



NEW MEXICO ASSOCIATION OF REALTORS® MEDICAL MARIJUANA INFORMATION SHEET -2020

Landlords should be aware that as to medical marijuana there is currently a conflict between federal and state law. Under federal law, marijuana remains a Schedule I substance under the Controlled Substances Act ("CSA") and distribution of marijuana remains a federal offense. Under New Mexico law, qualified patients may use and grow medical marijuana for their personal use and dispensaries established pursuant to New Mexico law may grow and sell/distribute medical marijuana to qualified patients. Due to this conflict, landlords face unique issues when renting to medical marijuana users, growers and dispensaries as further discussed below.

VARYING OPINIONS ON THE MEDICINAL USE OF MARIJUANA

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 helps with the symptoms of various illnesses and in the treatment of the side effects of chemotherapy treatments for cancer patients. Consequently, many states, including New Mexico have passed laws allowing the use of marijuana for these purposes. However, the Food and Drug Administration ("FDA") has not approved marijuana for any medical indication and maintains that marijuana is associated with numerous harmful health effects.

FEDERAL LAW

In a Department of Justice ("DOJ") memorandum issued in 2013, the DOJ made it clear that federal prosecutors will continue to aggressively enforce the CSA; however, as a general matter, the DOJ stated that federal resources should not be focused on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical *use* of marijuana. While indeed neither the DEA, nor the DOJ has prosecuted *users* of medical marijuana, it has prosecuted medical marijuana producers and owners of medical marijuana dispensaries and has seized real property under civil forfeiture laws (See more on Civil Forfeiture in the "Cultivating Marijuana" section below).

In 2015, Congress passed the Consolidated and Further Continuing Appropriations Act of 2015 ("Act") (it has been extended through 2016). The Act contains a section that states the following:

"None of the funds made available in this Act to the DOJ may be usedto prevent...States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

Following passage of the Act, the DOJ prosecuted the owners of a medical marijuana dispensary in California that was operating in compliance with California law. The federal trial court in California held that the Act prohibited the DOJ from prosecuting medical marijuana growers who were complying with state law. The DOJ disagreed with this interpretation of the law and appealed the decision to the 9th circuit Court of Appeals; however, before the appeal was heard, the DOJ dismissed its appeal. The DOJ also recently dismissed another similar case in a California federal trial court. However, since the issue was never decided by a higher court, it is possible for other federal trial courts to have different interpretations of the Act. Further, the Act is currently only effective through 2016.

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STATE LAW

Use of Medical Marijuana

In 2007, New Mexico passed the Erin and Lynn Compassionate Use Act ("ELCUA") which provides that "qualified patients" are exempt from state criminal and civil penalties for the medical use of cannabis.

The Act is administered by the New Mexico Department of Health (NMDH). A "qualified patient" is a New Mexico resident who has been diagnosed by a practitioner as having a debilitating medical condition and has received written certification and a registry identification card issued pursuant to ELCUA. The term "debilitating medical condition" is defined to include the following: 1) cancer; 2) glaucoma; 3) multiple sclerosis; 4) damage to the nervous tissue of the spinal cord, with objective neurological indication of intractable spasticity; 5) epilepsy; (6) positive status for human immunodeficiency virus or acquired immune deficiency syndrome; 7) admitted into hospice care in accordance with rules promulgated by the department; or 8) any other medical condition, medical treatment or disease as approved by the NMDH. The department may issue a registry identification card to an applicant under the age of 18 for the purpose of participating in the medical cannabis program upon the medical provider certification for patient eligibility from the applicant's practitioner and supporting application documents required under the rules.

In addition, ELCUA provides that a qualified patient's primary caregiver shall not be subject to arrest, prosecution or penalty in any manner for the possession of cannabis for medical use by the qualified patient if the quantity of cannabis does not exceed an adequate supply. Both the patient and the caregiver must obtain a registry identification card. It is also relevant to note that ELCUA prohibits the civil forfeiture under any *state or local law* of any property interest that is possessed, owned or used in connection with the medical use of cannabis (See more on Civil Forfeiture below).

Participation in a medical use of cannabis program by a qualified patient or primary caregiver does not relieve the qualified patient or primary caregiver from criminal prosecution or civil penalties for activities not authorized by ELCUA, liability for damages or criminal prosecution arising out of the operation of a vehicle while under the influence of cannabis. Furthermore, there are still civil penalties for possession or use of cannabis in the following locations: a school bus or public vehicle; on school grounds or property; in the workplace of the qualified patient's or primary caregiver's employment; or at a public park, recreation center, youth center or other public places.

