

Smoke-Free

Multi-Unit Housing

**INSTITUTE FOR
PUBLIC STRATEGIES**



MARIJUANA IN MULTI-UNIT RESIDENTIAL SETTINGS



As a growing number of states legalize medical and recreational marijuana and wrestle with 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 or vaping 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*.¹



Q: Is secondhand marijuana smoke harmful?

A: Limited research exists regarding the impact of exposure to secondhand marijuana smoke.² The combustion or vaporization of marijuana produces carcinogens, irritants, and toxins,

including many of the chemicals and fine inhalable particulates found in tobacco smoke.³ Known carcinogens present in marijuana smoke include acetaldehyde, arsenic, benzene, chromium, formaldehyde, isoprene, lead, mercury, nickel, and quinoline.⁴ Exposure to particulate matter, such as marijuana smoke, can cause respiratory symptoms, such as coughing, phlegm, and wheezing, and can exacerbate health problems, especially for people with respiratory conditions such as asthma, bronchitis, and chronic obstructive pulmonary disease.⁵ Secondhand smoke exposure also increases the risk of coronary heart disease⁶ and stroke.⁷ 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.⁸

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) updated its air standards to include cannabis smoke (as well as emissions from electronic smoking devices) in its definition of "environmental tobacco smoke."⁹ 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 the use of medical or recreational marijuana is legal?

A: There is no absolute right to smoke medical or recreational marijuana in any state, especially when smoking impacts others.¹⁰ Secondhand smoke, whether from combustible or aerosolized tobacco or marijuana products, spreads throughout multi-unit dwellings. A recent U.S. study reports that even in multi-unit buildings where smoke-free policies were enforced, 50 percent of residents experienced smoke entering into their units from adjacent units.¹¹ Multi-unit residential property owners have the legal authority to make their properties smoke-free, which includes prohibiting the smoking or vaping 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.¹²

Q: What are the benefits of a smoke-free multi-unit housing policy that prohibits the smoking or vaping 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 fires,

and helps meet the needs and preferences of most residents. Moreover, allowing the smoking or vaping of marijuana on the premises could generate resident complaints due to drifting smoke or aerosol, result in false advertising complaints, and even lead to Fair Housing Act complaints or lawsuits.¹³

Q: Can tenants in apartment buildings who are registered users of medical marijuana claim they are justified in smoking or vaping 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?¹⁴

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.¹⁵ For example, the Act requires housing providers to make “reasonable accommodations”¹⁶ 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.¹⁷ 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.¹⁸ 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”¹⁹ as defined in the federal Controlled Substances Act.²⁰ 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.).²¹ Thus, it remains a *federal offense* to possess or use marijuana.²² 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 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.²³ This appears to continue to be the federal stance in the Trump administration. 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.²⁴



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 on the ground that it is a nuisance²⁵ or that it violates the rental property's "warranty of habitability."²⁶

Q: What steps should landlords or multi-unit property owners take if they want to prohibit marijuana use in their residences?

A: First, landlords and property owners should be aware of (or consult an attorney familiar with) laws regarding marijuana use in their jurisdiction. These laws vary among states, particularly regarding marijuana use in multi-unit housing. In Massachusetts, for example, landlords can prohibit marijuana smoking via a lease agreement, but cannot prohibit the consumption of marijuana edibles or other non-smoking forms.²⁷ In Rhode Island, no landlord

may refuse to lease to, or otherwise penalize, a renter solely because of the renter's status as a medical marijuana cardholder.²⁸ The landlord does have the discretion, however, not to lease, or continue to lease, to a cardholder who cultivates marijuana in the leased premises.²⁹

Next, landlords and property owners should include language regarding marijuana use in their lease or rental agreements. These provisions should clearly and explicitly specify the type of marijuana use prohibited on the property, premises covered by the policy (inside and outside), and the consequences of lease violations.

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.³⁰ Several methods for ingesting medical marijuana — such as extracts, tinctures, oils, edibles, and pills — would not expose other residents to marijuana smoke.³¹ Although each individual's medical situation is different, a middle ground might be reached for many marijuana users, in concert with advice from the referring 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.³² These smoke-free policies may include a prohibition on smoking of medical, as well as recreational, 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.³³ 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.³⁴ 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.³⁵ 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 derivatives and synthetics (such as Epidiolex, Marinol, and Cesament), which are not medical marijuana or Schedule 1 drugs, and are thus allowed in public housing and voucher programs.³⁶

Q: Doesn't HUD's smoke-free rule prohibit the use of marijuana by residents in public housing?

A: No. HUD requires that public housing agencies prohibit the use of *tobacco products* in all indoor areas. This smoke-free requirement, which took effect July 31, 2018, applies to all public housing, but does not include all federally subsidized housing, such as dwelling units in mixed-finance buildings or privately owned dwellings financed under Section 8 of the Housing Act. The rule covers combustible tobacco products, such as cigarettes, cigars, and pipes, as well as hookahs, but does not include e-cigarettes or similar devices, or the smoking or vaping of marijuana. Property managers can opt to apply their facility's smoke-free standards to e-cigarettes and other products not covered by the HUD standard.

