

# Kimball, Tirey & St. John LLP

## Medical Marijuana Dilemma for Landlords

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California is one of several states which have enacted laws that consider marijuana use and cultivation to be legal when there is appropriate medical justification. (In addition, in November 2016 voters passed Proposition 64 which legalizes marijuana use, growth and transportation for recreational purposes. Proposition 64 does not affect California's medical marijuana laws, which remain in effect.) Many local jurisdictions in California have passed ordinances which specify the circumstances under which medical use or cultivation of marijuana will be allowed. Based on these statutes, tenants (primarily in housing, but in some commercial properties as well) have asserted that their landlord cannot control medical use or cultivation of the drug beyond the restrictions established in state and local law.

The California medical marijuana statute, called the Compassionate Use Act (CUA) stated specific limits for use and growth of marijuana by patients who had a doctor's recommendation. A California appellate court case in 2010 however, opened up the argument that other amounts might be reasonable as long as they are for "personal use" by the patient.

Our law firm has frequently been asked to counsel clients on this issue. We have shared with them the frustrating fact that there is a great deal of confusion because of a conflict in the applicable laws. Although medical and (and now recreational) use and cultivation may be legal under state and local laws, federal laws do not contain any exceptions, even for medical reasons. Thus, it continues to be a violation of federal law to use or cultivate marijuana...for any purpose.

With the recent passage of Proposition 64, many owners and management companies are considering whether they want to prohibit (or conversely allow) the use and/or cultivation of recreational marijuana on their rental properties. If the decision is made to ban the use and/or cultivation of marijuana on a residential rental property through the lease or an addendum, owners and management companies will likely continue to face issues regarding use and/or cultivation of marijuana for medical purposes.

An affected tenant would argue that medical use should be allowed as a disability accommodation (an exception to a landlord's usual rules) because it is legal under California law. The landlord would then have to consider whether prohibiting use and/or cultivation on the property, because it is not allowed under federal law, might cause the tenant to file a complaint based on disability discrimination under state law. In other words, would allowing such use and/or cultivation be deemed to be a "reasonable" accommodation under the circumstances?

In 2005, the U.S. Supreme Court decided a California case called *Gonzales v. Raich*, in which the issue was whether federal law applied to the medical use and cultivation of marijuana in our state. The argument in the lower courts was that state law, rather than federal law, would apply because there was no "interstate commerce" involved. The Supreme Court disagreed, deciding that the Commerce Clause was broad enough to allow federal jurisdiction even if the cultivation was not for commercial purposes and the product was not transported across state lines. The court did not give an opinion on whether marijuana should be re-classified under federal law as a drug which is recognized as having medicinal uses. There has also been legislation proposed to reclassify marijuana as a Schedule II substance under the Controlled Substances Act (which

would mean the federal government would recognize for the first time that it does have some medicinal value). It is unclear whether this proposed legislation will ultimately be passed, particularly in light of the new Trump administration which is highly likely to be more conservative than the Obama administration.

Under the Obama administration, federal law enforcement agencies appeared to have the power, but not the intent, to punish California residents under federal law for medical use or cultivation which would otherwise be legal under state or local law. On October 19, 2009, the U.S. Attorney General's office issued a memorandum which indicated that the Department was committed to making efficient use of its resources and while it would continue to prosecute "significant traffickers of illegal drugs, including marijuana" they would not be focusing their resources on "individuals whose actions are in clear and unambiguous compliance with existing state laws." However, the memo underscored that "no State can authorize violations of federal law" and that their allocation of resources was not intended to legalize marijuana or "provide a legal defense to a violation of federal law." In 2015, Congress cut all funding to the Department of Justice for enforcement activities relative to medical marijuana in states that have legalized it for medicinal purposes.

However, the Trump administration may take a very different view and clear the way for the Department of Justice to once again begin prosecuting violations of the federal Controlled Substances Act in states that have legalized marijuana for medicinal and/or recreational purposes. Should this occur, it is unclear whether the focus would be on commercial growth and sales of marijuana rather than on individuals who are using and/or cultivating marijuana for their own purposes (whether medical or recreational).

Reasonable accommodations for disability are required in both housing and employment.

In a California case, *Ross v. RagingWire Telecommunication*, the state Supreme Court addressed allowing medical marijuana use as a reasonable accommodation in the context of employment. The court in that case held that the Fair Employment and Housing Act (FEHA) "does not require employers to accommodate the use of illegal drugs" and that California's medical marijuana law does not give a person "a right to use marijuana free of hindrance or inconvenience, enforceable against third parties."

Using this same reasoning, a residential landlord may be able to argue that the FEHA likewise does not require the landlord to allow medical marijuana use or cultivation in housing. An accommodation is reasonable unless it creates an undue financial or administrative burden, or fundamentally changes the nature of the landlord's business. Since medical use or cultivation is illegal under federal law, a landlord could determine that allowing it is not a "reasonable" accommodation.

Even if a landlord decides that medical marijuana use or cultivation in compliance with state law is a reasonable accommodation, the analysis of reasonableness should be able to include rules that allow ways to control the impact on others. For instance, the CUA states that medical use does not have to be allowed in areas where smoking is prohibited by law. Many local governments have passed laws that prohibit smoking in some or all areas of multi-family rental housing. Note also that marijuana has been added to the Proposition 65 list of hazardous substances, so if there are complaints from neighbors regarding the health effects of being exposed to marijuana smoke, a landlord should seriously consider the competing interests of the parties. Other issues to be considered are complaints about the smell from drifting smoke or growing marijuana plants, use of additional utilities such as water and electricity in the growing process, the danger of mold or other water intrusion problems, the potential fire danger from the use of grow lights overloading the electrical system, the potential for security issues if others know that a drug like marijuana is available on-site, etc.

In conclusion, the use and/or cultivation of medical marijuana as a reasonable accommodation on residential or commercial rental property is a developing area of the law and will continue to

be an issue for owners and management companies even with the legalization of marijuana for recreational purposes. Landlords are advised to seek legal advice from a fair housing knowledgeable attorney before making any decision to deny an accommodation request or evict a resident for use of medical marijuana.

**Note that there are additional issues to be addressed if a residential rental community receives federal subsidies. Please seek specific legal advice regarding such properties.**

*Kimball, Tirey & St. John LLP has medical marijuana addenda available. Please contact the Fair Housing Practice Group at [KTSFairHousing@kts-law.com](mailto:KTSFairHousing@kts-law.com) or (800) 338-6039 for more information.*

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