

## Tenants and Marijuana: What's a landlord to do?

When it comes to landlords dealing with tenants who own, grow, and/or use marijuana throughout the U.S., landlords have the right, at least theoretically, to ban any possession of marijuana on their premises, as long as cannabis continues to be a "Schedule 1" controlled substance under the federal Controlled Substances Act. A prohibition could even extend to so-called "medical marijuana," now legal in 23 states and the District of Columbia.

The fact that the current administration has chosen not to fully enforce federal marijuana laws in states that permit some use of marijuana does not eliminate the exposure for landlords.

Even if marijuana should become legal under federal law, landlords would still be free in most jurisdictions to include "no smoking" clauses in leases. Such clauses would not necessarily stop tenants from having or using pot, which can be ingested in a variety of ways, but they would address the most hazardous use, which can combine burning embers with impaired senses.

What has changed, of course, are opinions about marijuana among members of the general public, including potential tenants. While it's still possible to ban marijuana possession on one's premises, whether such a ban is enforceable or desirable is another matter.

In light of the growing support for legalization or decriminalization of marijuana, landlords find it increasingly difficult to get a court to enforce an eviction over marijuana possession, especially over a first offense, so to speak. (Four states—Colorado, Oregon, Washington, and Alaska—have legalized possession of limited amounts of marijuana for recreational use. D.C. voters enacted a legalization measure, but it was overruled by Congress.)



Lease restrictions on marijuana will also cut rental properties off from a growing section of the market that, far from being stereotypical "potheads," include growing numbers of older professionals who may have used marijuana recreationally for years.



Moreover, the rental market also includes people with severe illnesses and injuries who rely on doctor-prescribed cannabis for relief. It would be awkward and probably illegal for a landlord to impose lease conditions on a prescription medication that is otherwise legal.

The question then becomes: How do landlords accommodate moderate marijuana use without putting themselves or their properties at risk?

### Insurance

The first thing landlords need to realize is that their insurance carriers are also in a difficult position. Given that cannabis

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remains illegal under federal law, insurers have some discretion to deny coverage for marijuana-related losses, as long as they do so consistently and not arbitrarily.

A precedent was established in 2012, when a federal court in Hawaii upheld USAA's denial of property coverage for loss to a woman's marijuana plants on the basis that they were illegal substances under federal law. (The company had earlier offered a settlement, but she declined it.) Significantly, the court ruled for the insurer even though the marijuana was used for legalized medicinal purposes.

Even with that precedent, however, it is not easy for state-regulated insurers to avoid paying for damage to a structure or personal property arising from a legal use of a substance legalized under state law.

The risk doesn't end there, however.

Shortly after Colorado allowed possession of limited amounts of marijuana for recreational purposes, fire departments in the state noted an increase in house fires arising from operations using open flames to extract "THC" oil, the substance that creates a "high," from marijuana plants.

Insurers are far more likely to deny coverage in such a case, and sustain the denial, by arguing that such processing, if not illegal, is a material increase in the risk not contemplated by the policy. Insurers have been known to deny coverage for building damage related to marijuana use by a tenant. That's one more reason why it is always important to verify, at least once a year, who your occupants are and how they are using your property.

Therefore, landlords must first check with their own insurers to determine whether any loss arising from marijuana use by a tenant might be excluded. If so, there are emerging sources of coverage for marijuana-related losses in what's called the "surplus lines" or "non-admitted" market for insurance.

### Provisions

Once a source of insurance coverage is established, landlords can identify the legal and practical limits of managing their exposure to marijuana.



To that end, it may prove problematic to draft lease provisions seeking to explicitly regulate where and how a tenant can use marijuana. Such an approach would implicitly put the landlord in a position of conceding that marijuana use is legal to some extent, a contention most landlords are not qualified to make.

A safer approach, at least from a legal and risk management perspective, would be to ban smoking of any substance, legal or illegal, and to prohibit unlicensed sales of any products—again, legal or illegal—on the premises.

In addition, landlords could consider prohibiting indoor growing operations which, in the case of marijuana, have been known to increase humidity and foster mold, as well as prohibiting processing operations, such as the processing of THC oil, which have caused building fires.

In the last two potential solutions, lawyers will need to fashion language that distinguishes unwanted growing and processing operations from ordinary gardening and cooking, but that is not insurmountable.

By regulating behaviors rather than a substance, landlords can keep their properties attractive to a wide range of prospective tenants.