legalized widespread hemp farming and distribution](#). The law also specifically allowed the sale of the plant’s byproducts — the only exception was Delta 9 with a high-enough level of THC to define it as marijuana.

Because the legislation made no mention of Delta 8, entrepreneurs leapt into the void and began extracting and packaging it as a legal edible and smokable alternative.

Precisely what kind of high Delta 8 produces depends on whom you ask. Some think of it as “marijuana light,” while others “are pitching it as pain relief with less psychoactivity,” said David Downs, senior content editor for [Leafly.com](#), a popular source of news and information about cannabis.



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Either way, Delta 8 has become “extremely ascendant,” Mr. Downs said, reflecting what he calls “prohibition downfall interregnum,” where consumer demand and entrepreneurial activity are exploiting the holes in rapidly evolving and fractured law.





Image



Joe Salome, owner of the Georgia Hemp Company, at his company's store in Decatur, Ga.Credit...Johnathon Kelso for The New York Times



Image





Delta 8 cartridges at Georgia Hemp Company. Credit...Johnathon Kelso for The New York Times





Image



Georgia Hemp Company started selling Delta 8 products, like gummies, in October. Credit... Johnathon Kelso for The New York Times



Image





Mr. Salome said he doesn't need to buy a state license because he feels protected by the 2018 farm bill. Credit... Johnathon Kelso for The New York Times

“We’re getting reports that you can walk into a truck stop in prohibition states like Georgia where you’re looking at what looks like a cannabis bud in a jar,” Mr. Downs said. The bud is hemp sprayed with high-concentration Delta 8 oil.

Joe Salome owns the [Georgia Hemp Company](#), which in October started selling Delta 8 locally and shipping nationally — about 25 orders a day, he said. “It’s taken off tremendously.”

His website heralds Delta 8 as “very similar to its psychoactive brother THC,” giving users the same relief from stress and inflammation, “without the same anxiety-producing high that some can experience with THC.”

Mr. Salome said that he didn’t need to buy an expensive state license to sell medical marijuana because he felt protected by the farm bill.

“It’s all right there,” he said, explaining it’s now legal to “sell all parts of the plant.”

The legal landscape is contradictory at best. Many states are more permissive than the federal government, which under the Controlled Substances Act considers marijuana an illegal and highly dangerous drug. In [36 states](#), marijuana is legal for [medicinal use](#). In [14 states](#), it’s legal for recreational use.

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But in a flip, under the farm bill, the federal government opened the door for the sale of hemp products even in states that haven’t legalized the recreational use of marijuana. Only a few states, like Idaho, ban hemp altogether, but in others, entrepreneurs of Delta 8 are finding a receptive market.



Image





Bottles for Delta 8 vapor products in the clean room of Hometown Hero in Austin.Credit...Tamir Kalifa for The New York Times



Image





Mark Ortiz, of Hometown Hero, packages tincture. Credit... Tamir Kalifa for The New York Times



Image



Packaging Delta 8 buds. While Delta 9 THC is explicitly outlawed, Delta 8 is not. Credit... Tamir Kalifa for The New York Times





Image



The manufacturing facility at Hometown Hero. Delta 8 may have “started as a loophole,” said Mr. Gilkey, “but it may be here to stay.” Credit...Tamir Kalifa for The New York Times

Lawyers for Mr. Gilkey believe the farm bill is on their side. “Delta 8, if it is derived from hemp, or extracted from hemp, that is considered hemp,” said Andrea Steel, co-chair of the cannabis business group at Coats Rose, a Houston law firm. She emphasized that the legality also depends on whether Delta 9 exceeds legal limits.

Ms. Steel noted that when making a Delta 8 product, it can be hard, if not impossible, to filter out all the Delta 9 from hemp.

“Adding another wrinkle,” she said, “a lot of labs do not have the capability of delineating between Delta 8 and Delta 9.”

Lisa Pittman, the other co-chair of the cannabis business group at Coats Rose, said that in her reading of the issue, the authors of the farm bill may not have contemplated the consequences of the law.

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Ms. Pittman said that the ultimate question of a product’s legality may be dependent on other factors, including how the Delta 8 is produced and sourced. Specifically, the



lawyers said, the D.E.A.'s rule on the issue seems to suggest that Delta 8 could be illegal if it is made "synthetically" rather than derived organically.

There are currently lawsuits pending over interpretation of the D.E.A. rule.

Mr. Gilkey said he had paid upward of \$50,000 in legal fees to make sure that he will not run afoul of the law. A veteran of the U.S. Coast Guard, Mr. Gilkey worked in a counternarcotics unit on boats out of San Diego. He "saw some really tough stuff," he said, and "wasn't happy about the war on drugs."

He wound up running a business in Austin that sold e-liquid for vaping devices. Then in 2019, he started his current business focused on selling CBD. Late last spring, he said, he started getting calls from customers about Delta 8.

"I said, please explain to me what that is," he recalled. Mr. Gilkey, whose company supplies other retail shops around the country with products, saw a huge opportunity. After checking with the lawyers, he started full-scale packaging gummies and vape pens and other products using Delta 8 he said he got from a major hemp supplier.

"It's about to go mainstream," he said. And it's just the beginning. "There's a Delta 10 in the works."





Image



The Georgia Hemp Company sells locally, like here at its store in Decatur, but also online. Credit...Johnathon Kelso for The New York Times

Matt Richtel is a best-selling author and Pulitzer Prize-winning reporter based in San Francisco. He joined The Times staff in 2000, and his work has focused on science, technology, business and narrative-driven storytelling around these issues. [@mrichtel](#)

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