



# Community Association Management *Insider*<sup>®</sup>

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## **Up in Smoke: Association Management Issues in the Age of Marijuana Legalization**

An Exclusive Special Report from  
*Community Association Management Insider*

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## About Community Association Management Insider

Community Association Management Insider helps community association managers keep their co-ops, condominiums, and homeowner's associations running effectively and within budget — and all in the bounds of state, local, and federal law, as well as their governing documents.

The screenshot shows the website's header with the logo "Community Association Management Insider" and navigation links: Home, Search, Log out, and My Account. Below the header is a dark blue navigation bar with links: New Headlines, Browse by Topic, Dealing With, Departments, Model Tools, eAlerts, About, and Membership. The main content area features two article teasers. The first is titled "COVID-19 Impacts: Handling the Jump in Home-Based Businesses" dated January 15, 2021, with a "Continue reading" button. The second is titled "What Happens When an Owner Refuses To Rehome a Dog That Bites?" dated January 13, 2021. On the right side, there is a search bar, a "Welcome Back" section with links to "Renew My Membership", "Manage My Group Members", and "My Account", and a "Most Popular Articles" section listing several topics like "Someone is Sick: Now What?", "Avoiding HOA Rule Selective Enforcement Claims", "Up in Smoke: Association Management Issues in the Age of Marijuana Legalization", "Protecting Common Areas from Contagion", and "Bickering and Brawls: How to Deal with Disputes, Tensions and..."

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# A Message from the President

More than 60 percent of American states have legalized some form of marijuana since 1996, and the legislatures in many of the holdouts have recently considered doing so. Those states with legal [marijuana](#) have seen it rapidly commoditized, with new businesses such as delivery services cropping up and becoming a part of homeowners' daily lives.

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***The proliferation of pot has begun to have repercussions for community association managers.***

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Not surprisingly, the proliferation of pot has begun to have repercussions for community association managers, both as property managers and employers. Whether you live in a state where marijuana is fully [legal](#), partially legal, or on the cusp of some degree of legalization, you need to know what that means on the ground.

This Special Report takes an in-depth look at some of the most pressing marijuana-related issues for community association managers and their clients and provides expert guidance on how to mitigate the associated risks.

Best regards,



**Matt Humphrey**

President

Plain-English Media

Publisher of [Community Association Management Insider](#)

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## The Current Legalization Landscape

It's hard to think of another substance whose profile has undergone as radical of a transformation as marijuana. The attitudes toward it have pivoted dramatically, from the fear mongering of *Reefer Madness* in the 1930s through the scorn or at least ridicule for the so-called stoners of the '70s to today, when polling shows that 65 percent of Americans support legalization, a record, well, high.

There's a good chance that some of the owners in your client associations are among the supporters — and that some would welcome the opportunity to legally partake under state law. But not every state has gotten on board yet, and many of those that have loosened their laws regarding marijuana use have done so on a limited basis. Here's what you need to know about the current legal status.

### State and Federal Laws

According to the National Conference of State Legislatures, as of June 25, 2019, 33 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have enacted laws permitting the medical use of marijuana. The medical marijuana laws differ in their scope, though.

Variations can be seen, for example, in the types of medical conditions covered. Some states limit medical use to “intractable epilepsy” or seizure disorders, while others extend it to conditions such as cancer, amyotrophic lateral sclerosis (ALS), multiple sclerosis, Crohn's disease, Parkinson's disease, and sickle cell disease.

States also may limit the authorized products. Until recently, for example, Florida didn't allow the smoking of medical marijuana; its law authorized medical marijuana only in the form of oils, sprays, tinctures, edibles, and vaping.

Fourteen states and territories have approved adult-use (or recreational) marijuana, and several other states, such as Minnesota and Florida, also seemed poised to legalize recreational use in late 2019. Some states have only decriminalized the possession of small amounts of marijuana.

“With regard to the criminalization of marijuana, most states that have legalized it have done so in very limited ways and typically have just removed the state [criminal penalties](#) for growing or using marijuana within the set parameters,” says Phaedra Howard, an attorney with Hellmuth & Johnson PLLC in Minneapolis (where only liquid medical use currently is permitted).

