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Don't Get Burned by Medical Marijuana Laws


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The "decriminalization" of "medical" marijuana in several states, along with the general changes in state drug enforcement laws has serious consequences for landlords if a tenant is suspected of using, possessing, cultivating, manufacturing, or distributing medical marijuana. While medical marijuana (and related medical marijuana dispensaries) may be legal in certain circumstances under state law, landlords potentially risk prosecution for aiding and abetting and potential forfeiture of their property under federal laws, which have not in any way "decriminalized" marijuana. To complicate matters, there are instances of courts refusing to evict tenants under the "lawful use" provisions of a lease because medical marijuana is "legal" under state Law.

The Medical Marijuana Laws

One example of this phenomenon California' s Compassionate Use Act of 1996 (Health & S C §11362. 5) , which allows certain persons to possess and cultivate marijuana for their personal medical use. California's Medical Marijuana Program Act (Health & S C §§11362. 7-11362. 83) clarifies and regulates the cultivation and distribution of medical marijuana. However, a landlord who knowingly rents property to a user, possessor, distributor or cultivator of medical marijuana runs the risk of (1) criminal prosecution under federal law for aiding and abetting (21 USC §846) or (2) a civil forfeiture of its real property under federal law (21 USC §881(a) (7)) See, *e.g., U.S. v Real Property Located at 5300 Lights Creek Lane* (9th Cir 2004) 116 Fed Appx 117.

Medical marijuana laws do not create a license to commit a nuisance or endanger the health or safety of others. Marijuana smoke is a carcinogenic substance and noxious to many people. In addition, there is often a criminal element associated with the cultivation and distribution of medical marijuana. For these reasons, tenants can still be subject to eviction under traditional public or private nuisance law. Furthermore, there is no state or federal antidiscrimination law requiring landlords to "reasonably accommodate" tenants who use, possess, distribute or cultivate marijuana for medical purposes. See, e. g. , *Ross v RagingWire Telecommunications, Inc.* (2008) 42 Cal 4th 920. Also, see e. g. , *James v. City of Costa Mesa* (2012 - US 9th Circuit) . As such, and since there are methods to "use" marijuana without smoking (foods such as cookies or brownies for example) , the actual smoking of marijuana (even in the tenant's residence) may be subject to express prohibition in a lease.

The Courts Refuse to Evict Based on "Compliance with Law"

Most leases contain a "compliance with law" clause that imposes a contractual obligation on the tenant to comply with all federal, state, and local laws. However, some courts are refusing to evict tenants based on the "compliance with law" provision because the tenant complied with state law and, therefore the Courts assert, did not violate the lease. Most successful evictions are based on local ordinances or traditional nuisance laws. For example, and in relation to medical marijuana dispensaries, the California Supreme Court in *City of Riverside v Inland Empire Patient's Health & Wellness Ctr.* (56 Cal 4th 729) held that the Compassionate Use Act, Health & Saf. Code § 11362. 5, and the Medical Marijuana Program, Health & Saf. Code, § 11362. 7 et seq. , did not expressly or impliedly preempt the city's zoning provisions declaring a medical marijuana dispensary to be a prohibited use, and a public nuisance due to the association of criminal elements, anywhere within the city limits.

What Typically Happens?

Most landlords do not knowingly lease to tenants who "use" medical marijuana or to medical marijuana dispensaries. In most instances, the tenant has relied on a "vague" use provision (often proposed by the tenant in order to "slip one past" the landlord) . For example, in connection with commercial properties, "skateboards and related paraphernalia" or "medicinal and therapeutic products" are use provisions tenants have relied on to argue they can distribute marijuana from the leased premises. Also keep in mind that since medical marijuana and medical marijuana dispensaries are legal in more than a few states, the "all lawful purposes" use provision in many leases is ripe for misuse by a tenant (especially a residential tenant who wants to smoke in their residence) .

Conclusion

As long as there is a conflict between state and federal law, the risk for landlords will exist. The best plan of attack is to include in your lease an express prohibition of the use, possession, cultivation and/ or distribution of illegal drugs, including "medical marijuana" regardless of its state law legality. In the context of a residential lease, express prohibitions on "smoking" may be required to counter any argument by a tenant that the tenant is permitted to smoke for medical reasons in their residence. However, if a landlord does find itself in a predicament with a "medical marijuana tenant", the landlord should consult with local counsel to analyze the issues based on legality of the medical marijuana. As a generality, success is achieved when landlord focuses on nuisance issues and express lease prohibitions.

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