

Marijuana in Property Management

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Background:

Cannabis, commonly known as marijuana, is a plant known for its psychoactive and physiological effects. The principal psychoactive chemical of cannabis is tetrahydrocannabinol (THC). Some believe that marijuana can help with the symptoms of various illnesses and in the treatment of the side effects of chemotherapy treatments for cancer patients. However, the medicinal value of cannabis continues to be a much disputed topic. To date, the Food and Drug Administration (FDA) has not approved marijuana for any medical reason, and maintains that marijuana is associated with numerous harmful health effects. The FDA has, however, approved [two drugs containing a synthetic version of THC](#) for treatment of certain medical conditions.

Since 1996 in the United States, 28 states and the District of Columbia have passed some version of laws allowing for the legal use of marijuana. While the laws vary, all 28 jurisdictions allow for some use of marijuana for medical purposes. There are important differences between states regarding what ailments marijuana is approved to treat. Medical marijuana can be used to treat nearly any condition in California, whereas in other stricter states, only very specific conditions are approved. A number of states allow cultivation of marijuana plants for individual consumption and eight states now allow the use of marijuana for recreational use. Legalizing recreational marijuana was on ballots in five states for the November 2016 election, winning in all except Arizona.

Federal laws treatment of marijuana differs from state law. Under federal law, marijuana remains a Schedule I substance under the Controlled Substances Act. Distribution of marijuana remains a federal offense, and as a Schedule I substance, marijuana is barred at the federal level from being prescribed. In recent years the Department of Justice has published a series of notices, explaining that they are unlikely to use federal resources to prosecute activities that are legal under the state law in which the activity is taking place; but the notices reinforce the fact that marijuana remains illegal at the federal level, and clearly retain their right to prosecute illegal activity. The memos outline 8 areas where the DOJ will focus their efforts: 1) sale and distribution to minors; 2) revenue being used for (other) illegal activity; 3) interstate commerce; 4) trafficking of other illegal substances; 5) preventing violence and illegal firearm use; 6) driving under the influence or other public safety issues; 7) cultivation on public lands; and 8) marijuana use on federal property.

There have been repeated calls to have the FDA change the status of marijuana so that it can be legally prescribed by doctors. Senators from Washington and Colorado, the two states with some of the most liberal marijuana laws, have urged the White House to allow state licensed marijuana businesses, dispensaries, and growers in their states to be immune from federal prosecution. Most believe its status cannot be changed without legislation. However, that has its own complications. The United States has signed a number of international treaties on combating illegal drugs that list cannabis as a Schedule I drug. Already, several countries have expressed concern with state laws legalizing marijuana, saying that the US is actively involved in preventing illegal drugs in their countries, but is not prosecuting their own.

In August of 2016, the National Conference of State Legislatures (NCSL), a bipartisan organization comprised of state legislators and their staff, adopted a resolution urging the federal government to amend its laws to explicitly allow states to set their own marijuana policies without federal interference. The NCSL does not support or oppose legalization, but supports the state's ability to make that determination. In February, 2015, Congressman Jared Polis (Colorado) introduced the "Regulate Marijuana Like Alcohol Act" (H.R. 1014), to remove marijuana from the Controlled Substances Act and

transfer oversight from the Drug Enforcement Agency to the Bureau of Alcohol, Tobacco, Firearms, and Explosives. H.R. 1014 was referred to the Subcommittee on Trade on March 27th, 2015 and was not moved.

IREM Policy Position

As marijuana legalization and cultivation laws are ever-changing and expanding, IREM has a formal policy position on the topic that allows IREM Members to engage in the business as they see fit, and within the confines of the law.

Medical Marijuana in Property Management

Background and Objective:

As a Schedule I controlled substance under the Controlled Substances Act, marijuana is illegal at the federal level for any use. However, 23 states and the District of Columbia have passed their own legislation authorizing the use of medical marijuana to varying degrees. This conflict between federal and state laws creates a complicated situation for property managers.

Per a 2011 memo, HUD has directed public housing agencies or owners to deny admission of applicants who are using medical marijuana.

IREM Position:

It is critical for property managers to stay up to date on the legality of the cultivation, use, and sale of marijuana in their jurisdiction. The legality and regulation of medical marijuana varies not only by state, but also by local municipality. Property managers should check with local municipal officials to ensure they are up to date on medical marijuana regulations. There are tools available to property managers enabling them to deal with marijuana as they see fit, such as lease addendums, with which smoking and illegal drug use can be prohibited. Please refer to our Statement of Policy on Combating Drugs in Real Estate, Smoking in the Workplace and Residential Smoking, and our white paper on Marijuana Legalization Laws.

