gasp colorado

Group To Alleviate Smoking Pollution

Advocating for smoke-free policies since 1977

Whether Medical Marijuana is a Reasonable Accommodation

Annie D. Murphy, attorney at Dufford Waldeck
744 Horizon Ct., Ste. 300
Grand Junction, CO 81506
(970) 248-5864

While the state of Colorado has legalized the use of recreational marijuana under the Colorado Constitution, many rules are now being passed concerning its use. Further, our state Constitution conflicts with federal law (Controlled Substances Act) on different levels and may conflict with certain rules of communities and/or owners. The best practice for housing providers and owners is to comply with all federal and state Fair Housing laws about the issue of medical marijuana.

Question: Must a Public Housing Authority (PHA) deny admission to a current user of marijuana?

Answer: Yes. Marijuana is categorized as a Schedule 1 substance under the Controlled Substances Act and the manufacture, distribution or possession of marijuana is a criminal offense. Colorado law conflicts with the federal law, as Colorado allows the use of marijuana for medical and recreational purposes.

Section 576(b) of the Quality Housing and Work and Responsibility Act of 1998 (QHWRA) addresses admissions standards related to current illegal drug use for all public and other federally assisted housing. This section requires PHAs and owners to deny admission to those households with a member who the PHA or owner determines, at the time of admission, is illegally using a controlled substance. PHAs, however, are *not* required to *evict* current illegal drug users.

However, see the discussion below regarding reasonable accommodations. The resident may be requesting a reasonable accommodation, and, if so, such a request should be handled appropriately.

Question: Must a Landlord allow a Resident to smoke medical marijuana in an apartment as a "reasonable accommodation" under the Colorado Fair Housing Act (Colorado Anti-Discrimination Act of 1957)?

Answer: No.

If the lease forbids smoking in the apartment due to public health, fire safety, and cleanliness, the Landlord does not need to allow the smoking of medical marijuana as a reasonable accommodation (allowing the use of other forms of medical marijuana raises a separate issue). A lease may also contain statements that its residents shall not commit, nor permit to be committed, any violation of local, state, or federal law, including illegal drug use. This lease clause would give the Landlord a good reason to deny the request.

Under the Americans with Disabilities Act ("ADA") and the Fair Housing Act, housing providers must reasonably accommodate disabled residents absent a showing of hardship or a change in the fundamental nature of the program by the housing provider. If a resident or applicant makes a request for a reasonable accommodation concerning medical marijuana, the housing provider should immediately engage in a dialogue concerning that request for an accommodation.

The first step is to determine whether a request for an accommodation has been made. In determining whether a resident/applicant is making a request for a reasonable accommodation concerning the use of medical marijuana, keep in mind that the resident/applicant does not have to use the actual word

"accommodation" to make such a request. If the resident/applicant is asking for staff to make an exception to the lease provision prohibiting the use and/or possession of marijuana, for example, then that resident or applicant is making a request for a reasonable accommodation. Whether a resident/applicant has made a request for an accommodation concerning medical marijuana can be confusing. Staff should be aware that a resident/applicant providing a copy of his/her registry card and making some type of statement that suggests they need marijuana to help with a medical condition could be construed as a request for a reasonable accommodation. The registry card states that the card holder has a debilitating medical condition.

Because this is a difficult issue, staff should be able to consult with legal counsel to determine whether an actual accommodation has been made. Once it is known that a resident or applicant has made a request for a reasonable accommodation, the next step is to evaluate and fully consider that request. The fact that a resident/applicant has a registry card, by itself, is not proof that such person is disabled as defined by federal and state Fair Housing laws.

Question: If a Resident believes he/she has been discriminated against by a housing provider based on failure to grant a reasonable accommodation, what must the resident prove?

Answer: Refusing to make accommodations in rules, policies, practices, or services when the accommodation is necessary to allow the person the opportunity for full use and
enjoyment of the premises is illegal discrimination. Refusing to consider a reasonable accommodation request is also discriminatory. To establish a prima-facie case of failure to accommodate, a Resident must show that:

(1) Resident has a "physical or mental disability".

(2) Housing provider knew or reasonably should have known of the complainant's disability.

3) Resident requested an accommodation.

(4) The requested accommodation is necessary to afford complainant an equal opportunity to use and enjoy the housing.

(5) The requested accommodation is reasonable on its face, meaning it is both efficacious and proportional to the costs to implement it; and

(6) The Housing provider refused to make the requested accommodation.

Question: May a Landlord inquire as to the nature of the disability?

Answer: Yes. Landlord may request reliable disability-related information that:

(1) is necessary to verify that the person meets the CFHA definition of disability[1];

2) describes the needed accommodation; and

(3) shows the relationship between the person's disability and the need[2] for the requested accommodation."

