

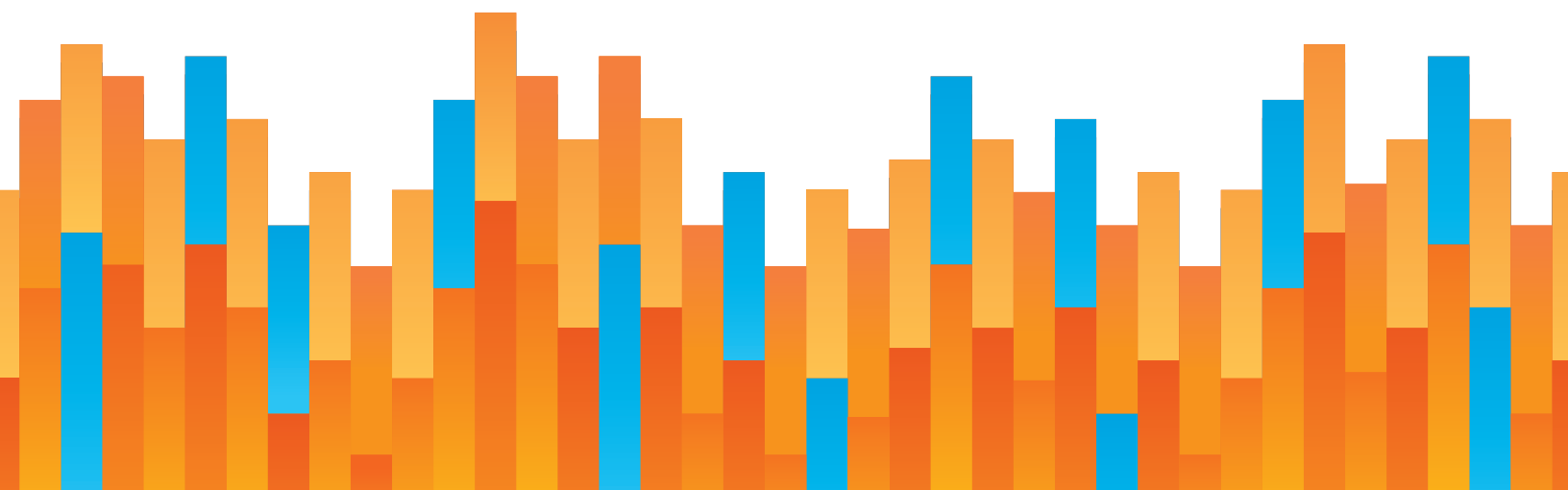


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# CRIMINAL CONVICTION RESTRICTIONS FOR MARIJUANA LICENSING

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by Allie Howell  
September 2018





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## PART 1

# JUSTIFICATIONS FOR LICENSE RESTRICTIONS

Both medical and recreational marijuana businesses require a state-issued license. In many states, working in the industry as a budtender, medical caregiver, or cashier also requires a permit. Some state licensing authorities have prohibitions on those with certain criminal convictions from working in the industry. In other states, “good moral character” clauses give licensing authorities the ability to reject an applicant based on criminal history.

Criminal conviction restrictions are an attempt to use past behavior to predict public safety risks in the future. In most industries, these restrictions are defended as necessary for consumer safety. In the legal marijuana industry, consumer safety concerns are coupled with a desire for the industry to comply with the Cole Memo. The Cole Memo was issued in 2013 by then-Deputy Attorney General James Cole in response to legalization in Washington and Colorado. The memo lays out the following key enforcement priorities for marijuana:

1. Preventing the distribution of marijuana to minors
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels
3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states

4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands
8. Preventing marijuana possession or use on federal property

The memo expects that legal states implement “strong and effective regulatory and enforcement systems” because “[i]f state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.”<sup>1</sup> States that voted to legalize marijuana under the Cole Memo worked to meet its objectives. In Washington, for example, regulatory decisions made by the Liquor and Cannabis Board were “made with the Cole Memo in mind.”<sup>2</sup>

Restrictions on licensure for convicted criminals is justified because, according to regulators and law enforcement, it reduces the likelihood that the legal industry will be used for criminal enterprises by so-called bad actors.<sup>3</sup> As summarized by Ken Corney, President of the California Police Chiefs Association, marijuana regulations have “strong protections against black market activity. A key component of these protections—and

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<sup>1</sup> Cole, James M. “Memorandum for all United States Attorneys.” U.S. Department of Justice Office of the Deputy Attorney General. Aug. 29, 2013.

