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Taxing based on THC: What it means for concentrates

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Stick around the cannabis industry long enough and you'll hear someone say "states are the laboratories of democracy." It's an idea that was first published by U.S. Supreme Court Justice Louis Brandeis in 1932, when Brandeis wrote that states have the ability to "try novel social and economic experiments without risk to the rest of the country," and it's a political idea that the cannabis industry has certainly embodied.

Since California broke with the federal government in 1996 to legalize medical marijuana, [every state in the union except Idaho](https://cannabisnow.com/only-1-state-in-the-us-doesnt-have-a-medical-marijuana-law-idaho/) has experimented with a different way to regulate cannabis, with varying levels of success. But today, one particularly interesting economic experiment is playing out in Illinois. The state is going to tax cannabis products based upon their THC percentage, not upon their weight, as most states with adult-use cannabis do today.

On June 25, [Illinois became the first state to legalize](https://cannabisnow.com/illinois-becomes-11th-state-to-legalize-cannabis/) an adult-use cannabis marketplace through the legislature. [The law that Gov. J.B. Pritzker signed](http://www.ilga.gov/legislation/101/SB/10100SB0007sam001.htm), which will go into effect on Jan. 1, 2020, puts forth a baseline tax structure for recreational cannabis in the state with three tiers.

Cannabis products with less than 35% THC will face a 10% excise tax. Cannabis products with more than 35% THC will face a 25% excise tax.

Meanwhile, cannabis-infused products, such as **edibles** (<https://cannabisnow.com/category/cannabis/edibles/>), will be taxed at 20%, regardless of their THC percentage. The vast majority of cannabis flower on the market today falls below that 35% THC line, while cannabis concentrates usually test at above 50% THC.

This means that a cannabis consumer in Illinois looking to purchase some **artisan ice-water hash** (<https://cannabisnow.com/artisan-hash-frenchy-cannoli/>), a delicious **terp sauce** (<https://cannabisnow.com/terp-sauce/>) or a **vape cartridge** (<https://cannabisnow.com/cannabis-cartridges-have-a-heavy-metal-problem-it-is-worse-than-reported/>) will pay 15% more in excise tax (not including any state or city sales taxes) than someone purchasing flower.

“We don’t have any examples of other places that have tried this, but it’s certainly not an unusual idea — you pay more for top shelf,” says Chris Lindsey, the senior legislative council for the Marijuana Policy Project. Lindsey worked on drafting the adult-use cannabis legislation that passed in Illinois, in collaboration with lawmakers and special interest groups.

Lindsey told Cannabis Now that the THC tax structure was proposed by one of the groups that “wasn’t explicitly opposed to legalization, but wanted to make sure that they were near the heart of the conversation, especially about issues of public health.”

“They came in to the discussion with an idea that the state should cap the amount of THC in raw cannabis, and of course, that wasn’t workable. We want to displace the underground market, and that’s setting yourself up for failure,” Lindsey says. “But then — and I don’t remember exactly who had the specific idea — the idea was just sort of floated the idea that we could do something similar to alcohol and tax it at higher rates for those who want to purchase higher amounts.”

Should Cannabis Be Regulated Like Alcohol?

Today, **Illinois levies** (<https://www2.illinois.gov/rev/research/taxrates/Pages/excise.aspx>) an excise tax of 23 cents per gallon on beer (or any alcohol between 0.5 and 7% alcohol), \$1.39 per gallon on wine (or any alcohol between 7 and 20% alcohol), and \$8.55 per gallon on liquor (or anything with more than 20% alcohol).

That means that a similar tier system for cannabis based on THC percentages should be nothing new to consumers.

But while Oklahoma-based cannabis attorney Sarah Lee Gossett Parrish says that she does think cannabis should be taxed similarly to alcohol, she cautioned that it might place too much of a burden on a state’s testing technology.

“Looking at **the federal cannabis legalization legislation S. 420 that’s pending** (<https://cannabisnow.com/the-marijuana-legalization-congresss-first-bill-is-s420/>), it would treat cannabis like alcohol, which I think is a good plan as far as having a structure to regulate and tax it,” Parrish says.

