

# Cannabis in the New Jersey Workplace...What You Need to Know

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# Overview

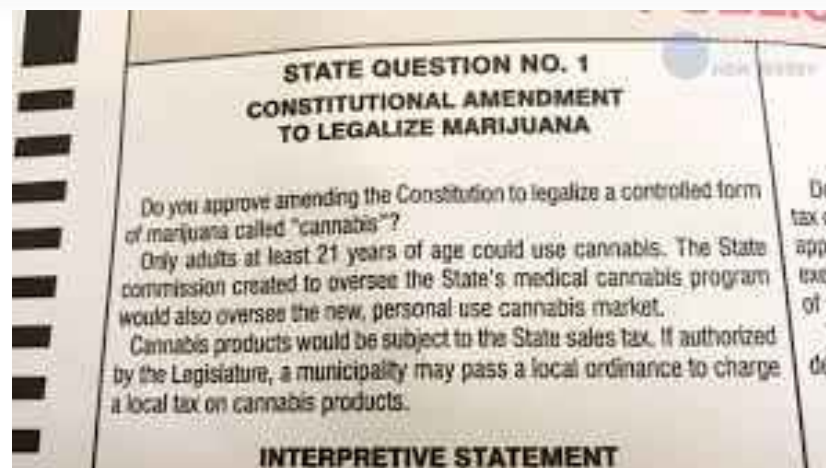
- How Did We Get Here?
  - Brief history of key NJ cannabis laws/events
- Where Are We Now?
  - Summary of key employer obligations/employee rights regarding cannabis and the NJ workplace
- Where Are We Going?
  - Impact of cannabis laws on continuing operations of NJ employers
- Your Questions

# How Did We Get Here? A Brief History

- *January 18, 2010* – Medical marijuana legalized
- *July 2, 2019* – Medicinal marijuana program expanded
  - The Jake Honig Compassionate Use Medical Cannabis Act
- *March 2020* – NJ Supreme Court rules adverse action against medical card registrant might be disability discrimination
- Currently, over 100,000 NJ residents have medical marijuana cards

# And Then Came . . . Lawful Adult Use of Cannabis

- *November 3, 2020* – Voter referendum approved
- *February 22, 2021* – Implementing legislation enacted
  - The New Jersey Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act (“CREAMMA”)



# Where Are We Now? Some Interesting Statistics

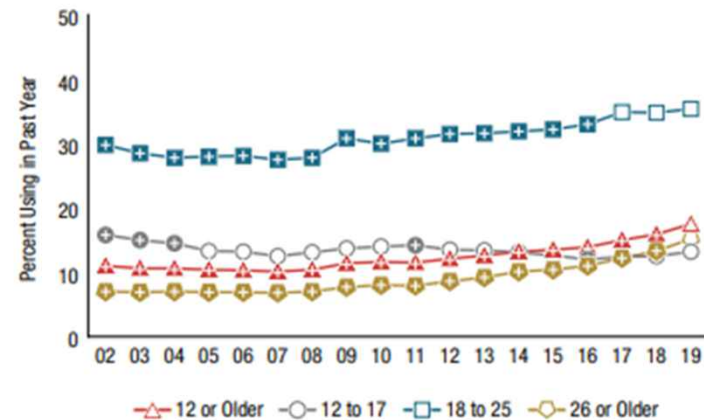
Use is much more socially acceptable

- 2/3 voter approval

Use is much more common

- 15% of adults aged 26 or older
- 35% of adults aged 18 to 25

Figure 12. Past Year Marijuana Use among People Aged 12 or Older: 2002-2019



\* Difference between this estimate and the 2019 estimate is statistically significant at the .05 level.

