

I. Introduction

Under the federal Controlled Substances Act, marijuana is categorized as a Schedule 1 drug that has a high potential for abuse and no accepted medical use in treatment in the United States. Therefore, under federal law, marijuana is a controlled substance whose use and possession in the United States is illegal.ⁱ

Despite federal law, as of April 2015, at least twenty-three states, along with the District of Columbia and Guam, have passed laws exempting qualified users of medical marijuana from penalties imposed under state law.ⁱⁱ States such as Maryland are able to pass laws related to marijuana so long as a state's law does not create a "positive conflict" with federal law, such that the two laws "cannot consistently stand together". Whether states' laws, including Maryland's, create a positive conflict with federal law remains unsettled.ⁱⁱⁱ

Because all marijuana, including medical marijuana, is illegal under federal law, there is a tension between the rights a qualified patient may be entitled to under state law to use or possess medical marijuana, and the rights a tenant may not have while residing on a landlord-owned property. In this memo, the issue of whether a landlord in Maryland may prohibit a tenant from using medical marijuana on a property is examined.

II. Brief Answer: a landlord in Maryland may prohibit medical cannabis use or possession on the landlord's property

Because marijuana is a Schedule 1 controlled substance, there are no federal protections for the use of medical marijuana. Current tenants living in a federally-subsidized unit may be permitted by a landlord's policy to continue to use or possess medical marijuana; however, there are no federal laws which protect a medical marijuana user should a landlord terminate a tenant's lease because of medical marijuana use or possession.

Maryland statute explicitly states that an authorization to use medical cannabis is not created by Maryland law when a policy prohibiting such conduct is in place; therefore, landlords and governing boards are permitted to prohibit the use of medical cannabis on their property.

III. Overview of Maryland law: qualifying patients, amount of medical cannabis, and marijuana paraphernalia

According to the Maryland Code, only "qualifying patients" and their "qualifying caregivers" are permitted to use or possess medical cannabis.¹ By definition, qualifying patients are individuals who:

¹ The nomenclature for medical marijuana in Maryland law is "medical cannabis". The Maryland statutes addressing penalties for possession of marijuana and marijuana paraphernalia, medical or otherwise, retain the term "marijuana" rather than "cannabis". The terms used in this memo intentionally reflect this terminology.

have been provided with a written certification by a certifying physician in accordance with a bona fide physician–patient relationship; and if under the age of 18 years, has a caregiver.^{iv, 2}

Qualifying patients may possess up to a 30-day supply of medical cannabis, unless their physician determines that this amount would not meet their medical needs and they require a greater quantity. A 30-day supply, according to the proposed regulations, is 120 grams of usable cannabis, or, in the case of a medical cannabis-infused product, 36 grams of Δ 9-Tetrahydrocannabinol.^v Additionally, qualifying patients are, in effect, permitted to possess marijuana paraphernalia for medical purposes under Maryland law.^{vi}

IV. No Federal protections for tenants who use medical marijuana

Despite the growing number of states that have legalized use of medical marijuana, qualifying patients who live in landlord-owned properties may not be afforded the same rights to use medical marijuana in their homes as their counterparts who do not reside in landlord-owned properties. This section explores the legal landscape in which landlords have successfully prohibited the use of medical marijuana by their tenants under federal law.

a. Americans with Disabilities Act

Title II of the Americans with Disabilities Act (ADA) prohibits public entities from denying the benefit of public services to any "qualified individual with a disability."^{vii} Public housing agencies that provide low-income families with housing are covered by the ADA, because the term "public entity" is defined broadly enough to include a public housing agency.^{viii} However, the ADA also provides that "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."^{ix} In discussing Title II claims relating to the use of medical marijuana, courts have examined whether the use of medical marijuana constitutes illegal drug use under the Controlled Substances Act (CSA), 42 U.S.C. § 12210(a).^x In assessing the plaintiff's Title II claims under the ADA, the court in *James v. Costa Mesa* looked to the CSA to determine whether the plaintiffs' medical marijuana use constituted "illegal use of drugs".^{xi} The court recognized that:

[T]he plaintiffs are gravely ill, and that their request for ADA relief implicates not only their right to live comfortably, but also their basic human dignity. We also acknowledge that California has embraced marijuana as an effective treatment for individuals like the plaintiffs who face debilitating pain. Congress has made clear, however, that the ADA defines "illegal drug use" by reference to federal, rather than state, law, and federal law does not authorize

