



Smoking Marijuana in Multi-Unit Residential Settings

As a growing number of states consider legalizing medicinal and recreational marijuana, and wrestle with many related issues such as regulating use in public areas and workplaces, property owners and tenants are beginning to ask questions about use in different multi-unit residential settings. This fact sheet addresses a few common questions about smoking marijuana in multi-unit residences, including federally subsidized housing, and describes similarities between smoke-free tobacco and marijuana policies. For a more detailed discussion about overlaps between marijuana and tobacco control legislation, check out the Consortium's law synopsis, *Toking, Smoking & Public Health: Lessons from Tobacco Control for Marijuana Regulation*.



Q: Is secondhand marijuana smoke harmful?

A: Studies have only recently focused on the health effects of exposure to secondhand marijuana smoke.¹ The combustion of marijuana produces carcinogens and toxins, including many of the thousands of chemicals in tobacco smoke and fine inhalable particles that can trigger heart attacks and can also cause respiratory symptoms, such as coughing, phlegm and wheezing.² In fact, research has found that marijuana smoke contains higher levels of several toxic compounds than tobacco smoke.³ Moreover, heavy passive exposure to marijuana smoke can result in measurable concentrations of THC (the ingredient that produces marijuana's psychoactive effect) in nonusers' blood serum and urine.⁴

As just one indication of concern about the health impact of secondhand marijuana smoke, the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) recently updated its standards to include cannabis smoke (as well as emissions from electronic smoking devices) in its definition of "environmental tobacco smoke."⁵ ASHRAE's national air standards have long been cited by tobacco control advocates, along with the Society's position that the only way to effectively eliminate the health risks posed by indoor exposure to secondhand smoke is to prohibit smoking.

Q: Can tenants smoke marijuana in multi-unit apartment buildings if they live in states where medical or recreational marijuana is legalized?

A: Secondhand smoke, whether from tobacco or marijuana products, spreads throughout multi-unit dwellings. Multi-unit residential property owners have the legal authority to make their

properties smoke-free, which includes prohibiting the smoking of medically prescribed marijuana in individual units and common areas, even in jurisdictions in which the use of medical marijuana is permitted by state law.⁶

Q: What are the benefits of a smoke-free housing policy that includes the smoking of marijuana?

A: In addition to creating a healthier indoor environment, a smoke-free housing policy reduces turnover costs due to the need to renovate smoked-in units, lowers the risk of smoking-caused fires, and helps meet the needs and preferences of residents. Moreover, allowing the smoking of marijuana on the premises could generate resident complaints due to drifting smoke, result in false advertising complaints and even lead to Fair Housing Act complaints or lawsuits.⁷

Q: Can tenants in apartment buildings who are registered users of medical marijuana claim they are justified in smoking medically prescribed marijuana in their units because they are disabled? What about the claim that they are entitled to “reasonable accommodations” under the federal Fair Housing Act?

A: This is an interesting question. The Fair Housing Act prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status and disability.⁸ For example, the Act requires housing providers to make “reasonable accommodations”⁹ in rules, policies, practices or services when necessary to give a disabled person an equal opportunity to use and enjoy a dwelling unit or common space.¹⁰ Under the Fair Housing Act, individuals are disabled if they have a physical or mental impairment that substantially limits one or more major life activities, have a record of such impairment, or are regarded as having an impairment.¹¹ Many individuals authorized to use medical marijuana would likely qualify as disabled under this definition.

The Fair Housing Act, however, states that a handicap “does not include current, illegal use of or addiction to a controlled substance”¹² as defined in the federal Controlled Substances Act.¹³ Although several states have passed laws legalizing its sale and use, marijuana continues to be categorized as a Schedule 1 drug under federal law (that is, a drug with high potential for abuse with no currently accepted medical use in treatment in the U.S.).¹⁴ Thus, it is a *federal offense* to possess or use marijuana.¹⁵ Because federal law supersedes state law, questions have naturally arisen about federal preemption of these state marijuana laws. In 2013, in an attempt to clarify the federal position on the enforcement of marijuana laws, the U.S. Department of Justice announced that the current administration would not prosecute individuals or organizations engaged in marijuana activities that are conducted in clear compliance with state and local narcotics laws that permit and regulate these activities.¹⁶ However, under a new administration, this policy could certainly change. Thus, even though the Fair Housing Act requires housing providers to make reasonable accommodations for persons with disabilities, marijuana’s current status as a Schedule 1 drug makes it unclear whether such a case brought under this federal civil rights law would succeed.¹⁷

Q: If a multi-unit property owner would like to adopt a policy that prohibits residents from smoking marijuana in their residences, and the property is in a state where medical

or recreational marijuana use is legal, what other grounds could be used as a basis for the policy?