Question: If Resident *cannot* produce a statement from a medical provider, can a Landlord enforce the provisions of the lease against a Resident if the Resident smokes medical marijuana in the apartment?

Answer: Yes. If a Resident who requests an accommodation does not provide sufficient information verifying that he meets the definition of "physical or mental disability" and that smoking medical marijuana in his/her

apartment is necessary to "use and enjoy" his apartment, Landlord may enforce the provisions of the lease against the Resident.

Question: How does a housing provider determine if the request reasonable?

Answer: Accommodation must be made, and modifications should be allowed unless it is an undue financial and administrative burden, or it changes the fundamental nature of the program.

> ***Federal law analysis***: Federal nondiscrimination laws do not require PHAs to allow marijuana use as a reasonable accommodation. HUD provides that PHAs and owners may not permit the use of medical marijuana as a reasonable accommodation because:
>
> (1) persons who are currently using illegal drugs, including medical marijuana, are categorically disqualified from protection under the disability definition provisions of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act; and
>
> (2) such accommodations are not reasonable under the Fair Housing Act because they would constitute a fundamental alteration in a PHA or owner's operations.
>
> ***Colorado law analysis***: Provided the Landlord prohibits all smoking on the premises and posts notice to that effect on the premises, housing providers do not have to permit the use of smoking medical marijuana as a reasonable accommodation. In Colorado, the request should be considered, but the housing provider may consider the following issues:
>
> (1) Is the request reasonable on its face?
>
> Yes. The request to deviate from marijuana policy is not unreasonable (if medical marijuana were illegal under both state and federal law, a much stronger case could be made that it is facially unreasonable to require a landlord to allow a resident to deviate from marijuana policy). Colorado law specifically allows the possession and use of medical marijuana. Although possession of all marijuana is illegal under federal law, the U.S. Department of Justice has discouraged the U.S. Attorneys from enforcing this law against people who use medical marijuana in compliance with state law.
>
> (2) Does the requested accommodation impose undue financial or administrative burdens or require a fundamental alteration in the nature of the program?
>
> Maybe. If the Landlord enforces the no smoking lease provision against all its residents, Landlord's no-smoking policy would be a sufficient reason to deny Resident's request for a reasonable accommodation.
>
> Remember to engage in an interactive dialogue. The Colorado Civil Rights Division has issued a finding of Probable Cause of Discrimination against a Housing Authority for its failure to engage in an interactive dialogue concerning a reasonable accommodation request related to medical marijuana. Note that this Determination conflicts with the U.S. Department of Housing and Urban Development's ("HUD") position on medical marijuana. HUD has repeatedly stated in a Memorandum that it has a zero-tolerance policy concerning the use of medical marijuana at communities that are either public housing or receive federal financial assistance.

Question: What should a marijuana policy contain?

Answer: We recommend a total prohibition, especially for properties that receive federal subsidies. Your policy should mirror the language of the statute. Even if you do allow the use of marijuana on your property, under no circumstance should a resident or occupant be allowed to grow marijuana, even if growing relates to a documented disability. The growth of marijuana can pose certain risks of damage to property related to the use of heat lamps, unauthorized alterations to the property, mold resulting from humidity, etc.

Question: Can a housing provider pursue eviction for violation of its marijuana policy?

Answer: Yes. It is important to enforce lease provisions consistently. Proper enforcement depends on each given set of circumstances, the available witnesses, whether law enforcement is involved, damage to property, as well as a variety of other factors. However, if a resident makes a request for a reasonable accommodation *after* the housing provider has taken some type of lease enforcement action, then the provider should stay any eviction or other adverse housing action pending the evaluation of the accommodation request.

Summary

Allowing Resident to smoke marijuana in derogation of the lease and federal law is most likely not considered a reasonable accommodation that a landlord must permit. It is unlikely that Colorado nondiscrimination laws would be interpreted to require any landlord to permit the use of federally prohibited drugs. And any such interpretation of state laws would be subject to preemption by the federal laws governing drug use in public housing and by the Controlled Substances Act. Such preemption would be under the legal doctrine of implied conflict preemption because the federal laws governing public housing and federally assisted housing do not expressly state an intention to preempt state laws.

Further, if the Landlord prohibits all smoking on the premises and posts notice to that effect on the premises, the lease provision governing smoking (which is forbidden due to public health, fire safety, and cleanliness) would be consistent with business necessity, as the purpose of the policy is a legitimate and substantial concern of the Landlord.

---

[1] "Disability": a person who has a physical or mental impairment that substantially limits one or more of that person's major life activities, has a record of such a disability, or is regarded as having such a disability.
[2] "Need": a close relationship between the disability and the requested accommodation.

**This informative outline was created for educational purposes only. The information presented is not intended as and may not be relied upon as legal advice. You are advised to consult your attorney for specific guidance regarding your resident(s) and/or property(ies).*