

No Roof for Your Reefer! Medical Cannabis Tenants Need Patient Protections in Federally Assisted Housing

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Authors:

Andrea Hope J. Steel

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One of the most fascinating aspects of cannabis law in America is that, despite marijuana being illegal at the federal level, almost every state allows for its legal use in some form or fashion. As of this writing, 36 states, Washington, DC, and four US territories have laws authorizing the medical use of cannabis. Additional states allow for low-THC medical cannabis, but these state programs are so restrictive that they are typically not considered legal medical states. Despite this overwhelming majority, families and individuals living in affordable housing across the nation risk losing their homes because the substance remains federally illegal, with no patient protections in place. Until this federal/state conflict is addressed, property owners—including public housing authorities (PHAs)—are left having to carefully navigate satisfying resident medical needs while remaining federally compliant.

Affordable housing comes in many forms, but the focus in this article is on federally assisted public housing and housing choice vouchers. Public housing and Section 8 housing are often used interchangeably, though they have different practical implications. Public housing refers to housing built and operated by PHAs using federal money and solely serving low-income residents with incomes not exceeding 80 percent of the area median income (AMI). Housing choice vouchers, often referred to as "Section 8," allow holders to choose any housing that meets the program requirements, as opposed to being limited only to subsidized public housing developments. Like public housing, eligibility is determined by a PHA based on income, but private landlords own and manage the voucher properties. Vouchers are given, to the extent available, to applicants whose incomes do not exceed 50 percent AMI,

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though most are reserved to those whose incomes do not exceed 30 percent AMI.

The Quality Housing and Work Responsibility Act of 1998 (QHWRA), which generally governs various aspects of HUD's public housing and tenant-based Section 8 housing assistance programs, including the housing choice voucher program, contains provisions applicable to the use of marijuana in federally subsidized affordable housing. For *applicants*, if the PHA or private landlord determines any member of the household is an illegal user of a controlled substance, it will bar admission to the housing. For *current tenants*, there must be policies or lease provisions that allow for termination upon discovery a resident is illegally using a controlled substance or whose illegal use interferes with other residents' health, safety, or peaceful enjoyment. The provision barring *applicants* from accessing federally assisted housing is a strict ban, but for *residents already living there*, some level of discretion is allowed. These federal provisions govern, even in states where medical cannabis use is expressly permitted. This conflict can have a significant adverse effect on families in need of affordable housing where a member is legally using cannabis as medicine in accordance with a state medical program.

In one glaring case, Mary Cease, a Navy Veteran earning less than 30 percent of the AMI in Indiana County, Pennsylvania, was denied housing when she moved there in 2018 after escaping an abusive spouse. Ms. Cease had no prior criminal record and was transparent in her application with the local PHA about her doctor-authorized medical use of cannabis in the treatment of her post-traumatic stress disorder and chronic back pain. After years of litigation stemming from the PHA's refusal to approve her housing application, she was victorious in February 2021 when the Pennsylvania Commonwealth Court found the term "illegally using a controlled substance" to be ambiguous where the resident's use was prohibited by federal law but permitted under state law. *Cease v. Hous. Auth. of Indiana Cty.*, 247 A.3d 57, 61 (Pa. Commw. Ct.), *appeal denied*, 263 A.3d 243 (Pa. 2021). The court went on to reason, "the pertinent provisions of QHWRA are based on the obsolete and scientifically flawed premise [of the federal Controlled Substances Act] that marijuana 'has no currently accepted medical

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use in treatment in the United States' and that 'there is a lack of accepted safety for use of marijuana under medical supervision.'" *Id.* The Pennsylvania Supreme Court denied further appeal, though the housing authority could still appeal to the federal courts.

Although a state court in Pennsylvania may have ruled in favor of the tenant in the case of Ms. Cease, federal courts in California ruled against evicted resident Emma Nation in 2020 when they held she was required to exhaust all administrative remedies prior to pursuing court action, specifically that she should have petitioned the Drug Enforcement Administration to reclassify the federal control status of marijuana. *Nation v. Trump*, 818 F. App'x 678 (9th Cir. 2020).

One of the greatest injustices in this state/federal conflict is the creation of a second class of citizens when it comes to the legal use of cannabis. The wealthy do not need to access federal assistance for housing or other basic needs such as healthcare, freeing them to follow the state laws without fear of losing their homes. Meanwhile, the poor face severe penalties for using the same medicine, creating a new world of illegality that only applies to certain sects of our population. Under current laws, cannabis is functionally illegal for low-income individuals in federally assisted housing, even in states where it is legal for others. Citizens most in need cannot benefit from certain healthcare treatment options available to those with deeper pockets, despite such activities being sanctioned by medical professionals and state law.

Recognizing the great harm the state/federal cannabis law conflicts cause to the nation's most needy citizens, Rep. Eleanor Holmes-Norton (D-DC) has three times filed legislation that would amend the QHWRA to expressly prohibit landlords and PHAs from establishing policies barring admission to federal housing programs where a household member is using medical cannabis in compliance with state law. The proposed legislation would clear the ambiguity found in the Cease case by explicitly stating the term "illegal use of a controlled substance" does not include "the use, distribution, possession, sale, or manufacture of marihuana (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) that is in compliance with the law of the State in which such

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use, distribution, possession, sale, or manufacture takes place." H.R. 3212 — 117th Congress: Marijuana in Federally Assisted Housing Parity Act of 2021. This bill was introduced in May 2021 but has not yet been heard in committee. Prior versions of the bill introduced in 2018 and 2019 similarly did not gain traction.

Perhaps 2022 will be the year we see some forward progress with cannabis laws at the federal level in some aspect, though I highly doubt comprehensive reform is likely any time soon. In the meantime, various actions can be taken to provide some semblance of protection for medical cannabis tenants in federally assisted housing:

- Individuals and companies or organizations can advocate for the passage of the Marijuana in Federally Assisted Housing Parity Act (and cannabis reform generally) by reaching out to their legislators in Congress.
- PHAs can develop carefully crafted policies that aim to protect tenants and applicants using medical cannabis following state law, including the following: o prohibit drug testing of applicants for cannabis or altogether o exclude medical marijuana from applicant inquiries on drug use o provide for reasonable restrictions on smokables to reduce potential complaints from other tenants, or even implement smoke-free housing policies o allow for discretion with respect to discovery of cannabis use by existing tenants o prohibit lease terminations based on the use of medication authorized in accordance with state law.

States and local municipalities can put in place certain laws or ordinances that support tenant and applicant protections, including the following:

- prohibit landlords from making certain inquiries of housing applicants about participation in the state's medical cannabis program; and
- prohibit landlords from terminating tenancy based on the use of state-legal medication taken in accordance with state law.

Any laws, ordinances, and policies would need to be meticulously drafted due to the inherent conflict between state and federal law.

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Pile on top of all of this, that most multifamily mortgage documents require the landlord to comply—and cause tenants to comply—with all federal, state, and local laws. Despite painstaking efforts to craft good policy, there are no guarantees such language would not be challenged in a court of law, and if so, what the outcome would be. However, the needle doesn't move on its own—some amount of risk must be taken to challenge the status quo and move the ball forward. When preparing these sorts of policies, seeking counsel from those experienced in both affordable housing and cannabis law is suggested to help navigate the various requirements and mitigate risk.

If you have questions or need assistance complying with medical cannabis laws, please contact Andrea Steel of Frost Brown Todd's Health Care Innovation and Multifamily Housing teams.

**Lila Greiner contributed to this article while working as an intern at Frost Brown Todd.*

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