Adopted 10/14

Types of Laws:

Medical Marijuana Laws: Currently 28 jurisdictions permit the use of marijuana for medical purposes (see chart below).

Growing Laws: 17 states have individual/personal cultivation laws (see chart below).

Recreational Marijuana Laws: Currently 8 states permit the recreational use of marijuana (see chart below).

Things to Consider:

Lease Addendum: If your lease prohibits smoking on the property, you do not need to specifically amend it to prohibit the smoking of marijuana, unless you specify tobacco in the lease. However, if your lease prohibits illegal drug activity – but does not specify federal or state law – you may need to specify federal law if you want to prohibit marijuana use in a state that permits it.

Reasonable Accommodation: Because the use of marijuana remains a federal offense, some will argue that you may deny a reasonable accommodation claim for the use of medical marijuana under the federal Fair Housing Act. However, the courts are not in agreement on this issue. In the employment area, courts have denied medical marijuana as a reasonable accommodation (see *Casias v. Wal-Mart Stores, Inc.* - <http://caselaw.findlaw.com/us-6th-circuit/1612751.html>). Given the federal government's express intention not to enforce the law prohibiting use of marijuana may lead state courts to be more lenient.

Growing Marijuana: Currently 16 states allow individuals to grow marijuana for personal use. The growing of marijuana requires significant amounts of water, heat, and humidity. These conditions can create mold issues in properties. These requirements can also increase utility costs for the landlord if tenants don't pay individual electric and water bills. Further, the property could be subject to civil asset forfeiture if you permit growing. If you own property in a state that allows individual growing, you will want to address this specifically in the lease. In 2005, the U.S. Supreme Court ruled that the federal government (through Congress) may criminalize the personal production and use of marijuana under the Commerce Clause of the Constitution, even where states approve its use for medicinal purposes (see *Gonzales v. Raich* at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=03-1454#concurrency1>.) See more on commercial marijuana cultivation under industrial properties.

Alternatives to Smoking Marijuana: Marijuana does not have to be smoked to absorb THC. There are a number of alternatives to smoking that may be available. Marijuana can be ingested through baking into food products; it can be incorporated into oils, butters, or teas; or made into a tincture that is added to foods or placed under the tongue. THC is also available in a spray form, and can be vaporized and inhaled. In fact, vaporizing may provide the highest levels of THC from the plant. There are even lotions or salves containing cannabis that can be applied topically. Lastly, there is a hash or wax that contains high levels of THC that can be added to food or drinks. Licensed dispensaries may carry these products in addition to the more traditional form of dried cannabis for smoking.

Marijuana Products: As discussed above, there are many ways to obtain THC other than smoking marijuana. However, the manufacturing of these other products – especially oils – is a complex process. The creation of hash oil utilizes butane, a heavy gas that sinks. This is the same gas used the manufacture of methamphetamine, and is the cause of the explosions that have occurred with the manufacture of meth. Explosions from the creation of hash oil have become more prevalent as marijuana is legalized.

Security Concerns: Unique security issues are attributed to the marijuana industry. As a Schedule I drug, federal laws prohibit marijuana businesses from utilizing federally regulated banks and credit/debit card systems. Some banks have opened specifically catering to marijuana-related businesses. However, they do not carry the benefits associated with being federally regulated such as FDIC insurance. Even when available, many marijuana businesses do not use them as their services can be very expensive. As a

result, businesses involved in the marijuana industry are compelled to operate on a cash-only basis. Payments to landlords for rental charges can be expected to be made in cash or by money order. Additionally, the marijuana plants and related products are at high risk for theft and crime. Commercial leases should clearly identify landlord and tenant responsibilities for security measures.

Summary of Lease Considerations:

- 1) If your lease prohibits smoking, review to ensure language is not limited to tobacco.
- 2) Remember there are alternatives to smoking marijuana, and consider policy on those.
- 3) Consider exceptions for reasonable accommodation for medical marijuana use.
- 4) Growing marijuana plants can be expensive and can lead to other property issues. Consider lease terms related to such.
- 5) Review lease language for conflicts between state and federal laws.
- 6) Review lease language for security responsibilities.