A: Depending on the jurisdiction, the housing association might be able to prohibit or otherwise restrict the smoking of marijuana on the property as a nuisance.¹⁸

Q: If a landlord or owner of a market rate property grants a tenant's request to use medical marijuana on the premises, does that mean that other residents run the risk of being exposed to marijuana smoke?

A: A “reasonable accommodation” should not result in the potential exposure of others to secondhand marijuana smoke.¹⁹ Several methods for ingesting medical marijuana exist that would not expose other residents to marijuana smoke, such as edibles, tinctures, beverages, oils, and pills.²⁰ Although each individual's medical situation is different, a middle ground might be reached for many marijuana users, in concert with advice from the prescribing physician.

Q: Can public housing authorities prohibit the smoking of marijuana in federalized subsidized housing?

A: Secondhand smoke, whether from tobacco or marijuana products, spreads throughout multi-unit dwellings. Public and other subsidized housing owners have the same rights as owners of non-public housing to adopt smoke-free policies.²¹ These smoke-free policies may include a prohibition on smoking of medical marijuana. Moreover, the U.S. Department of Housing & Urban Development (HUD) explicitly states that if applicants for public or Section 8 housing are known users of marijuana (medical or otherwise), their applications must be denied.²² Also, if current residents request a reasonable accommodation to allow them to use medical marijuana in their unit, the request must be denied, as that may set an expectation that all residents in similar situations could expect an accommodation.²³ In a memo released January 20, 2011, HUD clarified that the Public Housing Reform Act allows (but does not compel) public housing authorities to terminate assistance for existing residents if they use a controlled substance.²⁴ Public housing authorities have discretion to determine those policies deemed most appropriate for their local communities, including denying assistance or terminating individual medical marijuana users, rather than entire households, for both applicant and existing residents. The U.S. Food and Drug Administration has approved for medicinal use drugs comprised of marijuana synthetics (such as Marinol and Cesamet), which are not medical marijuana and are thus allowed in public housing and voucher programs.²⁵

Q: What are some basic guidelines for multi-unit residential property owners and housing authorities who would like to prohibit or restrict the smoking of marijuana on their property?

A: Below are a few basic considerations to keep in mind when implementing any smoke-free policy.²⁶

- Clearly define “smoking” and related terms in any lease and rental agreements in buildings designated as No-Smoking or Non-Smoking. If a property's smoke-free policy covers the smoking of marijuana, be explicit about what areas are smoke-free (for

example, indoor common areas and residential units). Other areas covered under such a policy could include outside premises, such as walkways, parking lots, balconies, patios or decks of individual units, and areas near doorways, windows and air vents.

- Explain the rationale for the policy. Make sure that residents, guests, employees and others associated with a multi-unit property understand the health and fire risks related to smoking and exposure to secondhand smoke.
- Apply the smoke-free policy uniformly to all residents, guests and employees.
- Ensure that an effective enforcement plan is in place that describes the process for handling infractions.
- Prepare tenants and staff for implementation of the policy by providing announcements, educational material or presentations, staff training, signage, etc.

Q: Where can I get additional information about issues related to smoking marijuana and parallels between marijuana regulation and tobacco control policies?

A: The Consortium, and its parent organization, the [Public Health Law Center](#), have a [web page](#) containing several publications and resources on smoke-free housing, including resources that discuss concepts related to [condominiums, apartments and other multi-unit dwellings](#), [affordable housing](#), and [smoke-free housing disclosure policies](#). Many of these materials may be relevant for those seeking to regulate the use, marketing and sale of marijuana products. Marijuana-specific legal resources include the Consortium’s law synopsis, “Smoking, Toking and Public Health: Lessons from Tobacco Control for Marijuana Regulation” (2015), two webinars sponsored by the Network for Public Health Law, “Regulating Non-Medical Marijuana: Lessons Learned and Paths Forward” (2014), available at <http://bit.ly/VA2NSv> and “Expanding Medical Marijuana Laws: Current Policies and Implications for Public Health” (2014), available at <http://bit.ly/1BuJo1V>, and a Consortium webinar, “Palliative Care Versus Harmful Exposure: Secondhand Medical Marijuana Smoke in Multi-Unit Housing” (2013), available at <http://bit.ly/1JiKIPs>.

