

Marijuana (Cannabis) Issues for REALTORS®

Is growing, using or selling recreational marijuana legal now that Proposition 64 has passed?

Not exactly. Proposition 64 legalized recreational use of marijuana in California, and allows an individual to cultivate up to six plants at home or in an outdoor garden that is not visible by normal unaided vision from a public space. However, for any kind of commercial activity involving marijuana, a license is required. California started issuing licenses at the beginning of 2018. Use of any kind of marijuana, even medicinal, remains illegal under federal law.

In California, must I allow a tenant to smoke marijuana in a rental property?

No, a lease agreement may have a “no smoking” clause that prohibits smoking of any substance, including tobacco and marijuana. Proposition 64 specifically provides that landlords may prohibit or restrict marijuana use on their property.

Under fair housing law, must a landlord adjust rental policies to reasonably accommodate a tenant’s use of medical marijuana and avoid a discrimination claim?

Likely no. While nothing stops a tenant from making a discrimination claim, that claim is unlikely to succeed. Under federal law, marijuana is a Schedule 1 drug with no accepted medical use, and a claim under the Americans with Disabilities Act will not be recognized. Further, Proposition 64 specifically permits a landlord to prohibit or restrict marijuana use on rental property. For risk management purposes, a lease that bans all forms of smoking on the property, while allowing use of medicinal marijuana in other forms (e.g., edible or topical), is likely a reasonable compromise.

What should be disclosed in selling a property in which marijuana is or has been cultivated?

Listed property with marijuana currently growing or being stored is likely a material fact that must be disclosed, even if is to be removed by closing. Any previous growing, processing or storage of plants indoors should also be disclosed regardless of legality since a “grow house” may be subject to various risks such as mold or utility overuse.

Should a brokerage allow an agent to engage in the sale of property where cultivated marijuana will be transferred as part of the sale?

It is the broker’s decision. Factors for the broker to consider are: 1) it may be legal under California law for a properly licensed landowner or lessee to cultivate marijuana or transfer its license; 2) the broker may not want to be in the business of checking a client’s marijuana license; and 3) marijuana is illegal under federal law.

Considering these factors, it would not be unreasonable for a brokerage to maintain a policy against transactions involving marijuana cultivation, or to require that all cultivated marijuana be removed by the close.