<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

<sup>2</sup> “Executive Summary.” *Washington State Liquor and Cannabis Board*.

<https://lcb.wa.gov/sites/default/files/publications/WSLCB%20Home%20Grows%20Study%20Report%20FINAL.PDF>

<sup>3</sup> Garofoli, John. “Medical Marijuana Law Could Ban Pot Felons from Industry.” *San Francisco Chronicle*. Sept. 16, 2015. <https://www.sfchronicle.com/business/article/Medical-marijuana-law-could-ban-pot-felons-from-6509874.php>

consistent with laws for other state licenses—is permitting the state to deny a business license to a person with a felony conviction if there is a public safety concern.”<sup>4</sup>



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Since Attorney General Jeff Sessions has rescinded the Cole Memo, there is concern that states must be even more careful to maintain a safe, legal market that doesn't impose externalities on the community.<sup>5</sup> In Massachusetts, Cannabis Control Commissioner Britte McBride cited Sessions' policy as reason to automatically disqualify license applicants with trafficking convictions for drugs other than marijuana: “[W]e no longer have the relative safety of the Cole Memorandum. We are dealing in a world where unwanted federal attention could lead to undermining the industry we're working really hard to establish. I think it is common sense to understand that the engagement of individuals with convictions for dangerous drug crimes could potentially bring the exact unwanted attention I think we're trying hard to avoid.”<sup>6</sup>

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<sup>4</sup> McGreevy, Patrick. “New Law Could Put Some Medical Marijuana Dispensaries Out of Business.” *Los Angeles Times*. May 13, 2016. <http://www.latimes.com/politics/la-pol-sac-pot-dispensary-felon-owners-20160513-story.html>

<sup>5</sup> Sessions III, Jefferson B. “Memorandum for all United States Attorneys.” *U.S. Department of Justice Office of the Attorney General*. Jan. 4, 2018. <https://www.justice.gov/opa/press-release/file/1022196/download>

<sup>6</sup> State House News Service. “Drug Trafficking Conviction Would Bar Employment in Legal Pot Industry.” *Worcester Business Journal*. March 1, 2018. <http://www.wbjournal.com/article/20180301/NEWS01/180309999/drug-trafficking-conviction-would-bar-employment-in-legal-pot-industry>

## PART 2

# COSTS OF CRIMINAL CONVICTION LICENSE RESTRICTIONS

When evaluating any regulation, one should consider if the supposed benefits outweigh any unintended consequences. For criminal conviction restrictions, one must consider whether the potential reduction in crime in the legal marijuana market is beneficial enough to make it worth the reduction in employment opportunities.

Researchers estimate that 8% of the U.S. population has felony convictions and 33% of the African American male population has a felony conviction. California, Massachusetts and Washington were three of the top five states for African Americans convicted of felonies.<sup>7</sup> While good data on how this impacts marijuana business ownership is lacking, there have been numerous complaints that these restrictions disproportionately keep minorities out of the legal marijuana industry.

Further, broad restrictions undermine the legal market by forcing some to stay in the black market, as summarized by a Blue Ribbon Commission report on marijuana regulations for California: “If a strategy of legalization is to bring current participants in the illicit market

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<sup>7</sup> Flurry, Alan. “Study Estimates U.S. Population With Felony Convictions.” *UGA Today*. Oct. 1, 2017. <https://news.uga.edu/total-us-population-with-felony-convictions/>

who are willing to comply with regulations into the legal market, then categorical exclusions of people who have in the past or are currently in the illicit market would be counterproductive, leaving many to continue working in the illicit market. Such categorical exclusions would also exacerbate racial disparities given past disparities in marijuana enforcement. For these reasons, categorical exclusions that are too broad, and that overly rely on past convictions as predictors of future behavior, should not be considered.”<sup>8</sup>



*California’s early medical marijuana market provides some evidence of how much market reduction criminal conviction restrictions may cause.*



California’s early medical marijuana market provides some evidence of how much market reduction criminal conviction restrictions may cause. The industry did not require state licenses until 2018, but California was the first state to legalize medical marijuana. As a result, Casey O’Neill, board chairman of the California Growers Association estimated that in 2016, 25–30% of the group’s 500 members had felony drug convictions.<sup>9</sup> Given that the black market continued to thrive during this period, it seems likely that these people were trying to move out of illegal markets and into legal ones.<sup>10</sup>