² The Maryland proposed regulations, which are currently out for public comment but not yet in effect, define a qualifying patient as "an individual who: lives in the state or, during that time an individual is present in the state, is physically present in the state for the purpose of receiving medical care from a medical facility in the state; has been provided with a written certification by a certifying physician in accordance with a bona fide physician-patient relationship; and if younger than 18 years old, has a caregiver." Code of Maryland Regulations (COMAR) 10.62.01(25)

the plaintiffs' medical marijuana use. We therefore necessarily conclude that the plaintiffs' medical marijuana use is not protected by the ADA."^{xii}

Neither does the ADA offer protection to tenants of private housing; the act does not cover private landlord housing.^{xiii}

b. *Controlled Substances Act*

Similarly, courts have held that tenants do not have rights to use medical marijuana under the Controlled Substances Act (CSA), 21 U.S.C. §801 *et seq.* The CSA criminalizes the possession of controlled substances, such as marijuana. It applies to all tenants (and generally, anyone in the United States), so there is no discrepancy of its applicability to tenants in private and public housing.

The U.S. Supreme Court has found that under the CSA, marijuana use, even for medicinal purposes, is prohibited. In *Gonzales v. Raich*, the court definitively stated:

The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses....marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "'superior to that of the States to provide for the welfare or necessities of their inhabitants,'" however legitimate or dire those necessities may be.^{xiv}

In a federal case in Washington State, the court found that the plaintiffs, who resided in public housing, violated the CSA by possessing and cultivating marijuana in a public housing unit.^{xv} In that case, the use and possession of marijuana rendered plaintiffs ineligible for federally subsidized housing "pursuant to their lease, Department of Housing and Urban Development (HUD) regulations, and federal statutes. See, e.g., 42 U.S.C. § 1437d(1)(6) (requiring public housing leases to state that any drug-related criminal activity during the lease term shall be grounds for lease termination); 42 U.S.C. § 13661(b)(1)(A) (prohibiting public housing owners from admitting users of illegal drugs); 42 U.S.C. § 1437a(b)(9) (defining 'drug-related criminal activity' to include illegal manufacture, use or possession of a controlled substance as defined by the CSA)."^{xvi}

At the time of the *Assenberg v. Anacortes Hous. Auth.* case, Washington had enacted Washington Initiative 692, codified at Revised Code of Washington 69.51A.005 *et seq.*, which provides an affirmative defense to state criminal prosecution for medical use of marijuana. In light of the state laws permitting the use and possession of medical marijuana, the court wrote:

[T]o the extent that the state law legalizes marijuana use and prohibits the forfeiture of public housing, it conflicts with the CSA and the federal statutes and regulations that criminalize marijuana use and prohibit illegal drug use in public housing....In addition, the Supreme Court has upheld Congress's authority under the commerce clause to enact the CSA and prohibit the intrastate use of marijuana, even when that use complies with a state's medical marijuana law. See *Gonzales v. Raich*, 545 U.S. 1, 50, (2005) (analyzing California's law).^{xvii}

c. *Fair Housing Act*

The provisions of the Fair Housing Act (FHA), as amended by the Fair Housing Act Amendments, 42 USCS § 3601 *et seq.*, apply to both private landlords, and to providers of public housing.^{xviii} As with claims under the ADA and CSA, courts have held that FHA does not afford tenants protection for their use of medical marijuana. In *Forest City Residential Mgmt. v. Beasley*, the tenant of a public housing unit brought a claim against her landlord for, *inter alia*, not permitting her to use marijuana in her home to treat her disability. In its opinion, the court analyzed the tenant's FHA claim by noting:

Section 3604 of the FHA prohibits discrimination in sale or rental of public housing on the basis of disability. It provides, in pertinent part:

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap—

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter. 42 U.S.C. § 3604.

