



## *Cheat Sheet: Eligibility for Social Equity Programs*

### **Introduction**

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Social equity is the idea that we should try to repair some of the harms caused by past enforcement of marijuana laws. One aspect of this includes special benefits for people disproportionately harmed by marijuana laws. These benefits can include programs for workers, such as training, placement, advancement, and mentorship programs. The programs also usually apply to businesses with at least 51% ownership by people disproportionately harmed by marijuana laws. Meaningful benefits for businesses include exclusive or early access to licenses, grants and loans, and technical assistance for both license applications and for operations.

But how do you determine whether a person has been disproportionately harmed by marijuana laws? This cheat sheet will guide you through the most frequently raised questions (but please note, it is not legal advice).

### **Impact Studies**

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Any jurisdiction interested in incorporating social equity into its marijuana law should begin by commissioning an independent study (usually called an “impact study”) as early as possible to determine the historical impact of drug criminalization in the region. This study will be key for both substantive and procedural reasons. Decision makers should base social equity eligibility on the results of the study, and that process should be public, transparent, and well-documented. Often it will be necessary to divide the study into phases due to missing data; you might decide to move forward with implementation with initial data but plan to revisit eligibility in one or two years.

### **“Neutral” Eligibility Factors**

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Cities and states often decide that a person or business is eligible for cannabis social equity benefits based on the following factors, which do not consider either race or residency:

- A person’s arrests, convictions, or incarceration under previous marijuana laws or other drug laws
- A person’s spouse’s or parent’s drug conviction

Some jurisdictions also use the following additional factors in considering how a person has been impacted:

- Assets or income (specifically whether total assets or annual income fall under a certain threshold)
- Public school attendance
- Housing loss through eviction or foreclosure

## **Eligibility Based on Race of Applicant**

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*Note: If a jurisdiction's social equity eligibility standards do not explicitly consider an applicant's race, these concerns are not applicable.*

### Background

Several states include race as one component in determining social equity eligibility. Some states use a person's Black, African-American, Latinx, or Indigenous status as one criterion or way to qualify. Other states provide special benefits to certified minority-owned businesses as part of more general racial diversity goals. Some do both.

### Interpretation

After the Supreme Court ruled in 2023 that race-based affirmative action programs in college admissions processes violate the Equal Protection Clause, it is questionable whether race can explicitly be taken into account as part of the eligibility process. However, the Court ruled that academic institutions may consider how race may have shaped an applicant's life.

### Considerations

- As part of its decision on social equity program eligibility, jurisdictions might consider – for example – a written account of the impact of racially biased drug laws on an applicant's life.
- Strict racial “quotas” (for example: a state law requiring that 15% of licenses must be granted to minority-owned businesses) have been ruled unconstitutional.

## **Eligibility Based on Residency of Applicant**

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*Note: If a jurisdiction's social equity eligibility standards do not explicitly consider whether an applicant is (or has been) a resident in a particular place, these concerns are not applicable.*

### Background

The most common consideration in determining eligibility for social equity programs has historically been whether a person resided in a geographical area determined by an impact study to have been disproportionately impacted by drug criminalization.

But the “dormant commerce clause” of the constitution generally prohibits states from enacting laws that either directly discriminate against out-of-state businesses or indirectly burden interstate commerce in a way that is excessive or unreasonable. While this raises concerns about the basic structure of every marijuana state program, it also raises specific concerns about social equity eligibility based on residency.

### Interpretation

Complicated by marijuana’s current status as a federally illegal substance, court opinions on residency requirements have been mixed. At least one court (the First Circuit Court) has ruled that a requirement for all licensees to be state residents violated the dormant commerce clause, leading to uncertainty on requirements involving residency. However, that decision did not involve social equity and did not consider the purpose, goals, or structure of any social equity program.

### Considerations

- Until these questions are settled, jurisdictions might consider avoiding residency requirements altogether and basing social equity eligibility on – for example – marijuana convictions that took place anywhere in the United States.
- If a jurisdiction is specifically concerned about repairing harm caused by its own criminal justice system, it might consider constructing a program in which people qualify if they have faced arrest, conviction, or incarceration by the jurisdiction’s own law enforcement agencies – regardless of the person’s past or present residency.

### **For More Information**

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For more information on constructing social equity programs generally, you can watch the video of our presentation “[Creating Social Equity Through Cannabis Policy](#)” to the National Academies of Science, or read our paper “[Fair and Square: How to Effectively Incorporate Social Equity Into Cannabis Laws and Regulations](#)” published by The Ohio State University Moritz College of Law Drug Enforcement and Policy Center.

For more information on the effectiveness of social equity programs, see the [Social Equity Impact Report](#) by Supernova Women, which looked at social returns of social equity programs and found a return on investment ranging from \$1.20 to \$4.56 for every dollar invested.

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