Because marijuana is a federally prohibited substance, the use and possession of this drug is already prohibited on HUD-funded (and other federal) properties, regardless of HUD's smoke-free law. Federal law preempts state law, including in those states where the use of medical or recreational marijuana is now legal.

Q: Can public housing agencies evict residents who use medical marijuana?

A: Yes, it is within their discretion to do this.³⁷ Landlords, however, should create a structure of graduated penalties with eviction as a last resort and seek alternatives to eviction whenever possible. HUD's 2011 memo mentioned above stated that residents who revealed marijuana use on their public housing applications would be denied admission to Public Housing or Housing Choice Voucher programs, regardless of their circumstances, since marijuana is a controlled substance.³⁸ However, the memo also gave public housing authorities (and, most often, individual landlords) the right to use their discretion on how to execute medical marijuana lease provisions. Housing authorities will need to conduct individual assessments of each individual request, focusing on the right of all tenants to have equal access to safe and clean air.

Also, as mentioned above, not only are several FDA-approved marijuana synthetics and derivatives now available, but medical marijuana users can ingest the drug in a variety of ways that do not result in secondhand smoke exposure of fellow tenants.

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

A: Property owners and housing agencies need to clearly communicate their marijuana-related policies to all residents, housing applicants, and visitors. They can do this by updating their established occupancy standards and lease provisions, and providing handouts to tenants, prospective tenants, or visitors.

Below are a few basic considerations to keep in mind when implementing any smoke-free policy.³⁹

- Clearly define “smoking,” vaping, and related terms in any lease and rental agreements in buildings designated as No-Smoking or Non-Smoking. If a property’s smoke-free (or tobacco-free) policy covers the smoking and vaping of marijuana, be explicit about what areas are included (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, porches, 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, vaping, and exposure to secondhand smoke and aerosol.
- 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, for example, announcements, educational material or presentations, staff training, and signage.

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

A: The [Public Health Law Center’s web page](#) contains 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 of marijuana products. Marijuana-specific legal resources include the Center's law synopses, *Smoking, Toking and Public Health: Lessons from Tobacco Control for Marijuana Regulation* (2018) and *There is No Constitutional Right to Smoke or Toke* (2019). Also, the American Nonsmokers' Rights Foundation's [website](#) has several resources related to secondhand tobacco and marijuana smoke, including regularly updated maps of state and local laws prohibiting the smoking and vaping of marijuana.

Contact Us

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Endnotes

- 1 Public Health Law Center, *Smoking, Toking and Public Health* (2018), <https://publichealthlawcenter.org/sites/default/files/resources/Toking-Smoking-Public-Health-2018.pdf>.
- 2 See, e.g., Matthew Springer and Stanton Glantz, *Marijuana Use and Heart Disease: Potential Effects of Public Exposure to Smoke* (April 22, 2015), https://tobacco.ucsf.edu/sites/tobacco.ucsf.edu/files/u795/glantz_MSHS_fact%20sheet_041115.pdf.
- 3 Ctrs. for Disease Control and Prevention, *Marijuana and Public Health* (last accessed June 30, 2019), <https://www.cdc.gov/marijuana/health-effects.html>.
- 4 Reproductive and Cancer Hazard Assessment Branch, Office of Environmental Health Hazard Assessment, California Environmental Protection Agency, *Evidence on the Carcinogenicity of Marijuana Smoke* (2015), http://oehha.ca.gov/prop65/hazard_ident/pdf_zip/FinalMJsmokeHID.pdf.
- 5 See, e.g., Hannah Holitzki et al., *Health Effects of Exposure to Second- and Third-hand Marijuana Smoke: A Systematic Review*, 5 CAN. MED. ASS'N J., E814-E822 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5741419>; Nat'l Inst. Drug Abuse, *What Are the Effects of Secondhand Exposure to Marijuana Smoke* (last accessed June 30, 2019), <https://www.drugabuse.gov/publications/research-reports/marijuana/what-are-effects-secondhand-exposure-to-marijuana-smoke>; Americans for Nonsmokers Rights, *Secondhand Marijuana Smoke* (2018), <https://no-smoke.org/second-hand-marijuana-smoke-fact-sheet>.
- 6 See, e.g., Joaquin Barnoya & Stanton Glantz, *Cardiovascular Effects of Secondhand Smoke*, 111 CIRCULATION 2684-98 (2005), <https://www.ahajournals.org/doi/full/10.1161/CIRCULATIONAHA.104.492215>.