“There is no ‘right’ to use or smoke marijuana even in those states that have removed the criminal penalties, which means that associations are still free to [regulate](#) what happens within their private property without running afoul of any such laws.”

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***“With regard to the criminalization of marijuana, most states that have legalized it have done so in very limited ways and typically have just removed the state criminal penalties for growing or using marijuana within the set parameters.”***

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**Phaedra Howard**, an attorney with Hellmuth & Johnson PLLC in Minneapolis

Moreover, at the federal level, marijuana remains an unlawful Schedule I substance under the Controlled Substances Act. The manufacture, distribution, or possession of marijuana, including medical marijuana, is a federal [criminal offense](#).

## The Implications for Community Associations

On the ground, few focus on the federal law. Many community associations are now operating in environments where the medical or recreational use of marijuana is widely considered legal by owners. The problems for boards of directors and their managers generally arise when owners decide to take advantage of their state laws by smoking marijuana, creating [second-hand smoke issues](#).

“We already had people who were using marijuana when it was made legal in Washington, but when people started using it with more gusto than they were before, we had several buildings that experienced a problem with that particular odor,” says Paul Gruzca, director of education and client engagement for CWD Group, Inc., an association management company in the Pacific Northwest.

“It usually comes up as people complain of smoke wafting through the common areas and hallways, or, in single-family homes, people complain about smoke coming over fences,” says Paul Windust, a principal with Berding Weil, a California law firm that specializes in HOA issues. “It’s the older projects with older governing documents and older construction where you tend to see more of these issues.”

So what’s a manager to do? Read on for advice on how to handle marijuana-related issues. ■

## 3 Ways to Regulate Marijuana Use in the Governing Documents

The obvious first question for associations in states where marijuana use has been legalized to some degree is whether to prohibit it in the CC&Rs. CC&R amendments are no small matter, though. The process can prove costly and reaching the requisite level of owner votes is rarely assured.

An association might be better off trying to work with smokers to mitigate some of the smoke with, for example, HEPA filters, seal vents, or sweeps at the bottom of doors.

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***“Some buildings say ‘we’re allowed in this state to use marijuana, but, in our building, we’d prefer you use edibles.’”***

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**Paul Grucza**, director of education and client engagement for CWD Group, Inc.

“Some buildings say ‘we’re allowed in this state to use marijuana, but, in our building, we’d prefer you use edibles,’” says Paul Grucza, director of education and client engagement for CWD Group, Inc., an association management company in the Pacific Northwest. “I haven’t seen any pushback or court cases on rules refining the type of product you can use.”

When less formal attempts at mitigation fail, though, associations are exploring other options to regulate marijuana use.

### 1. The Nuisance Provision Option

To avoid the headaches associated with CC&R amendments, some associations are turning to the [nuisance provisions](#) that already exist in their governing documents to prohibit or limit in-unit smoking. Most documents include a provision that prohibits “noxious or offensive activities” in any unit or common area, as well as anything that is or could become an annoyance or nuisance to other owners.

Many boards and owners consider the provision to be a catch-all, covering everything from loud parties and incessantly barking dogs to nasty odors and children playing loudly. But it’s governed by an objective standard.

“The board has to go through an analysis to determine if the alleged nuisance would objectively prevent the complainant from the quiet use and enjoyment of his unit,” says Paul Windust, a principal with Berding Weil, a California law firm that specializes in HOA issues. “If there’s actual smoke coming in, that’s pretty blatant.

“Where it gets harder is when neighbors know what their neighbors are up to and don’t like it. It’s their own personal biases causing this claim of nuisance. That’s not really preventing the person from quiet use and enjoyment; it’s just that they don’t like it.” (See the “Management Issues” section for more on how to handle neighbor-to-neighbor disputes.)

Windust says some of his association clients bring in an expert to investigate how the air flows between units to determine if it’s possible that smoke from one unit can invade another unit (an expense uninformed owners might object to). Even if the board determines the smoking does indeed rise to the level of a nuisance, though, the board needs to consider another issue — whether it can justify the cost to pursue [enforcement](#).



“Does the board want to use [community dollars](#) to solve this problem?” Windust says. “If I live clear across the community, I’m going to be upset if my association is spending thousands of dollars in legal fees to solve my neighbor’s problem.”