There is also evidence that burdensome occupational licensing for convicted criminals makes recidivism more likely. A study conducted by the Center for the Study of Economic Liberty at Arizona State University examined the relationship between occupational licensing laws and new crime recidivism rates (new crime recidivism does not include technical violations such as a parole violation). States with the highest occupational licensing burdens, including prohibitions on ex-prisoners receiving licenses, saw an increase in three-year new crime recidivism of 9.4% between 1997 and 2007. This is in

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<sup>8</sup> Newsom, Gavin, Keith Humphreys, and Abdi Soltani. “Pathways Report: Policy Options for Regulating Marijuana in California.” *Blue Ribbon Commission on Marijuana Policy*. July 22, 2015. <https://www.safeandsmartpolicy.org/wp-content/uploads/2015/07/BRCPathwaysReport.pdf>

<sup>9</sup> McGreevy, Patrick. “New Law Could Put Some Medical Marijuana Dispensaries Out of Business.”

<sup>10</sup> Yackowicz, Will. “Legal Cannabis Entrepreneurs Get a Rude Awakening: A Thriving Black Market.” *Inc.* Jan. 4, 2018. <https://www.inc.com/will-yakowicz/california-recreational-marijuana-and-black-market.html>



comparison to a 2.6% average increase in survey states and a 4.2% decrease in states with the lowest occupational licensing burden.<sup>11</sup>

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<sup>11</sup> Slivinski, Stephen. “Turning Shackles into Bootstraps.” *Center for the Study of Economic Liberty at Arizona State University*. Nov. 7, 2016. <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf>

## PART 3

# SUMMARY OF CRIMINAL CONVICTION RESTRICTIONS BY STATE

For recreational marijuana, all states restrict who will be issued a marijuana business license based on criminal conviction history. Some states only look at recent criminal history, such as the 10-year look-back period for completed sentences in Nevada and Washington. All states but California and Washington prevent people with certain criminal convictions from even being employed in marijuana establishments. The following state-by-state descriptions look only at criminal conviction restrictions for the initial license application. Restrictions may be more stringent for renewal applications. There may be other restrictions related to criminal behavior in each state, such as a good moral character clause, that are not discussed.

## 3.1

**ALASKA**<sup>12</sup>**Business Owner Restrictions**

Establishments may not be licensed to owners, officers, or agents with a felony conviction in the last five years or those still on parole for felony convictions. Also banned are those who have sold alcohol without a license or to someone under 21, those with certain misdemeanors within the last five years, and people with certain class A misdemeanors for marijuana within the last two years.

**Employee Restrictions**

Marijuana handler permits are required for licensees, employees, and agents of a marijuana establishment to be on the licensed premises. Those with felonies within the last five years, certain class A misdemeanors within the last two, and those on parole for a felony or under indictment for a disqualifying offense are not eligible.

## 3.2

**CALIFORNIA**<sup>13</sup>**Business Owner Restrictions**

License may be denied for convictions “substantially related to the qualifications, functions, or duties of the business.” Controlled substance convictions that are not substantially related and for which the sentence and probation are completed cannot be the sole reason for license denial.

**Employee Restrictions**

None

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<sup>12</sup> Alaska Administrative Code. 3 AAC Chapter 306.  
<https://www.commerce.alaska.gov/web/Portals/9/pub/MCB/StatutesAndRegulations/MarijuanaRegulations.pdf>; Alaska Statutes. Chapter 17.38. The Regulation of Marijuana.  
<https://www.commerce.alaska.gov/web/Portals/9/pub/MCB/StatutesAndRegulations/AS17.38.pdf>; “Marijuana Handler Permit Notice of Upcoming Changes.” *Alcohol and Marijuana Control Office*.  
<https://www.commerce.alaska.gov/web/Portals/9/pub/MCB/MJHandlerPermit/MHCBackground.pdf>

<sup>13</sup> Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA). California Law.  
[https://leginfo.ca.gov/faces/codes\\_displayexpandedbranch.xhtml?tocCode=BPC&division=10.&title=&part=&chapter=&article](https://leginfo.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=BPC&division=10.&title=&part=&chapter=&article)

## 3.3

**COLORADO**<sup>14</sup>**Business Owner Restrictions**

Ineligible from occupational licenses are people subject to or discharged from felony convictions in five years preceding the application, and felony controlled substance convictions in the ten years preceding their application date or five years from May 28, 2013 (whichever is longer). Those with state marijuana possession or use felony convictions which would no longer be felonies can still get a license.

**Employee Restrictions**

In addition to owners, all managers and employees working in a marijuana establishment must be licensed. Key and support employees face the same criminal background restrictions as owners.