Considerations by Property Type:

Community Association (both Single Family and Condominiums): Community associations may have covenants or rules against smoking on or around the property. However, many community association rules are silent on this issue. Associations can attempt to change the rules to address the issue of marijuana, but residents may see such a change (to prohibit smoking of marijuana within units) as an attack on private property rights. There has been no clear direction from the courts. In fact, most court decisions have resulted in a finding for private property rights over the rights of the property or neighbors. In reviewing their rules, community associations should consider the impact on all residents of the property. Can the smoke travel easily from one unit to another? Can filters be installed to limit smoke infiltration? Can the resident utilize another way to partake of the marijuana? If it can only be smoked, can the resident limit smoking to hours when neighboring residents are less likely to be at home? The ability to grow marijuana plants on a property should also be considered.

Multifamily Property: Multifamily properties with smoking bans may also restrict the smoking of marijuana. However, residents may request a reasonable accommodation for the use of medical marijuana; depending upon state law, owners/managers may find it difficult to refuse such a request. California, for example, considers denial of such a request a fair housing violation under state law. However, the conflict between state and federal laws make its application tricky for multifamily property owners and managers.

Multifamily owners and managers must also address the issue of cultivation of plants. While a number of states allow certified individuals to grow marijuana plants for individual use; such growing requires significant electricity, water and heat. Owners/managers may want to specifically prohibit the cultivation of marijuana plants in the lease, even when the tenant is responsible for paying for utilities.

Federally Assisted Properties: On December 29, 2014, HUD reiterated that the use of marijuana (even for medical purposes) is prohibited in federally assisted properties. HUD stated that Public Housing Authorities (PHAs) and owners of such housing must deny admission to those with a household member who is illegally using a federally controlled substance; and may not provide a reasonable accommodation for new tenants. For existing tenants, owners/managers must establish procedures and lease provisions that allow the termination of assistance and tenancy for those engaging in federally

illegal behavior. HUD did state that owners are not compelled to evict existing tenants, and PHAs may, on a case-by-case basis, make exceptions for users of medical marijuana that are existing tenants.

The notice can be found here:

<http://portal.hud.gov/hudportal/documents/huddoc?id=useofmarijinmfassistpropty.pdf>

Retail Space: States with marijuana laws also have processes for licensing dispensaries. These dispensaries are frequently located in retail locations, often in stand-alone buildings, but may also be located in shopping centers. When leasing or selling space to a licensed marijuana dispensary, managers and owners should take into consideration the impact on neighboring businesses and local residents, as well as federal civil asset forfeiture laws and municipal zoning laws. Additionally, since this is a cash-only business, security concerns should be identified and addressed.

Industrial Space: To allow people to obtain marijuana, states have also passed laws related to the commercial cultivation of marijuana. Marijuana plants require significant light, water and humidity to thrive. A plant can require 16-20 hours of light daily, the ideal growing temperature is between 75-86°F, and plants are often grown hydroponically. These factors should be taken into consideration when deciding whether to lease to licensed growers. In addition, there have been cases of federal law enforcement raiding properties growing substantial quantities of marijuana and holding the growers and the owner or manager of the property liable. Security concerns should also be considered since the tenant may become a target for theft of marijuana plants, products and equipment.

The manufacture of hash oil is another consideration. Some growers of marijuana also have become manufacturers of other products – including hash oil. The production of hash oil is highly volatile and has resulted in a number of property explosions. When leasing to growers or manufacturers of marijuana products, this should be taken into consideration.

Office Buildings: Office properties that are non-smoking should ensure that leases are not limited to tobacco if there is a wish to also exclude the smoking of marijuana. In addition, leases that have language about tenants' illegal drug use also want to be clear that "illegal" covers both state and federal law. Marijuana businesses are likely to need corporate office space that may be separate from retail or industrial space. Owners/managers should consider whether or not to lease to these businesses.

Conclusion:

Over the last 20 years, the number of states allowing use of marijuana has been increasing, and with a recent poll showing over 60% of Americans support legalization, we can expect that trend to continue. The implications for real estate are numerous. The conflict between state and federal laws creates extra considerations. Owners/managers should take care to be up-to-date on the laws in jurisdictions where they operate, and ensure their lease provisions specifically address their policies related to these laws along with any other special considerations.

Note: At the time of publishing this white paper, final statutory language was not published in states that passed an initiative in November 2016. This information will be updated as it becomes available.