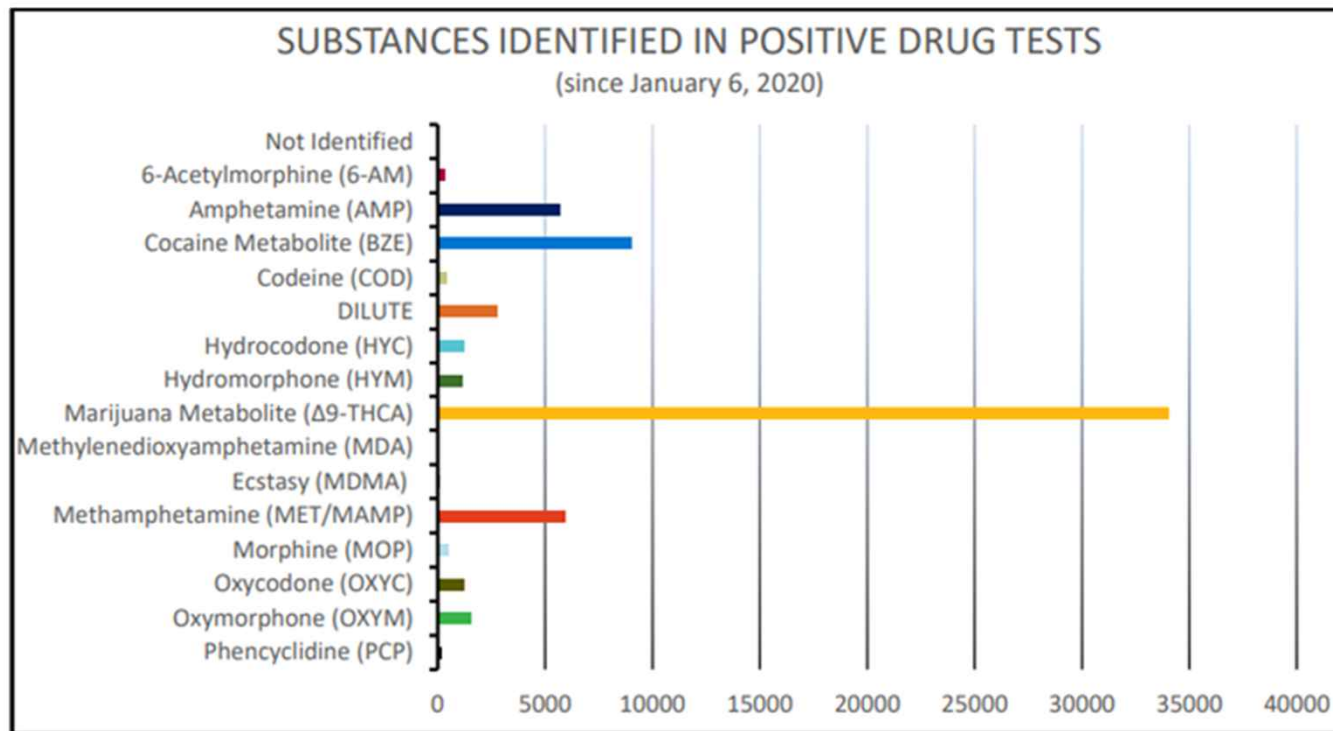
Figure 12 Table. Past Year Marijuana Use among People Aged 12 or Older: 2002-2019

Age	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19
≥12	11.0*	10.6*	10.6*	10.4*	10.3*	10.1*	10.4*	11.4*	11.6*	11.5*	12.1*	12.6*	13.2*	13.5*	13.9*	15.0*	15.9*	17.5
12-17	15.8*	15.0*	14.5*	13.3	13.2	12.5	13.1	13.7	14.0	14.2*	13.5	13.4	13.1	12.6	12.0*	12.4	12.5	13.2
18-25	29.8*	28.5*	27.8*	28.0*	28.1*	27.5*	27.8*	30.8*	30.0*	30.8*	31.5*	31.6*	31.9*	32.2*	33.0*	34.9	34.8	35.4
≥26	7.0*	6.9*	7.0*	6.9*	6.9*	6.8*	7.0*	7.7*	8.0*	7.9*	8.6*	9.2*	10.1*	10.4*	11.0*	12.2*	13.3*	15.2

\* Difference between this estimate and the 2019 estimate is statistically significant at the .05 level.