## 2. The Illegality Provision

The governing documents in some states also might include provisions requiring owners to abide by all federal, state, and local laws.

“Declarations in Illinois often have a general illegality provision,” says Michael Kim, of Chicago’s Michael C. Kim and Associates, “so associations are wondering if, even though their documents don’t refer specifically to cannabis smoking, they can use that provision to prevent cannabis smoking in individual units.”

Windust, based in California, also has clients with CCRs prohibiting violations of federal, state, and local laws (some documents might define “nuisance” to include such violations). “If associations want to be draconian about reaching into someone’s unit, they can say ‘this is a violation of federal law, so you can’t do it,’” he says. “I’ve never seen an association really take that position.”

According to Kim, no caselaw on this tactic yet exists, so it remains to be seen how courts would rule on it.

## 3. Explicit Bans

Phaedra Howard, an attorney with Hellmuth & Johnson PLLC in Minneapolis, recommends associations adopt more specific policies that target [smoking](#), whether it’s cigarettes, marijuana, or some other substance.

“An amendment to the [CC&Rs](#) that specifically restricts smoking or growing of marijuana in the units will be the most effective if you can get enough support for it,” she says. “An association could regulate or prohibit smoking in the common areas through the rules.”

Jennifer Horan is a shareholder with Becker & Poliakoff in Florida, where the medical marijuana law was recently expanded to allow smoking but recreational marijuana remains prohibited. “We’ve just started hearing from clients about amending the rules or documents for marijuana smoking,” she says, “and some have gotten more aggressive and tried to ban it in the unit.”

She advises managers to make sure their boards clearly state their reasons for specifically addressing marijuana, medical or otherwise: “You’d need to say the policy was enacted because it remains a crime under federal law, as well as because of the fear of the health effects on others.

“As long as you tailor your policy in a manner that clearly articulates that it’s for the health, safety, and benefit of all owners, you’re more likely to withstand a challenge.”

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***“As long as you tailor your policy in a manner that clearly articulates that it’s for the health, safety, and benefit of all owners, you’re more likely to withstand a challenge.”***

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**Jennifer Horan**, a shareholder with Becker & Poliakoff in Florida

For example, a [policy](#) might begin with the following preamble:

WHEREAS, the U.S. Surgeon General has conclusively determined that there is no risk-free level of exposure to secondhand smoke;

WHEREAS, the American Society of Heating, Refrigerating and Air Conditioning Engineers has issued a position document on environmental tobacco smoke concluding that “the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity”;

WHEREAS, given the proven health risks associated with smoking and breathing secondhand smoke, the [**governing body**] deems it advisable and in the best interest of all members of the Association to approve [**an amendment to the Declaration, a change to the Rules and Regulations, etc.**] that prohibits smoking in all condominium units as well as the [**indoor/outdoor**] common areas; and

WHEREAS, nothing in federal law, including the Federal Fair Housing Act, prevents the imposition of smoking prohibitions in multi-unit dwelling buildings ...

Horan also cites a 2014 memorandum from the U.S. Department of Housing and Urban Development regarding the use of marijuana in multi-family properties as support for an explicit ban.

The memo acknowledges that the use has been decriminalized in several states but directs that owners of federally assisted housing establish policies that allow the termination of tenancy of any household with a member who’s “illegally using marijuana or whose use interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.”

“The memo doesn’t apply to associations,” Horan says, “but I think it gives associations the ability to create rules or regulations that restrict marijuana smoking on association property if they can narrow them to say they’re for the health and happiness of the majority of residents.”

In Illinois, where recreational use is legal as of Jan. 1, 2020, associations may find it easier to act. The Illinois Cannabis Regulation and Tax Act expressly allows condo associations to prohibit or limit the smoking of cannabis within an owner’s unit (including the limited common elements) in the “condominium instruments” (generally defined as recorded documents, including the declaration and bylaws). It also permits restrictions of any kind of cannabis consumption in the [common elements](#).

Whether expressly authorized by law or not, drumming up sufficient support to amend CC&Rs can be challenging, more so in some states than others. Grucza has clients in Washington that are trying to pass an amendment to make their buildings nonsmoking and running into a wall.