Contact Us

Please contact the Tobacco Control Legal Consortium at publichealthlawcenter@wmitchell.edu with any questions about the information included in this publication or to discuss local concerns you may have about issues relating to the regulation of marijuana and tobacco control.

Last updated: June 2015

Notes

¹ See, e.g., Matthew Springer and Stanton Glantz, *Marijuana Use and Heart Disease: Potential Effects of Public Exposure to Smoke* (April 22, 2015), available at https://tobacco.ucsf.edu/sites/tobacco.ucsf.edu/files/u795/glantz_MSHS_fact%20sheet_041115.pdf.

² *Id.*

³ David Moir et al., *A Comparison of Mainstream and Sidestream Marijuana and Tobacco Smoke Produced Under Two Machine Smoking Conditions*, CHEMICAL RESEARCH IN TOXICOLOGY (2008) available at <http://www.ukcia.org/research/ComparisonOfSmoke.pdf>.

⁴ Rosalie Liccardo Pacula et al., *Developing Public Health Regulations for Marijuana: Lessons from Alcohol and Tobacco*, 104 AM. J. PUB. HEALTH 1021, 1024 (2014).

⁵ American Society of Heating, Refrigerating, and Air Conditioning Engineers, Addendum to guidance on Ventilation for Acceptable Indoor Air Quality (Jan. 2015), available at <http://bit.ly/1PFjEs1>

⁶ Clifford E. Douglas, Smoke-free Environments Law Project, *Restricting the Use of Medical Marijuana in Multi-Unit Residential Settings: Legal and Practical Considerations* (2010), available at <http://www.mismokefreeapartment.org/MManalysis.pdf>.

⁷ See, e.g., 42 U.S.C. § 3601 *et seq.*

⁸ *Id.*

⁹ See generally U.S. Dep't of Housing and Urban Development, People with Disabilities web page (HUD.Gov) (last visited May 1, 2015), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/disabilities/sect504faq#anchor257647; see also U.S. Dep't of Justice & U.S. Dep't of Housing and Urban Development, Reasonable Accommodations under the Fair Housing Act (May 5, 2008) (Joint Statement), available at http://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf.

¹⁰ 42 U.S.C. § 3602 (h).

¹¹ 42 U.S.C. § 3602 (h); see also Douglas, *supra* note 6, at 4.

¹² 42 U.S.C. § 3602 (h).

¹³ 21 U.S.C. § 802.

¹⁴ *Id.*

¹⁵ See 21 U.S.C. §§ 841(a)(1); 844(a); 812(b)(1)(A)-(C).

¹⁶ U.S. Dep't of Justice, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. The U.S. Department of Justice's priorities are: "Preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property." *Id.* at 1-2.

¹⁷ See Douglas, *supra* note 6, at 4.

¹⁸ *Pot May be Legal in Some States – But the Neighbors Don't Have to Like It*, U.S. NEWS & WORLD REPORT (July 25, 2014), available at <http://www.usnews.com/news/us/articles/2014/07/25/pot-may-be-legal-but-homeowner-agreements-can-ban>.

¹⁹ Douglas, *supra* note 6, at 7.

²⁰ Rachel Ann Barry et al., *Waiting for the Opportune Moment: The Tobacco Industry and Marijuana Legalization*, 92 MILBANK QUARTERLY 207, 208-9 (2014), available at <http://bit.ly/1uUpJeb>.

²¹ HUD Notice PIH-2012-25, May 29, 2012 (“This notice strongly encourages Public Housing Authorities (PHAs) to implement non-smoking policies in some or all of their public housing units. . . . PHAs are permitted and strongly encouraged to implement a non-smoking policy at their discretion, subject to state and local law.”).

²² See Memorandum from Helen R. Kanovsky, Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing 2, Jan. 20, 2011, available at <http://www.scribd.com/doc/47657807/HUD-policy-Memo-on-Medical-Marijuana-in-Public-Housing#download>.

²³ *Id.*

²⁴ *Id.* at 10-11.

²⁵ U.S. Food & Drug Admin., FDA and Marijuana: Questions and Answers (last visited June 1, 2015), available at <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421168.htm>.

²⁶ For more information on implementing smoke-free housing policies, see Tobacco Control Legal Consortium, *Creating Smoke-free Affordable Housing* (2015), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-creatingsmokefree-affordable-housing-2015.pdf>, and other smoke-free housing resources on the Public Health Law Center’s housing [web page](#).