## 3.4

**MASSACHUSETTS**<sup>15</sup>**Business Owner Restrictions**

No person who has been convicted of a felony in Massachusetts or in another state that would still be a felony in Massachusetts can be a controlling person in a business. Prior convictions solely for marijuana or another controlled substance possession are exempt from this rule unless the conviction was distribution. The commission may determine that the applicant is not suitable for licensure based on a suitability criterion for other legal issues.

**Employee Restrictions**

All employees, board members, directors, executives, managers, and volunteers must be registered for each marijuana establishment. Marijuana establishment agents cannot have been convicted of an offense involving the distribution of a controlled substance to minors in Massachusetts or any other state/territory. The commission may determine that the applicant is not suitable for licensure based on a suitability criterion for other legal issues. Criminal conviction restrictions are more stringent for laboratory agents.

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<sup>14</sup> Code of Colorado Regulations. 1 CCR 212-2.  
<https://www.colorado.gov/pacific/sites/default/files/ColoradoRegister.pdf1%20CCR%20212%20-2%20Retail%20Effective%2020222018.pdf>

<sup>15</sup> 935 Code of Massachusetts Regulations. Cannabis Control Commission.  
<https://www.mass.gov/files/documents/2018/03/27/935cmr500.pdf>

## 3.5

**NEVADA**<sup>16</sup>**Business Owner Restrictions**

Owners, officers, or board members convicted of an “excluded felony offense” may not obtain a license. This includes convictions that would constitute a category A felony if convicted in Nevada or convictions for two or more offenses that would constitute felonies if committed in Nevada. Sentences completed more than ten years prior and offenses for conduct that would be immune from penalty under medical marijuana law (unless the conduct occurred before Oct. 1, 2001 or was prosecuted by another authority) do not count.

**Employee Restrictions**

All owners, board members, officers, contractors, employees, and volunteers must obtain a marijuana establishment agent card. Applicants also cannot have an “excluded felony offense.”

## 3.6

**OREGON**<sup>17</sup>**Business Owner Restrictions**

Convictions “substantially related to the fitness and ability of the applicant to lawfully carry out activities under the license” may result in application denial. Convictions for marijuana manufacturing or delivery to persons 21 and older may not be considered if the conviction is from two years prior or there is only one conviction. Marijuana possession convictions may also not be considered.

**Employee Restrictions**

Marijuana worker permits are required for employees carrying out certain tasks. Applicants may be denied permits based on certain felony convictions within the past three years (five

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<sup>16</sup> Nevada Revised Statutes (NRS). Chapter 453D. <https://www.leg.state.nv.us/NRS/NRS-453D.html#NRS453Dsec230>; “Marijuana Establishment Agent Card Application and Checklist.” *State of Nevada Department of Taxation*. Nov. 18, 2017. <https://tax.nv.gov/uploadedFiles/taxnvgov/Content/Forms/Agent%20application.pdf>

<sup>17</sup> Oregon Revised Statutes. Chapter 475B. Cannabis Regulation. [https://www.oregonlegislature.gov/bills\\_laws/ors/ors475B.html](https://www.oregonlegislature.gov/bills_laws/ors/ors475B.html); Oregon Administrative Rules. Oregon Liquor Control Commission. Division 25. Recreational Marijuana. [https://www.oregon.gov/olcc/marijuana/Documents/Rules/OAR\\_845\\_Div\\_25\\_RecreationalMarijuana.pdf](https://www.oregon.gov/olcc/marijuana/Documents/Rules/OAR_845_Div_25_RecreationalMarijuana.pdf)

years for more than one conviction). All marijuana possession convictions and marijuana delivery/manufacturing convictions from two years prior do not count.

## 3.7

### WASHINGTON<sup>18</sup>

#### Business Owner Restrictions

Points are given to an applicant based on severity of offense. For felonies, points will be assigned for any conviction over the past 10 years. For gross misdemeanor and misdemeanor convictions, the look-back period is three years. Applicants with eight points or more may not receive a license. Applicants currently under federal or state supervision for a felony receive eight points. A felony conviction is 12 points, a gross misdemeanor is five points, and a misdemeanor is four. Two federal or state marijuana possession misdemeanors in the previous three years do not count toward points in the initial application. State possession convictions accrued after December 6, 2013 exceeding allowable amounts of marijuana still count towards points. A single state or federal conviction for marijuana growing, sale, or possession will be considered for mitigation on the initial application. A decision to mitigate is made on an individual basis and is based on the quantity of marijuana involved and other circumstances.