# Another Interesting Statistic

No. 1 drug used by truck drivers who tested positive for drugs

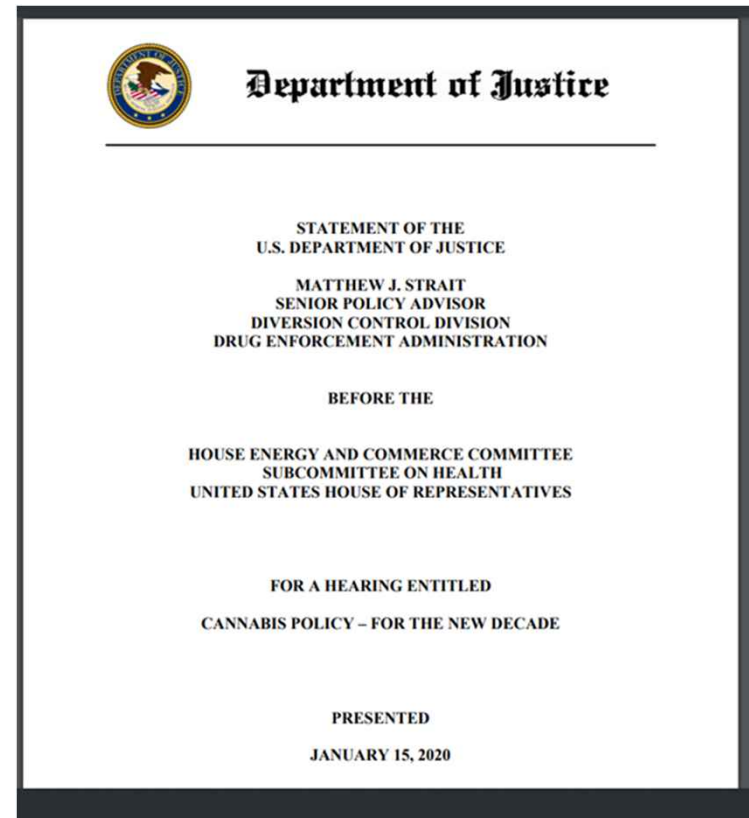


Positive drug tests reported as of 3/1/2021

# Where Are the “Feds”?

Cannabis remains illegal for any purpose under federal law

*“Congress specifically placed “marihuana” in Schedule I . . . and defined “marihuana” as all parts of the plant Cannabis sativa L., with certain exceptions for the parts of the plant that are not the source of cannabinoids.”*



# What Does This Mean for NJ Employers?

- Most likely, you have employees using recreational or medicinal cannabis
- Three key laws impact employers' treatment of employees using cannabis:
  - CREAMMA
  - The Jake Honig Act
  - NJ Law Against Discrimination (“NJLAD”)



# Where Are We Now – Employer Prohibitions Under CREAMMA

Employers may ***not*** take “any adverse action” against an employee:

- “Solely due to the presence of cannabinoid metabolites in the employee’s bodily fluid from engaging in conduct permitted under” CREAMMA

- OR -

- “Because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items”

*The latter provision also includes applicants*

# Where Are We Now – Permitted Workplace Rules Under CREAMMA

## **Employers are *permitted* to:**

- Maintain “a drug- and alcohol-free workplace”
- Prohibit “the possession, transfer, display, transportation, sale and growth” of cannabis “in the workplace”
- Promulgate a policy that employees shall not use cannabis or be intoxicated due to cannabis “during work hours”

# Where Are We Now – Permitted But *Regulated* Conduct Under CREAMMA

Any invasive test to detect cannabis must include:

1. “Scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva,” **and**
2. “A physical evaluation in order to determine an employee’s state of impairment” to be conducted by an individual

with the necessary certification to opine on the employee’s state of impairment, or lack thereof, related to the usage of a cannabis item in accordance with CREAMMA.



# CREAMMA Regulates Who Can Determine Employee Impairment

- Individual must have “Workplace Impairment Recognition Expert certification”
- To be issued only under regulations adopted by the Commission “in consultation with the Police Training Commission”
- Regulations must include the “minimum curriculum courses of study for the certifications, as well as standards for the commission’s approval and continuation of approval of non-profit and for-profit programs, organizations, or schools and their instructors to offer courses of study, and may include the use of a Police Training Commission approved school.”

# It's Not Just CREAMMA . . . Other Employer Obligations Continue

## Jake Honig Act not superseded

- Following a positive drug test of an employee or applicant, the employer must offer the person “an opportunity to present a legitimate medical explanation for the positive test result” and must “provide written notice of the right to explain”
  - After receiving such notice the individual, within three days, “may submit information to the employer to explain the positive test result, or may request a confirmatory retest of the original sample at the employee’s or job applicant’s own expense.”
  - The explanation can include the individual’s status as a medicinal marijuana card registrant.
- Remains illegal to take “any adverse employment action against an employee who is a registered qualifying patient based solely on the employee’s status” as a medicinal marijuana card registrant

# It's Not Just CREAMMA . . . Other Employer Obligations Continue *(continued)*

## NJ Law Against Discrimination not superseded

- Employers must reasonably accommodate disabled employees
- The accommodation process necessitates a cooperative dialogue with the employee
- A positive cannabis test result can be a signal that an employee is disabled and a cooperative dialogue is required

# Exemptions from CREAMMA Are Very Limited

- **Federal Law**
  - An employer action can be exempted to comply with federal law
  - E.g., federally regulated businesses where the regulation requires drug testing (most common in transportation - trucking, rail, and airlines)
- **Federal Grants**
  - An employer policy prohibiting “the manufacture, transportation, delivery, possession, or use of cannabis items” can be exempted to the extent necessary to satisfy federal requirements for receiving or applying for a federal grant
- **Federal Contractors**
  - An employer policy prohibiting “the manufacture, transport, distribution, delivery, possession, or use of cannabis items” can be exempted to the extent necessary to comply with the terms and conditions of a federal contract or to satisfy federal requirements for the federal contract
  - A federal contractor also “may revise their employee prohibitions” if they would suffer a “provable adverse impact” for adhering to CREAMMA

