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MEDICAL MARIJUANA USE IN AFFORDABLE HOUSING

During the December 9 meeting of the 2022 Special Committee on Medical Marijuana, members requested information concerning affordable housing policies concerning the use of medical marijuana, including state and federal policies.

The term "affordable housing" refers to either public housing or Section 8 housing, both of which involve federally regulated programs that are funded with federally allocated funding. Public housing consists of housing built and operated by public housing authorities, while "Section 8" refers to a housing voucher program under Section 8 of the U.S. Housing Act of 1937 by which participants secure housing through a private landlord and receive vouchers to offset the cost of rent. Both programs have different income eligibility requirements, but similar federal rules apply.

Federal Law

Controlled Substances Act

The Controlled Substances Act (CSA), 21 USC 801, *et seq*., classifies marijuana as a Schedule I controlled substance, which criminalizes the manufacture, distribution, or possession of marijuana. Due to the CSA status of marijuana, the U.S. Department of Housing and Urban Development (HUD) has stated the use of "medical marijuana" is illegal under federal law, even if permitted under state law.[1]

Quality Housing and Work Responsibility Act of 1998

Section 577 of the Quality Housing and Work Responsibility Act of 1998 (QHWRA), 42 USC 13662, requires owners of federally assisted housing (which includes both public housing and Section 8 housing) to take certain actions concerning the use of marijuana in their facilities and gives discretion for other circumstances.

Prospective Tenants

The HUD memorandum concerning the QHWRA states that owners of federally assisted housing are required to deny tenancy to any household with a member who the landlord determines is illegally using a controlled substance, at the time of application.

1 "Use of Marijuana in Multifamily Assisted Properties," December 29, 2014; accessed December 13, 2022. https://www.hud.gov/sites/documents/useofmarijinmfassistpropty.pdf

Current Tenants

Landlords of federally assisted housing are directed under the QHWRA to establish standards or lease provisions for continued assistance or occupancy in the housing that allow the landlord to evict the tenant or terminate assistance for any household with a member who:

- The landlord determines is illegally using a controlled substance; or

- Whose illegal use or pattern of illegal use of such substance is determined to interfere with the health, safety, or right to enjoyment of the premises by other residents.

The 2014 HUD memorandum has summarized these provisions to mean that the landlord has discretion to determine, on a case-by-case basis, when to evict members of a household. In addition, the memorandum states that landlords must not establish policies that allow occupancy by household members who use marijuana.

Notable Court Decisions

State

In one decision,[2] the Commonwealth Court of Pennsylvania [state appellate court] considered the case of a citizen who was denied housing assistance by the local public housing authority on the basis that she had stated in her housing application that she was a medical marijuana patient and held a medical marijuana card through the state's program. The Commonwealth Court held that the phrase "illegally using a controlled substance" found in the federal public housing laws to be ambiguous when the potential tenant's use was prohibited by federal law, but allowed under state law. The court further directed the housing authority to establish standards concerning applicants who are legally using medical marijuana under state law and to apply those standards to the plaintiff's application, and it stated the housing authority was not required to deny benefits based on medical marijuana use. The Pennsylvania Supreme Court later denied appeal of the decision.

Federal

Federal courts[3] have considered cases seeking to apply the protections of certain federal laws such as the Fair Housing Act (FHA), the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act to persons who are lawful medical marijuana patients under a state program and action seeking that the CSA be declared unconstitutional.

In *Forest City*, a public housing project manager sought a declaration that a tenant was not entitled to a reasonable accommodation under the FHA to use medical marijuana in the rental unit. The U.S. district court held that the Michigan Medical Marihuana Act was preempted by the CSA and that the tenant was not entitled to use medical marijuana as a reasonable accommodation under either the FHA or Rehabilitation Act.

2 *Cease v. Housing Authority of Indiana County*, 247 A.3d 57 (Pa. Commw. Ct. 2021).

3 *Forest City Residential Management, Inc. v. Beasley*, 71 F.Supp. 3d 715 (E.D. Mich. 2014); *Nation v. Trump*, 818 F. App'x 678 (9th Cir. 2020).

In *Nation v. Trump*, the 9th Circuit U.S. Court of Appeals affirmed a lower court ruling that a tenant was required to exhaust administrative remedies before the U.S. Drug Enforcement Administration prior to bringing the action. The case involved a tenant who was evicted from federally assisted housing because of medical marijuana possession. The plaintiff sued various parties alleging that HUD's application of the CSA to her use of medical marijuana under the California program violated the 10th and 4th Amendments to the *U.S. Constitution* because California allows limited use of medical marijuana for medicinal purposes.

State Law Tenant Discrimination Statutes

The statutes listed below are examples of tenant anti-discrimination statutes concerning medical marijuana patients.

Connecticut law[4] provides that a landlord or property manager may not prohibit the possession of cannabis or the consumption of cannabis except that smoking may be prohibited along with the use of an electronic cannabis device or cannabis vapor product.

Delaware[5] and Minnesota[6] have tenant protections in their discrimination statutes, but do not include the provisions concerning the smoking of marijuana on the premises.

Illinois[7] provides protections to tenants who are registered as medical marijuana patients or caregivers from discrimination by a landlord solely for their status as a registered patient or caregiver. However, the statute provides that landlords are not prevented from prohibiting the smoking of marijuana on the premises.

Maine[8] provides discrimination protections and also provides that landlords may prohibit the smoking of marijuana for medical purposes if all smoking is prohibited, and notices to that effect are posted on the premises.

South Dakota[9] provides discrimination protections, but allows landlords to impose "reasonable restrictions" on the medical use of marijuana by a cardholder.

4 C.G.S.A. 47a-9a

5 16 Del.C. 4905A

6 M.S.A. 152.32

7 410 ILCS 130/40

8 22 M.R.S.A. 2430-C

9 SDCL 34-20G-19