Dispensing of Medical Marijuana

To meet the needs of qualified patients, it is necessary to have medical marijuana producers, couriers, manufactures and laboratories. These entities are highly regulated by the NMDH.

There are two types of production licenses, one issued to persons for the growing of medical marijuana for personal use and one to facilities for the growing of medical marijuana for sale and distribution to persons or entities authorized to possess and receive it. The latter is referred to as a "non-profit producer" license.

A qualified patient may apply for a personal production license to produce medical cannabis solely for the qualified patient's own use. A qualified patient may obtain no more than one personal production license, which may be issued for production to occur either indoors or outdoors in no more than one single location, which shall be either the patient's primary residence or other property owned by the patient. No more than two personal production licenses may be issued for a given location, with proof that a second registered patient currently resides at the location. Multiple personal production licenses may not be issued for non-residential locations. A qualified patient who holds a valid personal production license is authorized to possess no more than four mature female plants and a combined total of 12 seedlings and male plants and may possess no more than an adequate supply of usable cannabis. The primary caregiver of a qualified patient who holds a personal production license may assist the qualified patient to produce medical cannabis at the designated licensed location that is identified on the personal production license; the primary caregiver may not independently produce medical cannabis.



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A non-profit producer that operates a facility is limited to a combined total of no greater than 450 mature female plants, seedlings and male plants and may not possess a quantity of either mature female plants or seedlings and male plants that exceeds the quantities authorized by their licensure and associated licensing fee.

ISSUES SPECIFIC TO RENTAL PROPERTY

Discrimination Under State Law

Under the New Mexico Human Rights Act, it is illegal for any person to refuse to sell, rent, assign, lease or sublease or offer for sale, rental, lease, assignment or sublease any housing accommodation or real property to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or *physical or mental handicap*, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation. Of course, the question at the state level is whether the refusal to rent to a tenant who has qualified to use medical marijuana amounts to discrimination based on physical or mental handicap. The ELCUA is silent as to any specific penalties for those who refuse to rent to a marijuana card holder and the issue of whether it constitutes discrimination has yet to be decided by a New Mexico court of record, so landlords have no guidance in this area and are at risk that a tenant may make such a claim.

Reasonable Accommodation under Federal Law

Under the federal Fair Housing Act, housing providers are required to make reasonable changes in their policies and procedures to allow disabled individuals to fully benefit from the housing opportunity. This obligation to provide a reasonable accommodation applies to private landlords. Because the use of marijuana remains a federal offense, some will argue that a landlord may deny a reasonable accommodation claim for the use of medical marijuana under the federal Fair Housing Act, but this issue is not settled. However, the U.S. Department of Housing and Urban Development ("HUD") has stated that if an applicant for public or Section 8 housing is a known marijuana user (medical or otherwise) his/her application must be denied.

As to private housing, the consensus is that it is unlikely HUD would pursue a federal fair housing claim for a refusal to permit the use of medical marijuana and most state courts nationwide have ruled against medical marijuana users on claims of disability discrimination for a housing provider's failure to accommodate medical marijuana use.

Restrictions on Use

Before allowing a tenant to use medical marijuana on the property, a landlord may request that the tenant provide a copy of the tenant's registry identification card. In addition, a landlord may place reasonable restrictions on the use of the medical marijuana. The "reasonableness" of these restrictions have not been determined by a New Mexico court of record, but arguably, for purposes of example, if the landlord has a non-smoking policy, the landlord may prohibit the smoking of marijuana, but allow it in other forms or if the landlord is willing to allow smoking of medical marijuana, he/she may place reasonable restrictions on where it could or could not be smoked, for example, no smoking in the common areas.

Cultivating/Growing Marijuana

The growing of marijuana requires significant amounts of water, heat, and humidity. Most grow houses wind up having widespread mold due to the use of the irrigation and moisture needed for the plants.

Larger-scale growers typically make more significant modifications to the property, including the cutting of holes in ceilings to allow ventilation and run water lines, changing the ductwork and rewiring the property to accommodate the high voltage grow lights.