“It’s almost impossible,” he says, “because state law requires a 90 percent affirmative vote of the membership because it constitutes a change of use.”

Not sure if the community truly supports a ban on marijuana smoking? Managers in this situation should suggest their boards hold a town hall [meeting](#) on the issue.

“The board might think it knows the desire of the community,” says Kelly Richardson, a principal with Richardson Harman Ober PC, a California law firm known for community association expertise, “but the meeting gives us an opportunity to see if it’s controversial. You don’t want to go to the expense of a CC&R amendment and then find out that it fails.”

If a proposed amendment seems destined to fail, the association should think about adopting clear restrictions in the rules. “You might be able to avoid any disputes in this area because people will know they can’t smoke, but they can vape, and they can’t smoke in the common areas under any circumstances,” Windust says. “People want certainty so give them upfront knowledge about what’s acceptable and what’s not.”

Grucza would take a different tack altogether. “I personally believe that in this day and age, in a state where marijuana use is legal, a board needs to develop some policy regarding the regulation of odors — not to specifically address marijuana odor but *all* odors.”

## Don’t Go It Alone

Despite your best guidance, you may have boards that want to proceed down an unnecessarily dangerous path, such as adopting too restrictive of a policy or a policy that’s unwise or impractical for some other reason.

“I always take anything that they want to do rule-wise, regulation-wise, guideline-wise, or otherwise, and tell them to spend \$400 for [legal review](#),” Grucza says. “We as a manager do not judge whether their preferred course of action is wise.”

Not that advice of counsel guarantees anything. “I have boards that don’t listen to the manager or the attorney,” Horan says. “So I always tell managers just to let them know you don’t agree. I have clients all the time that say, ‘Okay, thanks, we’re going to do that anyway.’” ■

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## Management Issues: How To Enforce Your Pot Policy and Manage Inevitable Complaints

As all community association managers know, it's one thing to establish a policy, and it's another to enforce it. Enforcement of your clients' policies is only one of the marijuana-related issues that can arise for managers in states that legalize the substance.

### Helping the Board Handle Complaints

Managers frequently are on the front lines when it comes to receiving complaints from owners, and it's no different when the complaints have to do with marijuana smoking.

The first step, says Paul Windust, a principal with Berding Weil, a California law firm that specializes in HOA issues, is to acknowledge the complaint, whether it relates to a specific policy or not.

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***“If there’s no policy, the next tactic is to ask the board what to do because managers’ hands are tied without something to enforce.”***

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**Paul Windust**, a principal with Berding Weil

“If there’s no policy, the next tactic is to ask the board what to do because managers’ hands are tied without something to enforce.” (See the previous section, “3 Ways to Regulate Marijuana Use in the [Governing Documents](#).”)

Managers, of course, should resist the temptation to take things into their own hands or not bother the board. “The manager should rely heavily on the business judgment of the board,” says Jennifer Horan, a shareholder in the Naples, Fla., office of Becker & Poliakoff who’s board certified in condominium and planned development law.

Even when an association does have a marijuana policy, Kelly Richardson, a principal with Richardson Harman Ober PC, a California law firm known for community association expertise, cautions association managers not to reflexively jump in. “The first thing I look for is corroboration, from other owners, security, staff, a board member, or whomever,” he says.

“Is it just that one owner complaining? If there’s no corroboration, it’s the kind of thing you don’t want to get involved in.” (See below for more on neighbor-versus-neighbor disputes.)

And if there is corroboration? “I’m a big proponent of gentle escalation, not going from zero to 200 miles per hour in four seconds,” Richardson says. Instead of leading off with an attorney letter, he suggests starting with something as simple as a phone call or a letter from the manager or a board member. “See if an informal conversation can solve it.

“I really counsel associations to do everything within reason and only go with [legal enforcement](#) when you really need to.”

Owners — and boards — can let their anger cloud their better judgment, though. “If the owner wants to take a real enforcement action,” Horan says, “the board has to determine if this is an efficient use of its time and resources.”

Managers and boards also have to be realistic about the challenges of enforcing marijuana-related [policies](#).

