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IS YOUR WORKPLACE READY FOR THE  
START OF RECREATIONAL CANNABIS  
SALES?  
WHAT NJ EMPLOYERS NEED TO KNOW.

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## OVERVIEW

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- 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
  - Impact of cannabis laws on continuing operations of NJ employers
- Your Questions

## HOW DID WE GET HERE? A BRIEF HISTORY

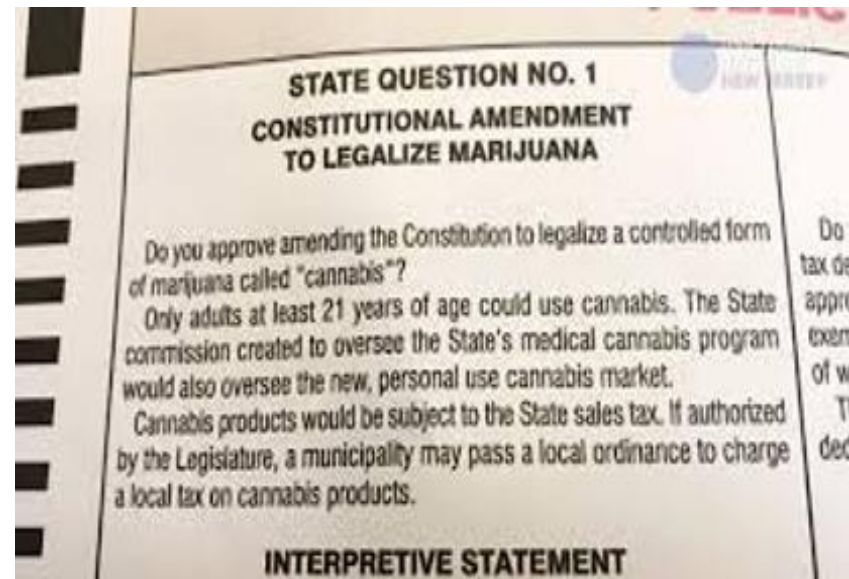
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- January 18, 2010 – Medical marijuana legalized
- July 2, 2019 – Medicinal marijuana program expanded
  - The Jake Honig Compassionate Use Medical Cannabis Act
- March 2020 – NJ Supreme Court rules adverse action against medical card registrant might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

## AND THEN CAME...

### LAWFUL ADULT USE OF CANNABIS

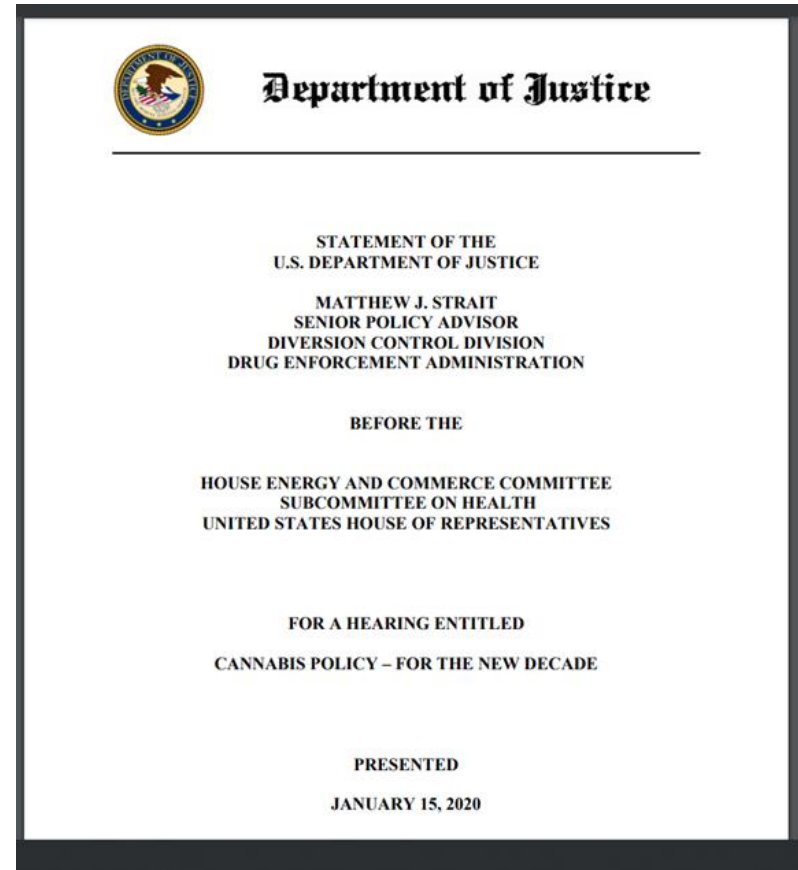
- November 3, 2020 – Voter referendum approved
- February 22, 2021 – Implementing legislation enacted
  - The New Jersey Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act (“CREAMMA”)



