



California Marijuana Legalization: Questions & Answers

On November 8, 2016, the voters passed California's Proposition 64, "Control, Regulate and Tax Adult Use of Marijuana Act, which legalized recreational use of marijuana. This is twenty years after the California voters passed Proposition 215, the Compassionate Use Act (CUA) decriminalizing the use of medical marijuana. The provisions of the initiative that made it legal for individuals to use and grow marijuana for personal use went into effect on November 9, 2016. The provisions regarding the lawful sale and subsequent taxation of recreational marijuana will not go into effect until January 1, 2018.

1. What does the initiative allow?

Proposition 64 legalizes the recreation use of marijuana for adults aged 21 years or older. Smoking and other uses are permitted in a private home or at a business licensed for on-site marijuana consumption. Use remains illegal while driving a vehicle and in public places. Smoking is also prohibited in any place where tobacco smoking is prohibited by law. Possession of up to 28.5 grams of marijuana (or 8 grams of concentrate) is legal, although not on the grounds of a school, day care center, or youth center while children are present. An individual is permitted to grow up to six plants within a private home, as long as the area is locked and not visible from a public place. The law also contains extensive provisions regarding the licensing of sellers and growers, and taxation and use of revenue.

2. What about federal law?

Marijuana use, cultivation and distribution, both recreational and medicinal are still illegal under federal law. In 2005, in *Gonzales v. Raich*, the U.S. Supreme Court held that Congress has the authority to prohibit local cultivation and use of marijuana, notwithstanding the fact that it is allowed by state law. As a result, compliance with California's law is not a defense to a federal marijuana related crime. While the United States Department of Justice under the Obama administration did not prioritize prosecution of individuals and businesses who are in compliance with state and local laws, it is unknown how the Trump administration will approach this issue.

3. What about local laws regulating smoking?

State law prohibits the smoking of marijuana in places where smoking of tobacco is prohibited by law. This means that if a local ordinance prohibits tobacco smoking on residential rental property, smoking of marijuana is also prohibited.

4. Can a property owner prohibit the use and cultivation of marijuana on his/her property?

Yes. The initiative expressly allows owners of private property to prohibit any of the actions related to marijuana that are otherwise permitted by the initiative.



What does CAA's Rental/Lease Agreement provide concerning marijuana?

CAA's Rental/Lease Agreement specifically prohibits all of the actions related to marijuana (cultivation, use, etc.) that would otherwise be allowed by the initiative. In addition, the smoking prohibition within the Rental/Lease Agreements has been expanded to include smoking of any substance, as well as the use of electronic cigarettes/vaping.

5. What if a landlord wants to allow residents to use and/or cultivate marijuana?

CAA recommends that owners work with their attorneys to develop policies that protects the owner's investment and the quiet enjoyment of your other tenants.

6. What if a tenant is disabled and wants to use/cultivate marijuana as a reasonable accommodation for a disability?

As with any request for a reasonable accommodation, CAA recommends that the owner promptly contact an experienced fair housing attorney to determine an appropriate and timely response. Two cases in the employment and public housing context suggest that an accommodation that requires an owner to allow a violation of federal law, is not "reasonable." In the Supreme Court case of *Ross v. Ragingwire Telecommunications*, the employee was fired when a drug test revealed his marijuana use, which had been prescribed by his physician for chronic pain. The Court held that:

California's voters merely exempted medical uses and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the CUA suggests the voters intended the measure to address the respective rights and duties of employers or employees.

The court further held that "FEHA does not require employers to accommodate the use of illegal drugs" and that the CUA does not give "the plaintiff a right to use marijuana free of hindrance or inconvenience, enforceable against third parties." The same reasoning can be applied to a case where an applicant or resident seeks an accommodation for medical marijuana use in rental housing. It is unclear, however, whether a sheriff in a particularly pro-medical marijuana community would carry out an eviction in those circumstances.

The case suggests that the CUA does not require an owner to allow the growing, smoking, and/or possession of medical marijuana in residential rental property as a reasonable accommodation for a disabled person.

Similarly, in 2006, in *Assenberg v. Anacortes Housing Authority*, a federal district court in Washington State held that a housing authority was not required to make a reasonable accommodation to allow a Section 8 tenant to use medical marijuana pursuant to Washington State law. The court held that the housing authority had no duty to accommodate an illegal drug user because "reasonable accommodations do not include requiring [the housing authority] to tolerate illegal drug use or risk losing HUD funding for doing so. In an unpublished opinion, the 9th Circuit Federal Court of Appeals, upheld the lower court's decision, finding that it would not be reasonable to require public housing authorities to violate federal law.

References:

CAA Forms 2.0/2. – CAA Rental/Lease Agreement
CAA Form 34.0 – Smoking Addendum
California Ballot Proposition 64