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The Colorado Inspection Services created the following Growing Facility Damage Checklist:

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|---|--|
| Unsafe wiring | Oversized fusing |
| Damaged fixtures | Holes for ventilation and electrical access |
| Wood rot | Rusted hollow columns |
| Rusted gas burning appliances and damaged vents | Mold from venting to interior, attic or crawlspace |
| Deterioration of chimney mortar from venting to fireplace | |

Requirements for growth of the plants may also increase utility costs for the landlord if tenants don't pay individual electric and water bills. Further, the property could be subject to federal civil asset forfeiture if growing is permitted. Civil asset forfeiture is a legal tool that allows law enforcement officials to seize property that they assert has been involved in certain criminal activity. In fact, the owner of the property doesn't even need to be guilty of a crime; civil asset forfeiture proceedings charge *the property itself* with involvement in a crime. This means that federal law enforcement can seize the car, home, money, or valuables without ever having to charge a person with a crime. In the event a landlord allows growing on his/her property, whether it for personal use or commercial sale, the landlord should always request a copy of the tenant's production license.

Alternatives to Smoking Marijuana

Marijuana does not have to be smoked to absorb THC. There are several alternatives to smoking that may be available. This would allow a landlord to maintain a non-smoking policy and still allow a qualified patient to use medical marijuana on the property. 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. 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.

Manufacturing of 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 in 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 Considerations

Unique security issues are attributed to the marijuana industry. Federal banking laws prohibit marijuana businesses from utilizing the banking system since these business activities are illegal at the federal level. 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 (arguably) at high risk for theft. Commercial leases should clearly identify landlord and tenant responsibilities for security measures.

Consult an Attorney, Your Insurance Provider and Other Professionals

Due to the conflict in state and federal laws regarding marijuana, owners/landlords are advised to consult with an attorney to assist in fully understanding the potential liability associated with both denying and granting a tenant's reasonable accommodation request to use and/or grow medical marijuana on the property. In the event an owner/landlord elects to allow the use or growing of medical marijuana on the property, he/she should consult with his/her insurance carrier for any coverage consequences to allowing an activity that is illegal under federal law. Lastly, to further understand the impact the growing of marijuana may have on the property, the owner/landlord should consult a professional. For more information visit, <http://www.realtor.org/field-guides/field-guide-to-the-impact-of-legalized-marijuana>.



NEW MEXICO ASSOCIATION OF REALTORS® — 2022 INFORMATION SHEET – RECREATIONAL MARIJUANA



FEDERAL LAW

Since the passage of the Controlled Substances Act (“CSA”), Congress has generally prohibited the cultivation, distribution, and possession of marijuana. Today, under federal law, Marijuana is still considered a Schedule I controlled substance. In a Department of Justice (“DOJ”) memorandum issued in 2018, the DOJ rescinded all previous guidance as to the enforcement of marijuana prosecution and directed all U.S. Attorneys to use previously established prosecutorial principles to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime. The current Attorney General, Merrick Garland, has stated that the DOJ will not prioritize prosecuting marijuana use.

STATE LAW

Use of Recreational Marijuana

In 2021, New Mexico passed the Cannabis Regulation Act (“CRA”) which legalized the use of recreational marijuana in New Mexico effective as of April 1, 2022.

Under the CRA, adults who are 21 and older are allowed to:

- possess, purchase, and give other adults up to two ounces of marijuana, up to 16 grams of concentrated marijuana, and 800 milligrams of edible cannabis;
- cultivate up to six mature and six immature cannabis plants, with a maximum of 12 mature plants per household;
- create cannabis-infused foods at home or perform extracts that do not involve volatile solvents;
- possess greater amounts of cannabis, if it is stored in a locked space at the person’s residence that is not visible from public spaces; and
- possess, manufacture, and give away paraphernalia.

Medical Marijuana

Nothing in the CRA shall be construed to limit a privilege or right of a qualified patient, a primary caregiver or a reciprocal participant participating in the medical cannabis program or the use, dispensing, possession, prescribing, storage or transport of a prescription drug containing cannabis that is approved pursuant to the Federal Food, Drug, and Cosmetic Act. For more information of the medical use of marijuana, please see the New Mexico Association of REALTORS® Medical Marijuana Information Sheet – 2021 Form 2312.

Cultivating/Growing Marijuana

The commercial production of marijuana is subject to state licensing under the CRA and is regulated by the Cannabis Control Division (“CCD”) of the New Mexico Regulation and Licensing Department.

Permitted Amounts: Under the CRA, individuals may engage in the personal production of marijuana. Persons over the age of 21 may cultivate up to six mature and six immature cannabis plants, with a maximum of 12 mature plants per household; create cannabis-infused foods at home or perform extracts that do not involve volatile solvents; or may manufacture and give away paraphernalia. Anything more than this and an individual may be subject to a fine or up to a fourth-degree felony.