## WHERE ARE 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?

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- 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

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### 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

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### 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

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### 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

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- Individual must have certification as “Workplace Impairment Recognition Expert” (“WIRE”)
- WIRE 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.”

## SO WHAT'S A WIRE CERTIFICATION?

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- The law charged the Commission to adopt rules and regulations within 180 days after the law's enactment
- August 19, 2021 Commission published rules & regulations
- WIRE certification requirements not included in regulations
- Regulations provide:
  - “until such time that the Commission, in consultation with the Police Training Commission . . . Develops standards for a [WIRE] certification, no physical evaluation of an employee being drug tested in accordance with [CREAMMA] shall be required.”
- As of today, no further guidance on WIRE certification requirements



## WHAT HAPPENED TO THE OTHER EMPLOYMENT - RELATED PROVISIONS OF CREAMMA?

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- The August 2021 regulations make clear that employment protection provisions of CREAMMA **are** in effect; which means:
  - NJ employers may **not** take “any adverse action” against a person “solely” due to testing positive for cannabis or “because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items”
- Employers face significant challenges and legal exposure when looking to terminate someone suspected to be under the influence of cannabis while at work
  - NHTSA 2007 Report To Congress “there are currently no evidence-based methods to detect marijuana-impaired driving”
  - NJ Supreme Court ruling on law enforcement use of Drug Recognition Experts

## IT'S NOT JUST CREAMMA...

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### 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...

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### 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

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## 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

- 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
- No WIRE certification currently required (could change in the future)
- Assessments without testing are inherently subjective

#### ARGUMENTS AGAINST TESTING

- At some point may be barred by CREAMMA unless employer uses a certified WIRE
- Costs and obstacles involved with conducting impairment assessment
- Positive test result  $\neq$  impairment
- An obvious inability to perform job duties/functions can be dealt with as a disciplinary matter regardless of impairment
- 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



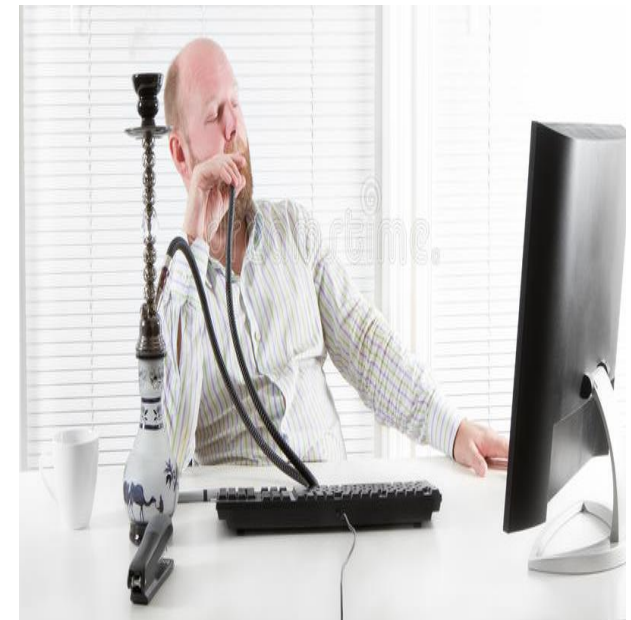
**EVEN AFTER WIRE REGULATIONS ARE ISSUED,**  
**QUESTIONS MAY STILL REMAIN**

- 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?