“Unfortunately, our testing technology isn’t quite specific enough right now to be basing a law off of the results.”

Labs in states **such as Oregon** (<https://www.analyticalcannabis.com/articles/major-shortcomings-revealed-at-oregons-cannabis-testing-labs-311483>) and **Washington** (<https://www.leafly.com/news/industry/can-washington-fix-its-broken-cannabis-lab-testing-system>) have been plagued with problems in their lab testing industries, though it does appear that determining the 35% THC barrier will be a less intensive testing requirement than the full pesticide and heavy metal contaminants tests that states are struggling with today.

Another key detail that separates cannabis from alcohol is the complexity of the plant's cannabinoids and the way they interact with the human body. By focusing only on the THC percentage (like the ethanol percentage in alcohol) in creating the tax, Illinois regulators could be creating a loophole for concentrate consumers to start purchasing products to get high that aren't THC, like **delta-8 extracts** (<https://cannabisnow.com/atomic-bonds-the-increasing-emergence-of-delta-8-thc/>).

But Lindsey says the Illinois tax structure is written to be flexible, and the state is planning and prepared to alter as the industry matures.

"Right now, no one's talking about other cannabinoids, except CBD," Lindsey says. "The way it would happen is there's another popular cannabinoid that comes along, and we hear about it constantly, or we hear about another cannabinoid that causes intoxication, and that's where we'd see a quick response. They'd fill that gap. Right now, there's no conversation around delta-8 in Illinois."

What Does the THC Tax Mean for Medical Marijuana Patients?

While Parrish expressed concern that taxing cannabis based upon THC percentages could put an undue burden on medical marijuana patients who turn to high-potency products for things like relief from chemotherapy-induced nausea, Lindsey says that Illinois's THC tax applied only to the recreational cannabis market.

"Patients are not going to pay any additional tax," Lindsey says. "Medical marijuana products fall into the same bucket as pharmaceuticals, which is taxed at 2%, so that won't change. This [THC tax] is only for the adult non-medical market — though, of course, some of those people are using the adult-use cannabis market for medical reasons."

Lindsey says that if the THC tax model takes off, the Marijuana Policy Project would lobby other states to make sure they weren't using it as an excuse to price gouge patients.

Will the THC Tax Catch On Elsewhere?

Since Illinois passed its adult-use cannabis law, there's been very little focus on this new tax structure. Most of the attention has been on **the promise of the state's equity program** (<https://cannabisnow.com/illinois-equity-legalization/>) and the hundreds of thousands of people who stand to have their cannabis possession records expunged.

"I thought this new tax structure was going to make a big splash, but that was before everyone got excited about expungement and we did the math about how many people's records would be impacted," says Lindsey. "At the time, I predicted this was something we'd see in other places. But now, it's too early to know if that's really going to happen."

For now, the only other jurisdiction with a similar tax structure is Canada. In Canada, edibles, extracts and topicals **face an excise tax** (<https://www.leafly.com/news/politics/canadas-2019-budget-thc-based-taxation-excise-tax-medical-cannabis>) at a rate of one cent per milligram of THC.

Lindsey says that it's too early to tell if other jurisdictions will think that the THC tax structure for Illinois is a good idea and follow along. However, he thinks it's important to note the Illinois program was built with so much flexibility because the lawmakers were not beholden to a voter initiative that legalized cannabis, which is what every other state with adult-use cannabis has faced in the past. (Vermont **legalized adult-use cannabis through the legislature in 2018** (<https://cannabisnow.com/how-vermont-became-the-first->

[state-to-legalize-cannabis-through-the-legislature/](#)), but only made it legal to possess cannabis. It **has not yet set up a legal marketplace** (<https://cannabisnow.com/vermont-legalizes-cannabis-consumption-adults/>) for cannabis.)

“The way the Illinois bill was structured was to set a baseline for regulations, but there’s tons of running room beyond that, so that the legislators can get the program up and running without public comment and deliberation,” says Lindsey. “At the end of every section of the law, it ends by saying ‘and you can change the rules.’ Talk about the laboratory of democracy!”



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