The FHA further defines discrimination:

(3) For purposes of this subsection, discrimination includes—

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. . . . 42 U.S.C. § 3604(f)(3)(B).^{xix}

According to the *Forest City* court, an FHA reasonable accommodation plaintiff must establish that the proposed modification (in this case, a modification to the landlord's policies to permit the plaintiff to use medical marijuana in her home) is both reasonable and necessary, as well as "that she suffers from a disability, that she requested an accommodation . . . , that the defendant housing provider refused to make the accommodation . . . and that the defendant knew or should have known of the disability at the time of the refusal."^{xx} Ultimately, the court's holding rested on the federal government's stated policy objectives provided in the Congressional Findings that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs"^{xxi} Thus, the court concluded, requiring the public housing landlord to grant a medical marijuana user a reasonable accommodation to use marijuana would "fundamentally alter the nature of (the landlord's) operation by thwarting Congress' mission to provide drug-free federally assisted housing."^{xxii}

d. **Must** a public housing or Housing Choice Voucher program landlord prohibit the use of medical marijuana?

The Department of Housing and Urban Development (HUD), the federal agency that administers the federal public housing and Housing Choice Voucher programs, has issued a number of memoranda

addressing the issue of whether Public Housing Agencies (PHAs) and owners of other federally assisted housing may or may not grant current or prospective residents a reasonable accommodation under federal or state nondiscrimination laws for the use of medical marijuana.^{xxiii}

i. *Prospective residents*

According to HUD, the controlling authority for marijuana use in multifamily assisted properties in states that have decriminalized the use of marijuana is Section 377 of the Quality Housing and Work Responsibility Act of 1998 (QHWRA), 42 U.S.C. § 13662.^{xxiv} Under the QHWRA, owners of federally assisted housing are required “to deny admission to any household with a member who the owner determines is, at the time of application for admission, illegally using a controlled substance, as that term is defined by the CSA.”^{xxv} As discussed above, marijuana is a Schedule I controlled substance under the CSA, and its use is illegal under federal law. Thus, if a public housing landlord is aware at the time of application that a prospective resident, or a member of her/his household, is a medical marijuana user, the landlord is required to deny the applicant admission.

ii. *Current residents*

The continued occupancy standards of the QHWRA, however, differ from the admission standards. Section 577 of the QHWRA states in part:

Notwithstanding any other provision of law, a public housing agency or owner of federally assisted housing (as applicable) shall establish standards or lease provisions for continued assistance or occupancy in federally assisted housing that allow the agency or owner (as applicable) to terminate the tenancy or assistance for any household with a member-

(1) Who the public housing agency or owner determines is illegally using a controlled substance; or

(2) Whose illegal use (or pattern of illegal use) of a controlled substance . . . is determined by the public housing agency or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. (Emphasis added)^{xxvi}

Because the QHWRA allows, but does not require, PHAs and owners to terminate occupancy based on medical marijuana use, PHAs and owners are not required to evict current residents for such use.^{xxvii} The Supreme Court has upheld such authority of PHAs to use discretion in terminating a tenancy for “any illegal drug use”.^{xxviii} However, PHAs and owners may not establish lease provisions or policies that affirmatively permit occupancy by medical marijuana users.^{xxix}

V. No protection under Maryland law for tenants who smoke medical cannabis

Maryland law directly addresses the issue of whether a landlord, condominium association, and homeowners association may prohibit the use of medical cannabis. Health-General Article §13–3314 states, in relevant part:

- (a) This subtitle may not be construed to authorize any individual to engage in, and does not prevent the imposition of any civil, criminal, or other penalties for, the following:

....

(5) Except as provided in subsection (b) of this section, smoking marijuana or cannabis on a private property that:

- (i) 1. Is rented from a landlord; and
2. Is subject to a policy that prohibits the smoking of marijuana or cannabis on the property; or
(ii) Is subject to a policy that prohibits the smoking of marijuana or cannabis on the property of an attached dwelling adopted by one of the following entities:
1. The board of directors of the council of unit owners of a condominium regime; or
2. The governing body of a homeowners association.

- (b) The provisions of subsection (a)(5) of this section do not apply to vaporizing cannabis.

Because the statute explicitly states that an authorization to use medical cannabis is not created by Maryland law when a policy prohibiting such conduct is in place, landlords and governing boards are permitted to prohibit the smoking of medical cannabis on their property. Additionally, ingesting cannabis through other means, such as edibles, is not permitted under Maryland’s proposed regulations³, and would likely be subject to the restrictions enumerated in Health-General Article §13–3314(a)(5).