- 7 See, e.g., Angela Malek et al., *Secondhand Smoke Exposure and Stroke: The Reasons for Geographic and Racial Differences in Stroke (REGARDS) Study*, 49 AM J. PREV. MED. e89–e97 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4656115>.
- 8 Rosalie Liccardo Pacula et al., *Developing Public Health Regulations for Marijuana: Lessons from Alcohol and Tobacco*, 104 AM. J. PUB. HEALTH 1021, 1024 (2014).
- 9 American Society of Heating, Refrigerating, and Air Conditioning Engineers, *Standards for Ventilation and Indoor Air Quality – Standards 62.1-62.2* (2016).
- 10 Public Health Law Center, *There is No Constitutional Right to Smoke or Toke* (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/No-Constitutional-Right-Smoke-Toke-2019.pdf>. Note that although Alaska has a privacy right that covers the consumption of marijuana in the home, this does not mean Alaskans have a right to expose fellow tenants to secondhand smoke. *Id.* at 12-13.
- 11 Andrea S. Gentzke et al., *Attitudes and Experiences with Secondhand Smoke and Smoke-Free Policies Among Subsidized and Market-Rate Multiunit Housing Residents Living in Six Diverse Communities in the USA*, 27 TOBACCO CONTROL 194 (2018).
- 12 Clifford E. Douglas, Smoke-free Environments Law Project, *Restricting the Use of Medical Marijuana in Multi-Unit Residential Settings: Legal and Practical Considerations* (2010), <http://www.mismokefreeapartment.org/MManalysis.pdf>.
- 13 See, e.g., 42 U.S.C. § 3601 et seq.
- 14 See generally Tobacco Control Legal Consortium, *Smoke-free Public Housing: Reasonable Accommodations* (2017), <https://publichealthlawcenter.org/sites/default/files/resources/Smoke-Free-Public-Housing-Reasonable-Accommodations-2017.pdf>.
- 15 *Id.* Note that Title II of the Americans with Disabilities Act also ensures that individuals with disabilities have equal access to fair housing. 42 U.S.C. §§ 3604; 12102.
- 16 See generally U.S. Dep’t of Housing and Urban Development, *People with Disabilities* web page (HUD.Gov), 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), <https://www.hud.gov/sites/dfiles/FHEO/documents/huddojstatement.pdf>.
- 17 42 U.S.C. § 3602 (h).
- 18 42 U.S.C. § 3602 (h); see also Douglas, *supra* note 12, at 4.
- 19 42 U.S.C. § 3602 (h).
- 20 21 U.S.C. § 802.
- 21 *Id.*
- 22 See 21 U.S.C. §§ 841(a)(1); 844(a); 812(b)(1)(A)-(C).
- 23 U.S. Dep’t of Justice, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), <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.

24 See Douglas, *supra* note 12, at 4.

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

26 See, e.g., Public Health Law Center, *Smoke-free Housing and Rent Abatement* (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/Smoke-Free-Housing-Rent-Abatement-MN-2019.pdf>.

27 Mass. Cannabis Control Commission, *Consumption of Marijuana for Adult Use* (last accessed June 30, 2019), <https://mass-cannabis-control.com/wp-content/uploads/2018/06/Fact-Sheet-Consumption.pdf>. They can, however, prohibit the use of non-smoked marijuana if failing to do so would cause the landlord to violate a federal law or regulation, or if the property is owned by the Commonwealth, a subdivision of the Commonwealth (e.g., a county, city, or town), or a state or local government agency. *Id.*

28 R.I. STAT. Title 21, Sec. 21-28. 6-4, <http://webserver.rilin.state.ri.us/Statutes/TITLE21/21-28.6/21-28.6-4.HTM>.

29 *Id.*

30 Douglas, *supra* note 12, at 7.

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

32 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.”).

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

34 *Id.*

35 *Id.* at 10-11.

36 U.S. Food & Drug Admin., *FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers*, <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421168.htm>.

37 See, e.g., U.S. Dep’t Housing and Urban Development, *Use of Marijuana in Multifamily Assisted Properties* (2014), <https://www.hud.gov/sites/documents/USEOFMARIJINMFASSISTPROPTY.PDF>.

38 U.S. Dep’t Housing and Urban Development, *Medical Marijuana Use in Public Housing and Housing Choice Voucher Programs* (Feb. 10, 2011), <http://portal.hud.gov/huddoc/med-marijuana.pdf>.

39 For more information on implementing smoke-free housing policies, see Tobacco Control Legal Consortium, *Creating Smoke-free Affordable Housing* (2015), <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-creating-smoke-free-affordable-housing-2015.pdf>, and other smoke-free housing resources on the Public Health Law Center’s housing web page. Another example of a resource that addresses the use of tobacco and marijuana in multiunit housing is Gasp of Colorado, *Colorado Guide: Establishing No-Smoking Policies in Multi-Unit Housing* (last accessed June 30, 2019), <http://mysmokefreehousing.org/pdf/COSmokeFreeHousingGuide.pdf>.