#### Employee Restrictions

None

## 3.8

### OTHER STATES

For the 30 states and Washington D.C. with medical marijuana laws, the restrictions may be even more stringent. For example, under the medical marijuana pilot program in Illinois, restrictions even apply to patients.<sup>19</sup> In New York, a marijuana conviction automatically keeps one from working in a medical marijuana dispensary.<sup>20</sup>

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<sup>18</sup> Washington Administrative Code. Title 314. Chapter 314-55. *Marijuana Licenses, Application Process, Requirements, and Reporting*. <http://apps.leg.wa.gov/wac/default.aspx?cite=314-55>

<sup>19</sup> Illinois Compiled Status. 410 ICLS 130. Compassionate Use of Medical Cannabis Pilot Program Act. <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3503&ChapterID=35>

<sup>20</sup> “Marijuana Reform in New York: Diversity and Inclusion in the Marijuana Industry.” *Drug Policy Alliance*. Sept. 2017. <http://smart-ny.com/wp->

## PART 4

# THE HYPOCRISY OF CRIMINAL CONVICTION RESTRICTIONS IN THE MARIJUANA INDUSTRY

Supporters of keeping those with certain criminal convictions out of the new industry claim that doing so makes legal marijuana reputable. Last year, the CEO of medical marijuana provider Patriot Care wrote: “Permitting those who have demonstrated the interest and willingness to ignore state and federal drug laws sends the wrong signals to those who would participate in the legal, regulated industry.” The CEO’s statement was in response to efforts in Massachusetts to remove the ban on convicted drug felons in the medical marijuana program. Ironically, as pointed out in *Forbes*, all marijuana businesses—including Patriot Care—are in violation of federal law.<sup>21</sup>

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content/uploads/2017/06/StartSMART\_DPA\_NY\_Marijuana\_Reform\_Diversity\_Inclusion\_09.14.2017.pdf

<sup>21</sup> Zhang, Mona. “Cannabis Industry Struggles With Hiring People With Past Pot Convictions.” *Forbes*. Oct. 4, 2017. <https://www.forbes.com/sites/monazhang/2017/10/04/cannabis-industry-hiring-people-past-pot-convictions/#3069de2a5cd4>

Restrictions on participation in the marijuana market based on previous marijuana crimes have been a contentious issue. In most industries, prior experience works in an applicant's favor. But in the marijuana industry, previous experience could have resulted in a criminal record. Further, it seems contrary to one of the key goals of legalization—minimizing the harms of the drug war—to continue to penalize license applicants for marijuana crimes.

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For recreational marijuana, most states have some limited exemption for past marijuana crimes built into the law. In Nevada, the exemption is especially narrow: offenses for conduct that would be immune from penalty under medical marijuana law are exempt—unless the conduct occurred before Oct. 1, 2001 or was prosecuted by another authority.<sup>22</sup> Alaska specifically prevents those that have “within two years before submitting an application, been convicted of a class A misdemeanor relating to selling, furnishing, or distributing marijuana or operating an establishment where marijuana is consumed contrary to state law” from obtaining a license.<sup>23</sup>

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<sup>22</sup> NRS Chapter 453D.

<sup>23</sup> 3 AAC Chapter 306.



## PART 5

# SHOULD THE MARIJUANA INDUSTRY PAY REPARATIONS FOR THE DRUG WAR?

Given the hypocrisy of keeping drug criminals out of the legal drug industry, some states and localities have taken the opposite stance that convicted drug criminals should receive preferential treatment in licensing. In Massachusetts, for example, applicants “who are able to demonstrate experience in—or business practices that promote—economic empowerment in communities disproportionately impacted by high rates of arrest and incarceration for offenses under state and federal laws, including the Controlled Substances Act” receive priority review. The state also has a social equity program for applicants who have resided in areas of disproportionate impact for five of the last ten years, lived in Massachusetts for the past 12 months with a drug conviction, or are married to or children of convicted drug criminals and have been state residents for the past year. Social equity participants have access to training and assistance raising funds.<sup>24</sup>

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<sup>24</sup> “Summary of Equity Provisions.” *Massachusetts Cannabis Control Commission*. <http://mass-cannabis-control.com/wp-content/uploads/2018/03/UPDATED-Guidance-Summary-of-Equity-Provisions-with-6th-criterion-added-1.pdf>



