

# **MARIJUANA: You've Got Questions, We've Got Answers**

The media has been all marijuana all of the time. At least part of the hype can be explained by the calendar. Even though Amendment 64 passed in November 2012, the portions of Amendment 64 that legalized the recreational use of marijuana did not become effective until January 1, 2014. The recent media hype is not justified because nothing has changed. The law has not changed since the passage of Amendment 64. Further, the passage of Amendment 64 did not change existing landlord tenant law. While the law has not changed, the overblown media hype has created the impression, in the multifamily industry that marijuana laws have changed and that action needs to be taken. To cut through the hype, this month, we answer the most common questions our clients have been asking about marijuana.

Is marijuana legal? Yes and No. Under federal law, marijuana remains a Class I Controlled Substance, and therefore illegal under federal law. Colorado's marijuana laws do not make marijuana legal under federal law. However, Colorado has legalized both the use of medical marijuana and the recreational use of marijuana. Colorado treats marijuana very similar to alcohol, i.e. you have to be twenty-one years of age to purchase, and cannot drive or operate a motor vehicle under the influence of marijuana. Even though marijuana is illegal under federal law, the Obama administration stated in August of 2013 that it would not challenge laws legalizing marijuana, in Colorado and Washington, as long as these states maintain strict rules involving the sale and distribution of marijuana.

Now that recreational marijuana use is legal, do I have to allow it on my property? No. Landlords can prohibit tenants from using marijuana because it is illegal under federal law. More importantly, Amendment 64 specifically states that landlords may prohibit marijuana use on leased property. "Nothing shall prohibit any person who owns or controls a property from prohibiting or otherwise regulating the possession, consumption, use, or growing of marijuana on that property." Accordingly, it is clear under Colorado law that your right to prohibit marijuana

trumps a tenant's right to legally possess, use, and grow marijuana under Amendment 64. Based on the law, smoke-free properties can remain smoke-free.

Does Amendment 64 give your employees the right to smoke marijuana either on the job, or elsewhere if you decide to prohibit it? Federal law allows employers to both prohibit use and drug test for use. Amendment 64 specifically states that nothing in the law is intended to require an employer to permit or accommodate the use of marijuana in the workplace, or to affect the ability of employers to have policies restricting the use of marijuana by employees. Accordingly, landlords may still require drug testing as a condition of employment.

Regardless of whether or not you allow marijuana, should you or can you prevent tenants from growing marijuana on my property? Yes and Yes. Again, growing marijuana is illegal under federal law and Amendment 64 specifically allows you to prevent tenants from growing marijuana on your property. Persons who grow marijuana are much more likely to be selling marijuana. Marijuana distribution may lead to high traffic, as well as undesirable traffic. Further, cash and marijuana crops are attractive targets for thieves and increase the potential for marijuana-related violence at your community. Marijuana also needs a significant amount of water and electricity (for grow lights) to grow. Excessive use of electricity will increase utilities and could disproportionately impact other tenants under allocation formulas. Excessive water can increase the relative humidity of an apartment and increase the probability of mold. Thus, even if you allow marijuana use, we strongly recommend against allowing growing. If you allow marijuana use, but prohibit growing, your lease documents may need to be revised.

We prohibit marijuana use at our community, what is the best way to implement? You should eliminate potential marijuana problems before they begin by clearly setting forth your policy in your rental criteria. "Recreational marijuana use is legal in Colorado. However, both Colorado law and federal law give us the right to prohibit it. Marijuana use, possession, and/or growing is prohibited at this community, and violators will be evicted." If you're a no-marijuana property, clearly stating your policy up front will avoid the countless "marijuana is legal in Colorado" arguments

with tenants. To give you maximum enforcement ability, your lease documents (either the main lease or an addendum) should give you the right to terminate marijuana violators without a right to cure. If your lease documents already give you this right (the right to terminate based upon violation of federal law), you don't need to change your lease. You only need to change your lease documents if your crime-free and drug-free language is based on Colorado law, since use of marijuana is no longer a crime under Colorado law. If you're using an NAA (Blue Moon) Lease without an addendum that deals with crime or smoking in greater detail, you may also want to update your lease language. The NAA lease doesn't prohibit all unlawful behavior. With regard to drug use, it only prohibits possession or use of "controlled substances". This begs the question of "controlled" by whom, given that Colorado no longer controls small amounts of recreational marijuana.

A tenant's marijuana smoking is disturbing other tenants, what should I do? It depends. If you have a no-marijuana policy, then you serve the tenant with a three-day Demand for Compliance or Possession. You demand that the tenant stop smoking marijuana and stop disturbing other tenants. If you don't prohibit marijuana, then you demand that the tenant stop disturbing other tenants. Regardless of your policy, tenants are never allowed to disturb other tenants. If the behavior persists, you commence eviction proceedings. If your lease contains crime-free language, you may have the right to serve a Notice to Quit, meaning a right to terminate the lease. The difference between a Notice to Quit (get out) and a demand (comply or get out) is whether the tenant has a right to cure. You can still enforce marijuana-related violations, but Amendment 64 has decreased your leverage to deal with them. Before Amendment 64, many landlords were successful in imposing a practical solution, "Get out, or I'm calling the police." Because recreational marijuana use is now legal, the police can't be called or won't respond to marijuana issues in most instances. Eviction cases, based on marijuana violations, will also be more difficult to prove without police documentation and testimony.

What should your marijuana policy be? If you're a federally subsidized property, the answer to this question is simple. You may not allow the use of marijuana

on your property. HUD regulations and policy prohibit marijuana use, because it is illegal under federal law. If you're not federally subsidized, your marijuana policy is a business decision based on a host of factors similar to other business decisions you make. Will prohibiting marijuana hurt occupancy? Will allowing marijuana hurt occupancy? Remember, fifty-five percent of the electorate voted to legalize marijuana. Because marijuana is legal, maybe marijuana smokers will flock to Colorado? Similar to going smoke-free, your marijuana policy is determined by business considerations and risk analysis. Policies cover the spectrum from prohibition to tolerance. Some communities prohibit recreational use of marijuana, but allow medical marijuana.

Regardless of the policy, you should have a policy. We frequently receive and handle marijuana situations for clients. In order to provide legal advice, we need to know your policy. Too often onsite team members tell us that they don't know the community's position on marijuana. Obviously, if your onsite teams aren't clear on your policy, they can't enforce it. If your policy isn't well thought out, your documents probably won't address your policy, and in some instances may be even contradictory to your policy. Once you have adopted your policy, your rental criteria and lease documents should track your policy, and all personnel should be educated about the policy, and trained on how to enforce your policy. While we can't run your communities for you, we are available to answer your questions, and to discuss the various pros and cons of different policies.