It is important to note, however, that Health-General Article §13–3314(b) explicitly carves out an exception for the vaporization of cannabis, which suggests that the Maryland legislature sought to protect the ability of qualified patients to vaporize cannabis on property that is rented from a landlord or subject to policies enacted by a condominium or home owner’s association. Maryland statutes and proposed regulations are silent as to the issue of whether a medical cannabis-infused product, which is defined in the proposed regulations as an “oil, wax, ointment, salve, tincture, capsule, suppository, dermal patch, cartridge or other product containing medical cannabis concentrate or usable cannabis that has been processed so that the dried leaves and flowers are integrated into other material”, are subject to the limitations of Health-General Article §13–3314(a)(5).

³ 42 Md. Reg. 13 (2015) (to be codified at Md. Code Regs. 10.62.01.01B(21)(b)). “(21) Medical Cannabis-Infused Product. (a) “Medical cannabis-infused product” means oil, wax, ointment, salve, tincture, capsule, suppository, dermal patch, cartridge or other product containing medical cannabis concentrate or usable cannabis that has been processed so that the dried leaves and flowers are integrated into other material. (b) “Medical cannabis-infused product” does not include a food as that term is defined in Health-General Article, §21-101, Annotated Code of Maryland.”

REFERENCES

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- ⁱⁱ *Id.*
- ⁱⁱⁱ *Id.*
- ^{iv} Health-General Article §13-3301(m).
- ^v COMAR 10.61.02(35).
- ^{vi} MD Criminal Law – Article §5-619(c)(4).
- ^{vii} *James v. City of Costa Mesa*, 700 F.3d 394, 397, (9th Cir. 2012), citing 42 U.S.C. § 12132.4.
- ^{viii} *Brooker v. Altoona Hous. Auth.*, 2013 U.S. Dist. LEXIS 82228 (W.D. Pa. June 12, 2013) citing 42 U.S.C. § 12131(1)(A)-(B); *Sinisgallo v. Town of Islip Housing Authority*, 865 F.Supp.2d 307, 337 (E.D.N.Y. 2012).
- ^{ix} *James*, 700 F.3d at 397, citing 42 U.S.C. § 12210(a).
- ^x *James*, 700 F.3d at 398; *State v. Hutchings*, 2014-Ohio-4675(Ohio Ct. App., Cuyahoga County Oct. 23, 2014).
- ^{xi} *James*, 700 F.3d at 397.
- ^{xii} *Id.* at 397.
- ^{xiii} 42 U.S.C. §12101 *et seq.*
- ^{xiv} 545 U.S. 1, 27,37 (2005) (citations omitted).
- ^{xxv} *Assenberg v. Anacortes Hous. Auth.*, 2006 U.S. Dist. LEXIS 34002 (W.D. Wash. May 25, 2006).
- ^{xvi} *Id.* 13-14.
- ^{xvii} *Id.* at 13-19.
- ^{xviii} *Rappo v. 94-11 59th Ave. Corp.*, 2011 U.S. Dist. LEXIS 133867 (E.D.N.Y. Oct. 31, 2011).
- ^{xix} *Forest City Residential Mgmt. v. Beasley*, 2014 U.S. Dist. LEXIS 167532, 22-23 (E.D. Mich. Dec. 3, 2014).
- ^{xx} *Id.* citing *Hollis*, 760 F.3d 531 (6th Cir. Tenn. 2014).
- ^{xxi} *Forest City Residential Mgmt.*, 2014 U.S. Dist. LEXIS 167532 at 29, citing 42 U.S.C. § 11901(1) (emphasis added).
- ^{xxii} *Id.* at 30.
- ^{xxiii} Department of Housing and Urban Development, *Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing* (2011), available at [http://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm\(012011\).pdf](http://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm(012011).pdf); Department of Housing and Urban Development, *Medical Marijuana Use in Public Housing and Housing Choice Voucher Programs* (2011), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=med-marijuana.pdf>; Department of Housing and Urban Development, *Use of Marijuana in Multifamily Assisted Properties* (2014), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=useofmarijinmfassistpropty.pdf>.
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- ^{xxv} *Id.*
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- ^{xxvii} Department of Housing and Urban Development, *Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing* (2011), available at [http://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm\(012011\).pdf](http://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm(012011).pdf).
- ^{xxviii} *Assenberg*, 2006 U.S. Dist. LEXIS 34002 at 18, citing *Department of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 129-30 (2002).
- ^{xxix} Department of Housing and Urban Development, *Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing* (2011), available at [http://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm\(012011\).pdf](http://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm(012011).pdf).