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Marijuana industry creates opportunities and risks for owners of industrial real estate - by William Moorman

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Laws permitting the cultivation and sale of medicinal marijuana in each of the New England states, and the recent enactment of laws regarding recreational marijuana in Massachusetts and Maine (but recently vetoed by the Maine governor), have created great opportunities for owners of industrial real estate in New England. However, these opportunities come with certain legal and business risks that must be taken into account by those who decide to lease their property to marijuana based tenants.

Notwithstanding the passage of state laws permitting the cultivation and sale of marijuana, marijuana remains a Schedule I controlled substance and is illegal under the federal Controlled Substances Act (CSA). Even in states where marijuana has been legalized, anyone involved in or facilitating the cultivation, processing, distribution or sale of marijuana is subject to federal enforcement action, including criminal prosecution, civil liability, seizure and forfeiture of their property. This can occur even if the parties are in full compliance with applicable state marijuana laws.

While the DOJ has historically remained on the sidelines in this area, it has occasionally instituted actions against marijuana related business activities that were otherwise legal under state law. Furthermore, there is much uncertainty as to how President Trump and attorney general Sessions intend to treat marijuana businesses and whether they might even increase enforcement in states, such as those in New England, that have approved medicinal marijuana.

In light of the various risks that are peculiar
to the operation of a marijuana cultivation
facility or dispensary, and the possibility of stricter enforcement of the CSA, the following are some of the more important lease provisions that landlords should consider when leasing to such tenants:

• Landlord is granted increased inspection rights to ensure tenant remains in compliance with applicable marijuana laws and regulations, taking into account limited access to areas where marijuana is grown or stored.

• Burden of compliance and risk of enforcement of applicable federal and state marijuana laws is placed on tenant.

• Landlord has early lease termination rights under certain circumstances, including attempted seizures by government, finding of nuisance or cancellation of insurance.

• Tenant reimburses landlord for extraordinary expenses arising from tenant's use, including security guards, supplementary janitorial services, water usage or HVAC system maintenance.

• Special indemnification clauses protect landlord against particular risks of having a marijuana cultivator or dispensary as a tenant.

• Tenant responsibilities upon lease termination include removal of marijuana equipment and cleaning premises of marijuana-related product and residue.

For more details visit http://www.psh.com/MarijuanaLeaseClauses.

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