

When Arizona voters passed Proposition 203 last November, they may have believed that they were simply allowing anyone who needed marijuana to deal with a serious medical condition to smoke it. If so, that thinking was misguided. While Proposition 203 does allow the use of medical marijuana under limited circumstances in Arizona, its parameters are not nearly as broad as many people think.

The underpinning of Proposition 203 is the idea that “qualifying patients” will be permitted to have limited legal access to medical marijuana and that employers, schools, and housing providers may not discriminate against them because they smoke pot for medical purposes. Who qualifies as a “qualifying patient” and how such qualifying patients are certified is still an open question. The Arizona Department of Health Services will be issuing proposed regulations on this topic on December 17, 2010 and is expected to have a final rule available by the end of April 2011.

On its face the law states that a “qualifying patient” is a person whose physician, after conducting a full assessment of the person’s medical condition, will certify that the patient needs medical marijuana to treat or alleviate the symptoms of certain chronic conditions. Conditions specified in the law include cancer, glaucoma, positive HIV status, AIDS, Lou Gehrig’s disease, Crohn’s disease, some Alzheimer’s conditions, and certain other debilitating medical conditions that result in severe nausea, severe and chronic pain, seizures, wasting, or severe and persistent muscle spasms. Once the person receives the physician’s certification, then he/she must present the certification to ADHS and register as a medical marijuana user. When that happens the person will be given a registration card.

After the person receives the registration card, then he/she will be entitled to obtain up to 2.5 ounces of marijuana in a 14-day period from a registered nonprofit medical marijuana dispensary. If the qualifying patient’s home is located more than 25 miles from the nearest nonprofit medical marijuana dispensary, then the patient or the patient’s caregiver will be allowed to cultivate up to twelve (12) marijuana plants in an enclosed, locked facility. Unless the person has received a medical marijuana card from ADHS and obtains his/her marijuana from a state licensed facility, use of the marijuana is still unlawful and the person has no protection under Arizona laws.

Assuming the person has a medical marijuana card and obtains his/her marijuana legally, then most schools, landlords and employers are prohibited from discriminating against the person because he/she uses medical marijuana. Although this provision sounds broad, it is still significantly limited because of what is not required. For example, a landlord is not required to permit a medical marijuana user to smoke in a public place; persons who are driving under the influence of marijuana can still be cited for DUI; and employers are not required

to allow the ingestion of marijuana in the workplace. By implication it is also clear that persons who violate community policies or rules when they are under the influence of medical marijuana can still be held accountable for their inappropriate conduct, to the same extent that they would be held accountable if they were not medical marijuana users.

In addition, the law contains an exception for properties that would lose federal money or licenses if they permit marijuana use on the premises. Those properties (and other entities) are immune from the discrimination provisions of Proposition 203. In other states with similar laws, for example, properties that receive federal funding or which fall under the broad spectrum of “public housing” are exempt from the requirement that they cannot discriminate against medical marijuana users. As of this date, one Section 8 office in Arizona has advised us that HUD’s position is that marijuana is illegal for Section 8 participants even in states where medical marijuana is otherwise permitted, and that possession of any form of marijuana on the premises is grounds for lease and program termination of Section 8 participants.

As a practical matter properties need to start planning early for residents who expect to take advantage of the law. As a general rule, properties should look at medical marijuana users the same way that they would any other person with a disability who is requesting a “reasonable accommodation” because of a disability. The only difference here is that the “accommodation” sought may include an exception from the rule that prohibits the possession and/or use of medical marijuana on the tenant’s premises.

As part of the planning process it would be advisable for properties to make decisions about when and under what circumstances the use of marijuana will be permitted in the community. For example, does the property want to ban all use of medical marijuana in common areas? How will the property handle the conflict between residents who are registered medical marijuana users and those who don’t want their children exposed to second hand marijuana smoke? A lease addendum, clearly spelling out the community’s policy on the use of drugs on the premises, and notification of the rights and obligations of medical marijuana users, can eliminate conflicts and confusion because they will explain the property’s position upfront and make it easier to enforce. For existing residents, the Arizona Residential Landlord and Tenant Act still requires thirty days notice in connection with any change in the community rules or policies, so properties need to be proactive if they are going to change either their policies or their enforcement status.

Finally, properties need to understand that for Arizona, this is a novel issue that is going to create more problems than it solves, at least until the state has more experience with enforcement. When in doubt, consult legal counsel who should be staying abreast of these changing rules and standards and can best advise you on what you can and cannot do.