# Where Are We Going – Should You Continue Testing for Cannabis?

## Arguments for Testing

- Required by federal law
- Required by federal contract or grant
- Deterrence to impairment
- Assessments without testing are inherently subjective

## Arguments Against Testing

- Barred by CREAMMA without impairment assessment by a certified impairment assessor
- Costs and obstacles involved with conducting impairment assessment
- Impairment assessment certifications not available until Commission issues regulations and schools start awarding certifications
- Positive test result  $\neq$  impairment
- Obvious inability to perform job can be dealt with as an obvious inability to perform the job, regardless of reason
- Positive test result triggers Jake Honig rights and may disclose existence of a disability protected under NJ law
- Weeding out labor in a tight labor market



# Is CREAMMA's Regulation of Testing in Force and Effect?

- The employment-related provisions discussed above “shall take **effect** immediately [i.e., Feb. 22, 2021], but shall only become **operative** upon adoption of the commission’s initial rules and regulations.”
- The law charges the Commission to adopt such rules and regulations within 180 days after the law’s enactment
  - NHTSA 2007 Report To Congress “there are currently no evidence-based methods to detect marijuana-impaired driving”

# Questions Remain About the Mechanics of Testing

- How quickly must an impairment assessment be conducted?
- Can the assessment be done remotely?
- What can the employee be asked to do during the assessment?
- Are applicants covered by the impairment assessment provisions?

*Awaiting guidance from Commission regulations*

# What To Do With A Positive Test Result?

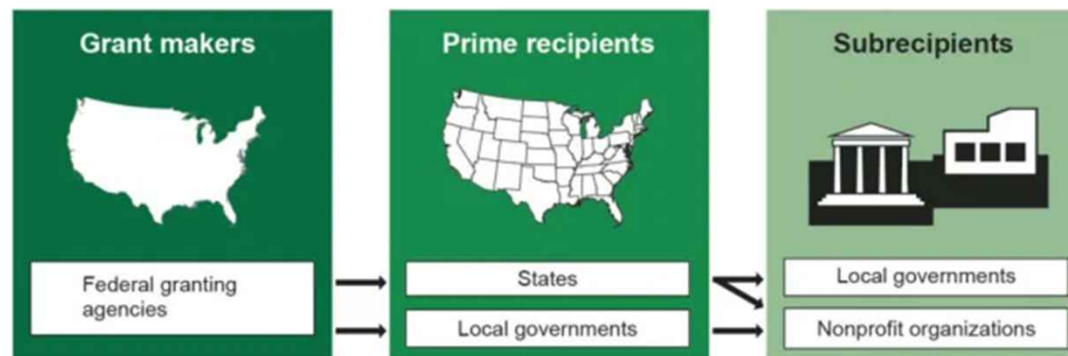
- First, make sure employee receives the Jake Honig notice and account for any information supplied
- Second, determine whether impairment assessment and the test results conflict
- Third, consider whether the test result stems from a protected disability
  - Interactive dialogue obligation
- Fourth, update your policies and determine whether to have standard or ad hoc discipline

# Are You Exempt from CREAMMA?

## Federal Grant Recipients

- Read the grant
- CREAMMA exemption *only to the extent necessary to comply with the grant*
- Compliance with federal Drug-Free Workplace Act required

Figure 1: Examples of How Federal Funds Flow through Primary Grant Recipients to Subrecipients



Source: GAO analysis of grant processes; and Art Explosion clip-art.

# Are You Exempt from CREAMMA? *(continued)*

## Federal Contract

- Determine whether you're a "federal contractor"

For healthcare providers:

- Receipt of Medicare Parts A & B does **not** make you a federal contractor
- Participation in a federal employee healthcare program **might** make you a federal contractor
- If you are a "federal contractor" read the contract
- CREAMMA exemption allowed ***only to the extent necessary to comply with the contract***
- Compliance with federal Drug-Free Workplace Act required for contracts of \$100,000 or more

## Are You Exempt from CREAMMA? *(continued)*

### State regulated businesses where the applicable regulation requires drug testing

- Examples include drug rehabilitation facilities and programs and a number of State employers (police, corrections, firefighters, auto mechanics)
- Regulations do not take precedence over CREAMMA's drug testing requirement provisions
- May want to contact the regulators for guidance

# Where Are We Going . . . Changes in the Workplace Will Be Necessary

- The interplay between CREAMMA, Jake Honig, and NJLAD is complex
  - Employers with multi-state operations beware; similar employee protective bills are now pending in nine different state legislatures
- Workplace policies and practices must be updated to comply with new employer obligations and employee rights
- Management staff must ensure that updated policies and practices are actually implemented and followed
- Failure to understand and adapt to these new laws will expose employers to potential legal claims

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