*Perhaps will be addressed when additional regulations are issued by the Commission.*

## YOU DECIDED TO TEST YOUR EMPLOYEE AND IT'S POSITIVE . . . WHAT DO YOU DO?

- First, make sure employee receives the Jake Honig notice and review any information supplied
- Second, determine whether impairment assessment (whether conducted by a WIRE or other person) and the test results conflict
- Third, consider whether the test result stems from a protected disability and whether employee has any other “protected” status under CREAMMA or other laws (e.g., CEPA)
  - Interactive dialogue obligation if disability related
  - Be mindful of risks created by employees who vocalize their off-duty cannabis usage
- Fourth, review your policies (and actual practices) regarding discipline for testing positive for intoxicating substances and act consistently



# ARE YOU EXEMPT FROM CREAMMA?

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## 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)

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### 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
- 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)

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### State regulated businesses where the applicable regulation requires drug testing & testing for safety sensitive positions

- 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
- BUT, remember possible federal regulations
  - E.g., some NJ law enforcement agencies taking position police cannot use cannabis because of ATF requirements
- May want to contact the appropriate regulators for guidance
- Prior legal precedent allowed random testing for employees in certain safety sensitive positions
  - This legal precedent seems to conflict with CREAMMA

## SOME FINAL THOUGHTS & PRACTICE POINTERS

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- Remember, the interplay between CREAMMA, Jake Honig, NJLAD and other laws is complex
  - Employers with multi-state operations beware; cannabis laws vary from one state to the next
- Have you updated your workplace policies and practices to comply with CREAMMA and the most current regulations?
- Ensure that management staff understand employer obligations regarding cannabis usage and protections under CREAMMA
- Failure to understand and adapt to these laws and regulations will expose employers to potential legal claims
- This area of law is constantly developing and changing – *make sure you keep updated!*

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John D. Fanburg has more than 30 years of experience in health and hospital law, with an emphasis on corporate, transactional, and regulatory matters for physicians and healthcare institutions. A recognized leader in this sector, John is known for excellence in transactions, perseverance in deal-making, and strength in corporate, M&A, and regulatory matters.

His broad experience representing major hospitals, diverse medical groups, solo practitioners, and statewide physician specialty organizations provides him with in-depth knowledge of all aspects of the business of healthcare. He helps healthcare providers position themselves to deal with the constantly evolving medical marketplace, particularly healthcare reform. This includes advising clients about mergers and acquisitions, various business ventures, and creative healthcare business arrangements. John provides counsel on strategic alliances and transactions relating to physician practices, hospitals, ACOs, ambulatory surgery centers, and medical homes. He also offers guidance on regulatory compliance, corporate compliance, HIPAA, litigation, and government investigations.

In addition, as Co-Chair of Brach Eichler's Cannabis Industry Practice, John provides counsel to companies and individuals who seek to participate in New Jersey's growing medicinal cannabis industry.



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Matthew Collins has extensive experience representing clients in all aspects of labor and employment law. He provides strategic counsel to clients on a wide range of labor and employment issues such as discrimination; harassment; whistleblowing; discipline and discharge; layoffs; collective bargaining agreements; reasonable accommodations for disabled employees; and compliance with state and federal family and medical leave acts and applicable wage and hour laws. He also conducts training in these areas for executives, directors, managers, supervisors, and employees and conducts internal investigations of employee complaints. Matthew drafts and provides advice on employment contracts, employment manuals, personnel policies and procedures, restrictive covenants, and severance agreements, among others.

An integral part of Matthew's practice involves the representation of clients in state and federal court, in arbitrations, and before various administrative agencies including the United States Equal Employment Opportunity Commission, the New Jersey Division on Civil Rights, the United States Department of Labor, and the New Jersey Department of Labor. In addition to litigating all types of employment-related claims, he represents clients in lawsuits arising from business torts, shareholder disputes, contract disputes, and restrictive covenant violations.



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