State	Statutory Language (year)	Patient Registry/IDs	Allows Dispensaries	Specifies Conditions	Recognizes Patients from other states	Recreational Use
Alaska	Statute Title 17, Chapter 37 (1999)	Yes	No	Yes	Yes, for AK-approved conditions, but not for dispensary purchases.	Yes
Arizona	Proposition 203 (2010)	Yes	Yes	Yes	Yes	No
Arkansas	Issue 6 (2016) Details Pending	Yes	Yes	Yes	Yes	No
California	SB 420 (2003)	Yes	Yes	No	No	Yes
Colorado	Amendment 20 (2000)	Yes	Yes	Yes	No	Yes
Connecticut	HB 5387 (2012)	Yes	Yes	Yes	No	No
Delaware	SB 17 (2011)	Yes	Yes	Yes	Yes, for DE-approved conditions.	No
DC	L18-0210 (2010)	Yes	Yes	Yes	No	Yes
Florida	Amendment 2 (2016) Details pending	Yes	Yes	Yes	Pending	No
Hawaii	SB 862 (2000)	Yes	No	Yes	No	No
Illinois	HB 1(2013)	Yes	Yes	Yes	No	No
	Proposed rules as of April, 2014					
Maine	Title 22, §2423-A	Yes	Yes	Yes	Yes, but not for dispensary purchases.	Yes
Maryland	§13-3301	Yes	Yes	Yes	No	No
Massachusetts	Question 3(2012)	Yes	Yes	Yes	No	Yes
	Regulations(2013)					
Michigan	Proposal 1(2008)	Yes	Not in state law, but localities may create ordinances to allow them and regulate them.	Yes	Yes, for legal protection of possession, but not for dispensary purchases.	No
Minnesota	SF 2471, Chapter 311 (2014)	Yes	Yes, limited, liquid extract products only	Yes	No	No
Montana	Title 50, Ch.46 pt.301-344	Yes	Yes	Yes	No	No
	Initiative 182 (2016)					
Nevada	NRS 453A	Yes	Yes	Yes	Yes, if the other state's program are "substantially similar." Patients must fill out	Yes
	NAC 453A					
New Hampshire	HB 573 (2013)	Yes	Yes	Yes	Yes, with a note from their home state, but they cannot purchase through dispensaries.	No
New Jersey	SB 119(2009)	Yes	Yes	Yes	No	No
New Mexico	SB 523 (2007)	Yes	Yes	Yes	No	No
New York	A6357 (2014)	Yes	Ingested doses may not contain more than 10 mg of THC, product may not be smoked	Yes	No	No
North Dakota	Measure 5 (2016) Details pending	Yes	Yes	Yes	Pending	No
Ohio	HB 523 (2016) Not yet operational	Yes	Yes	Yes	Pending	No
Oregon	Oregon Medical Marijuana Act(1998)	Yes	Yes	Yes	No	Yes
	SB 161 (2007)					
Pennsylvania	35 P.S. §10231.101-110	Yes	Yes	Yes	Yes	No
Rhode Island	Chapter 21-28.6	Yes	Yes	Yes	Yes	No
Vermont	18 V.S.A. § 4471-4474m	Yes	Yes	Yes	No	No
Washington	RCW Chapter 69.51A.005-900	No	Yes	Yes	No	Yes
	WAC Marijuana rules: Chapter 314-55 WAC					

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Laws Relating to Personal Cultivation of Marijuana Plants (for those with a medical prescription)

State	Cultivation Law
Alaska	Six marijuana plants, only three of which may be mature
Arizona	12 marijuana plants, none within 25 miles of a licensed dispensary
California	Six mature or 12 immature marijuana plants (some counties allow a grow space of up to 100 square feet)
Colorado	Six marijuana plants
Delaware	Only licensed compassion center agents may cultivate medical marijuana for qualified patients (home cultivation is prohibited)
Florida	<i>Pending</i>
Hawaii	Seven marijuana plants
Maine	No more than six mature marijuana plants
Massachusetts	Up to a 60-day supply
Michigan	12 marijuana plants
Montana	Four mature plants, up to 12 seedlings
Nevada	12 mature plants, none within 25 miles of an operating dispensary
New Mexico	12 seedlings and four mature marijuana plants (16 total); licensed producers may grow up to 150 mature plants at a time
Oregon	Medicinal- 18 seedlings and six mature marijuana plants (24 total) Recreational- 4 marijuana plants
Rhode Island	12 marijuana plants and 12 seedlings
Vermont	Two mature and/or seven immature marijuana plants
Washington	Four marijuana plants if not entered into the medical marijuana authorization database, 6 if entered into database, 15 if a doctor deems necessary
D.C.	Six marijuana plants, only three of which may be mature