

While the Arizona Department of Health Services (“ADHS”) works its way through the myriad comments connected with Arizona’s implementation of Proposition 203 (medical marijuana), property owners are finding new complications in light of the memo released by the United States Department of Housing and Urban Development (HUD) on January 20, 2011.

While the memo is specifically applicable to federally assisted housing, its broad interpretation of the federal Fair Housing Act makes it an important consideration as properties decide how they will go forward. Specifically the Memo establishes several important principles:

First, it reaffirms HUD’s 1999 Memo holding that a state law purporting to legalize the use of medical marijuana in public “or other assisted housing” would conflict with the admission and termination standards found in federal law, and would be subject to preemption by federal law. Although the Memo agrees that public housing agencies and owners “maintain discretion to evict or refrain from evicting current residents,” who use medical marijuana, “PHAs and owners may not grant reasonable accommodations for medical marijuana use.”

Second, HUD’s interpretation of the federal Fair Housing Act clearly establishes that HUD, at least, believes that use of medical marijuana can never be a reasonable accommodation under that law. The Memo considers this from three separate perspectives and reaches the same conclusion each time. It concludes:

- (1) A person using marijuana is not a person with a disability under the law’s definition of disability, since that definition specifically excludes persons who are currently using drugs that are unlawful under federal law. Since a current user of illegal drugs is not a covered person with a disability, the person who uses them is not protected under the federal fair housing laws.
- (2) When a landlord evicts or takes other adverse action against a person who is using illegal drugs, that landlord is not violating fair housing laws. HUD reasons that in this situation the landlord is not acting “because of a person’s disability” but rather because of the illegal drug use. “A housing provider is acting on the basis of current drug use, when, for example, the provider evicts a tenant for violating the provider’s drug-free policies. In that context, the tenant, even if suffering from a serious impairment such as cancer or multiple sclerosis, would not be disabled . . . for purposes of filing a claim” under the fair housing act.
- (3) Waiving a drug-free policy is not a reasonable accommodation under federal fair housing laws. Under the Fair Housing Act, an accommodation is not reasonable if it would require a fundamental alteration in the nature

of the housing operation. Because sanctioning violating of federal criminal laws would amount to a fundamental alteration in the nature of the housing operation, no accommodation is required.

HUD buttresses its analysis by pointing to court decisions from states that currently allow persons to use medical marijuana. California and Oregon courts, for example, have both held that employers are not required to accommodate an employee's use of medical marijuana, even if the use is off-site and during the employee's nonworking hours, because that accommodation is not reasonable under the Americans with Disabilities Act. In the public housing context, courts have reached the same conclusion with respect to residents who are medical marijuana users.

As Arizona's Proposition 203 comes closer to implementation, properties need to take a close look at both the forthcoming Arizona regulations and how their decisions will reasonably impact on their operations. Properties are strongly urged to consult legal counsel before amending their drug-free rules and policies this season.