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Ohio, Maryland, Florida, and Pennsylvania all have equity programs for their medical marijuana markets. A few localities in California have adopted similar measures for recreational marijuana.<sup>25</sup> Oakland, for example, requires that half of all permits must be issued to equity applicants during the initial permitting phase.<sup>26</sup>

The underlying premise of these programs is that minorities who were more likely to be arrested for marijuana crimes and participants in the marijuana black market “paved the way” for the legal industry.<sup>27</sup> Thus, as summarized by New York gubernatorial candidate Cynthia Nixon: “We can't let them [rich white men] rake in profits while thousands of people, mostly people of color, continue to sit in jail for possession and use.”<sup>28</sup> Some states have opted for “marijuana forgiveness remedies,” to divert or expunge prosecution of marijuana charges that are no longer legal offenses, or are lesser offenses.<sup>29</sup> While social equity programs and preferential licensing attempt to address the issue, their impact has been constrained thus far. The way to redress the injustices of the war on drugs is directly through criminal justice reforms and forgiveness. Imposing mandates or quotas in the legal marijuana market imposes costly economic distortions and ultimately hurts the same people.

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<sup>25</sup> Mock, Brentin. “California’s Race to the Top on Cannabis.” *CityLab*. Feb. 5, 2018. <https://www.citylab.com/equity/2018/02/the-racial-equity-race-to-the-top-on-cannabis-in-california/551912/>

<sup>26</sup> “Become an Equity Applicant or Incubator.” *City of Oakland*. <http://www2.oaklandnet.com/government/o/CityAdministration/cannabis-permits/OAK068455>

<sup>27</sup> Zhang, Mona. “Cannabis Industry Struggles With Hiring People With Past Pot Convictions.”

<sup>28</sup> Riggs, Mike. “What Do Cannabis Entrepreneurs Owe Victims of the Drug War?” *Reason*. May 15, 2018. <http://reason.com/blog/2018/05/15/social-justice-warriors-want-to-write-th>

<sup>29</sup> Craven, James. “Marijuana Forgiveness Remedies.” *Reason*. June 4, 2018. <https://reason.org/policy-brief/marijuana-forgiveness-remedies/>



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For example, Oakland, California has so far granted 16 dispensary permits. Eight new permits were given in January with six going to equity applicants. With 115 applicants for eight new permits, the city chose winners through two different processes. Four new permit holders were selected through a competitive point process—two of these permits went to equity-owned business. The other four permits were selected through a lottery drawing of equity applicants.<sup>30</sup> While this program has been beneficial for the select few, the program has done nothing to benefit the remaining applicants.

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<sup>30</sup> Boyd, Karen. “City Announces First Cannabis Dispensary Permit Recipients Under Equity Program.” *City of Oakland*. Jan. 31, 2018.  
<http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/pressrelease/oak068879.pdf>

## PART 6

# CONCLUSION

Criminal conviction restrictions are justified as one way to ensure that the legal marijuana market will not be used to divert drugs out of state, to minors, or to fund criminal enterprises. But using past behavior as a predictor for future actions is an imperfect measure. It is impossible to determine how exactly these restrictions contribute to public safety since they are always coupled with other regulations. We do know, however, that there are other ways to facilitate a functioning legal market using regulations that are not subject to prediction error. Security requirements, marijuana tracking systems, and bookkeeping requirements deter criminal behavior without using an applicant's past to make assumptions.

In addition to uncertainties that criminal conviction restrictions are the best way to ensure a functioning legal market, it is also important to consider the costs of these restrictions. Criminal conviction restrictions reduce entry into the legal marijuana industry. By excluding drug criminals, conviction restrictions may fundamentally undermine the goals of marijuana legalization by forcing some to stay in the black market. Having a safe legal market is useless if the black market is still the primary supplier of marijuana.

Given the hypocrisy of these criminal conviction regulations, it is not surprising that some states and localities have adopted policies to help those negatively impacted by previous drug policies enter the marijuana industry. Equity programs, however, will only help a chosen few priority applicants. Fundamentally opening up employment opportunities in the marijuana industry by reducing conviction restrictions has the potential to help many people who have been impacted by the drug war.

# ABOUT THE AUTHOR

**Allie Howell** is a research intern at Reason Foundation. Previously, she was a Burton C. Gray Memorial intern at Reason and an economic policy intern at the Manhattan Institute. Allie has been published by Economics21.org, the Foundation for Economic Education, and Reason. She is a recent graduate of Hillsdale College where she majored in economics and mathematics. Allie will be attending Notre Dame Law School in the fall of 2018.