Potential Problems Resulting from Marijuana Cultivation in a Property: The growing of marijuana requires significant amounts of water, heat, and humidity. Most grow houses wind up having widespread mold due to the use of the irrigation and moisture needed for the plants.

Larger-scale growers typically make more significant modifications to the property, including the cutting of holes in ceilings to allow ventilation and run water lines, changing the ductwork and rewiring the property to accommodate the high voltage grow lights.



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As recreational marijuana has become legalized in other states, various property issues started to become apparent within growing facilities. The Colorado Inspection Services created the following Growing Facility Damage Checklist:

- Unsafe wiring
- Damaged fixtures
- Holes for ventilation and electrical access
- Rusted hollow columns
- Wood rot
- Rusted gas burning appliances and damaged vents
- Mold from venting to interior, attic, or crawlspace
- Deterioration of chimney mortar from venting to fireplace
- Oversized fusing

Civil Forfeiture: Further, the property could be subject to federal civil asset forfeiture if growing is permitted in violation of the CRA and CCD regulations. Civil asset forfeiture is a legal tool that allows law enforcement officials to seize property that they assert has been involved in certain criminal activity. In fact, the owner of the property doesn't need to be guilty of a crime; civil asset forfeiture proceedings charge the property itself with involvement in a crime. This means that federal law enforcement can seize the car, home, money, or valuables without having to charge a person with a crime.

Disclosure that the Property was used for Marijuana Cultivation: There is nothing in the CRA that specifically addresses a seller's or broker's duty to disclose the fact that a property has been used to cultivate/grow marijuana. However, given the issues that may exist in such a property, the question must be asked: was the property altered in any way to facilitate or accommodate the growth of the marijuana? As noted above, any such modification of the property could create problems, even if the seller is not currently aware of such problems. In New Mexico, real estate brokers are required to disclose adverse material facts regarding the property of which the broker knows or "should know". Therefore, if the property has been modified in any way to accommodate marijuana growth, such information should be disclosed to potential buyers, even if the broker is unaware of any actual problems caused by such alteration of the property.

Leasing Considerations

Security: Unique security issues are attributed to the marijuana industry. Federal banking laws prohibit marijuana businesses from utilizing the banking system since these business activities are illegal at the federal level. There are only a limited number of local banks and credit unions that openly accept account deposits from the marijuana industry. As a result, some 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 (arguably) at high risk for theft. Commercial leases should clearly identify landlord and tenant responsibilities for security measures.

Insurance: In the event an owner/landlord elects to allow the use or growing of marijuana on the property, he/she should consult with his/her insurance carrier for any coverage consequences to allowing an activity that is illegal under federal law

Utility Costs: Requirements for growth of the plants may increase utility costs for the landlord if tenants don't pay individual electric and water bills.

Proof of Licensure: In the event a landlord allows growing on their property, the landlord should always request a copy of the tenant's production license.



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Consult Professionals

Due to the conflict in state and federal laws regarding marijuana, owners/landlords are advised to consult with an attorney to assist in fully understanding the potential liability associated with both denying and granting a tenant's request to use and/or grow marijuana on the property. Lastly, to further understand the impact the growing of marijuana may have on the property, the owner/landlord should consult a professional.

For More Information

For more information, [Click Here](#)

Scenarios

Dramatic case #1

Buyer makes an offer on a house with an indoor atrium. After inspections it is discovered that there is mold in the home. The buyer terminates the deal because they do not want to deal with mold. Buyer's broker claims that the seller was growing marijuana and never disclosed. The buyer felt that if they had known there was marijuana being grown in the house, that they never would have made an offer. The buyer feels that the seller should re-imburse for the cost of the inspections.

Did the seller need to disclose whether or not there was marijuana being grown?

Would it have changed the outcome if the seller was growing orchids?

Could the buyer have asked this question prior to making an offer?

Would the seller need to answer?

Not Knowing Case #2

Buyer purchases house in 2001. When the appraiser goes out to the property, he informs the buyer that the “casita” was a grow house. Buyer said, I do not know what that is or what that means, but I am going to update it as a guest house. It is now 2023 and buyer is ready to sell the house. All that the buyer did to the guest house is new flooring and fixtures. There are 3 large closets with electrical in them. There are high windows, water lines running all around the main room and large built in work benches on one side. Not to mention, an abundance of electrical outlets throw-out the “casita”

Should the realtor market the property as having a grow house?

Will the buyer need to disclose what the appraiser told her 20 years ago?

Would you consider this an adverse material fact?

Resources

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www.rld.nm.gov