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The pitfalls of pot

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Arlo Guthrie famously sang that the "times, they are a changing". When he wrote that song in 1964, I am sure he never thought that the times would be changing when it came to the legality of marijuana. Not so long ago, if someone had told me that states would be legalizing the use and possession of marijuana, for both medicinal AND recreational use, I would have told them that they were already high! Now, more than 23 states have legalized some form of marijuana use, while others are voting on or considering such laws. The issue has therefore arisen as to whether such laws legalizing marijuana affect a residential landlord's ability to control such use on their property. In other words, in states where the possession of marijuana has been de-criminalized, is possession of marijuana still grounds for termination of a tenancy?

In Massachusetts (Mass.), there are presently two forms of legalized possession of marijuana. In 2009, Mass. voters passed a referendum decriminalizing possession of less than an ounce of marijuana. Thus, if a person is found in possession of such a quantity for their person use (i.e. they are not selling same to others) the police may issue a fine, but not arrest them. In 2012, Mass. voters went further, voting to legalize medical marijuana. As such, a person possessing a prescription from a physician may purchase, and dispensaries may sell to such persons, marijuana intended to be used for medicinal purposes. Based on these laws, many have argued that a residential landlord has no ability to evict a person who legally maintains marijuana in their apartment under these state laws. Not so fast. To fully understand the issue, one must harken back to their 5th grade social studies classes when we all learned about the hierarchy of laws! Surely you remember that the United States Constitution is the highest law in the land and, to the extent any federal or state law conflicts which such law, it is unenforceable. So to if a state law conflicts with a federal law, the federal law controls. On and on it goes, with state laws overruling local laws, etc. In relation to marijuana, and using our renewed knowledge from 5th grade, the problem arises when we look at the dictates of the federal Controlled Substances Act (CSA).

The CSA, as the name suggests, is the federal laws dealing with controlled substances. This law, passed by Congress and amended from time to time, separates drugs into several categories based on their approved uses. Some drugs have been found to have some medicinal use and therefore can be possessed as long as a physician has issued a prescription. Some drugs have been found to be so safe that no prescription is required. Some drugs, however, have been found to have no proper medicinal purposes and, as such, are banned for any use. Marijuana is one of the drugs that has been placed into this "banned" category by the federal government and, therefore, the CSA prohibits the possession of same for any purpose. Following our hierarchy of laws, therefore, the state laws which find that this drug can be possessed, either for recreational or medicinal purpose, appear to directly conflict with the CSA and therefore, one would argue, are not valid. Again, as these state laws conflict with the federal law, which law clearly identifies marijuana as having no

medical purpose, the federal law would control. The fact that the FBI chooses not to enforce this federal law is irrelevant to the argument. Does the fact that the police don't pull you over for driving 56mph on the highway change the speed limit?

The issue raised by this conflict of laws appears to support the position that, notwithstanding these state laws, a residential landlord has the authority to terminate a tenancy where a tenant is found in possession of marijuana. In fact, in federally financed properties, HUD has already opined that the possession of marijuana is still illegal and, as such, the landlord has the obligation to terminate a tenancy based on the lease provision dealing with the illegal possession of a controlled substance. In other housing, however, the issue remains in flux. In at least one case from the Boston Housing Court, a judge found that a tenant's possession of less than an ounce of marijuana was not the "illegal" possession of a controlled substance and therefore was not grounds for termination. That case, in fact, was appealed to the Supreme Judicial Court which requested parties to brief the issue. Unfortunately, despite extremely well written and reasoned briefs filed in the case (including our firm's brief on behalf of GBREB and IREM!!), the Supreme Judicial Court elected to punt on the issue, finding that the scale, cash, and baggies, which the trial judge had somehow ignored, demonstrated that the tenant was distributing the marijuana. As such, while the arguments allowing for the evictions for possession of marijuana appear to be strong and convincing, the issues of whether this possession of marijuana is still "illegal" in Mass. is still to be determined by any appellate court.

So...what's a landlord to do?

1. Our position is that the possession of marijuana continues to be illegal under federal law and, as such, all landlords continue to have the right, if not duty, to terminate or void the tenancy of a tenant that uses or possesses any quantity of marijuana. This is true regardless of whether the marijuana is for personal use or medical use. In fact, the U.S. Supreme Court has recognized the effect that illegal drugs have on residential housing, including resulting gun violence, and other criminal acts. Thus, we continue to believe that a landlord maintains the right to either void the tenancy under G.L. c. 139

Â§ 19 (the "fast-track" eviction statute) or terminate the tenancy under the lease.

2. In addition, we often see this issue arising when a resident complains of the odor of marijuana coming into their apartment, rather than an arrest occurring on the property. Of course, to proceed with an eviction for "criminal" activity, the landlord needs evidence that the substance is, in fact, marijuana. Property managers lack the expertise to identify the substances or "odors" as marijuana, regardless of where they went to college. As such, without a police officer to testify, the landlord lacks the ability to proceed with an eviction for criminal activity. However, the fact that a resident is creating unreasonable odors in their apartment is an independent basis for termination. In these cases, whether it is marijuana or peppers and onions, a resident that creates unreasonable odors in his apartment is subject to termination under most leases.

3. Landlords should strongly consider amending their leases to prohibit the use or possession of marijuana, regardless of its legality. This eliminates any issue as to whether or not the possession is illegal, and also makes residents clear on their rights in this regard. By amending the lease to clearly address this issue, the residents are on notice that this activity is prohibited and the landlord avoids being the test case on this issue! Likewise, while some residents may claim that the landlord cannot prohibit this "legal" activity in their apartment, such an argument holds no legal weight. Landlords prohibit many legal activities in apartments. For example, some landlords prohibit pets, which we all

know is a legal activity. Many landlords prohibit smoking in apartments which, again, is a legal activity. As such, it appears clear that landlords have the authority to prohibit marijuana in apartments, regardless of any state law.

4. The final issue, which is surely to arise, is whether or not a tenant can request a waiver of a marijuana prohibition as a reasonable accommodation. In other words, if the tenant is disabled and a physician prescribes marijuana to them under state law, can a resident ask to be allowed to maintain this drug as a reasonable accommodation. This, of course, is surely going to be a major issue which will require clarification from a higher authority (at least higher than me). As such, any tenant that raises the issue should have the request processed pursuant to the landlord's reasonable accommodation policy. When the request is reviewed, it would appear that there are several reasons supporting the denial of such a request. First of all, it would appear to be "unreasonable" as, in fact, it is a request to allow the person to violate federal law in their apartment. Would we consider a request to allow a person to maintain an automatic weapon in their apartment without a license or to keep a tiger where the law prohibits such an animal in residential housing? Of course not. Therefore, one would argue that a request seeking to allow a person to violate federal law by using marijuana would be unreasonable. In addition, there is a strong argument that there is an alternative accommodation available, being the pill form of the medicine contained within marijuana, which some argue serves the same medical purpose. Likewise, there is the ability for the resident to use the drug elsewhere. As such, there appear to be strong arguments supporting a landlord's right to deny a request for a reasonable accommodation to maintain medical marijuana. Having said that, it is imperative that you seek legal counsel prior to making any decision in relation to such an issue.

The pitfalls of pot are pervasive. But its "high" time people stopped being dazed and confused on the issue and we all took a joint look at same. While the benefits and effects of legalized marijuana will be debated by others, the benefits of developing a clear and cogent policy on the issue cannot be overstated...dude.

The foregoing article should not be considered or relied upon as legal advice. You should contact attorney Turk or your legal counsel to the extent you require legal advice on this, or any other legal issue.

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