“It’s so hard to enforce,” says Paul Gruzca, director of education and client engagement for CWD Group, Inc., an association management company in the Pacific Northwest. “I’m not going to go unit to unit to see if they put in the filter or the block at the bottom of the door that the association requires as a mitigation device.”

Michael Kim, of Chicago’s Michael C. Kim and Associates, agrees about the role of practicalities. “Associations can easily adopt rules banning cannabis in common elements,” he says, “but what if someone is sitting in the lobby eating a brownie? Are you going to test it?”

“It’s one of those thing where you should probably pass rules prohibiting it but not get crazy about enforcing it.”

## Neighbor-versus-Neighbor Disputes

Neighbor-versus-neighbor issues can drag a manager down an exhausting and frustrating road. “There seems to be a growing notion that the association is responsible for taking care of everything,” Richardson says, “but managers need to be careful to make sure they don’t too quickly embroil the association in something that could be strictly a personality dispute.”

The guiding principle should be the general overall well-being of the community, Horan says. “Is this something that is just a beef between neighbors, or is it really affecting the operation of the association? The board has an obligation to the community as a whole and not just a few individual members.”

One potential avenue in what are clearly neighbor-versus-neighbor conflicts is informal dispute resolution. In California, for example, all associations must have “Internal Dispute Resolution” policies that provide a “fair, reasonable, and expeditious” procedure for resolving disputes between the association and its members. A savvy association could wield the same procedure for what Richardson calls “Hatfield and McCoy situations.”

“I suggest the board offer to act as a mediator to at least see if there’s any way to keep things from escalating,” he says.

Windust has seen this approach work. “The association quasi-mediate and can suggest to the person smoking the marijuana that they should consider other ways,” he says. “They say, ‘why don’t you get an air filter, use a vape, or use edibles?’ But there’s no requirement that anyone agree to anything.”

## Bringing in Law Enforcement

With marijuana still illegal under federal law, as well as a significant number of states, some owners or board members might want to seek intervention by law enforcement on users. Horan says its best to leave it to individual members to reach out to the police: “I’d tell them that if they feel unsafe or that illegal things are going on, don’t hesitate to call as a citizen and report it to the [police](#).”

Grucza seconds that: “There’s no right or obligation at that point for the manager to do something. I wouldn’t go off and call the police. It has to be generated by the owners.”

In states where marijuana use is legal, though, police likely won’t want to get involved in what they regard as association spats. “Cops are quick to say this is something that has to be handled by your association,” Horan says.

Richardson worked with an HOA where an owner had rented out his townhouse. When the HOA needed [access to the unit](#) because of a water emergency, it discovered the entire townhouse had been converted into a marijuana grow house.

“It was using an enormous amount of electricity and water, and the humidity had all but destroyed the interior with mold,” he says. “Law enforcement was called in for that. But, typically, I don’t hear about law enforcement involvement.”

Richardson also points out that the type of activity that would trigger local law enforcement’s interest probably varies quite a bit from region to region.

But what about federal law, owners might argue — marijuana use is still illegal under federal law. “I don’t think you can call the Drug Enforcement Agency and have them come in unless you’ve got some drug kingpin,” Kim says.

Some owners and boards might worry about any type of marijuana sales, whether conducted by a kingpin or just your friendly neighborhood weed dealer who happens to live in the community. You generally don’t need to turn to law enforcement to shut down such activity, though.

“Most associations have commercial activity clauses that prohibit owners from operating businesses to keep people from coming and going a lot,” Horan says.

## Managing Deliveries

Concerns about too many unknown or unvetted people coming and going also might make associations wary of the marijuana delivery services that have popped up in states that have legalized marijuana. “We represent some high-end communities that are even concerned with grocery delivery services,” Horan says.

“I think you have to attack it through an access approach,” she continues. “You can try to limit access by requiring the delivery person to give an ID or follow whatever other policy you have for guest registration.” ■

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## Accommodation Issues: Must an Association Allow the Use of Medical Marijuana?

As with most prohibitions or restrictions in a community association, an outright marijuana ban can raise reasonable accommodation issues. The [Fair Housing Act](#) (FHA) and its state law counterparts generally make it unlawful to refuse to make [reasonable accommodations](#) in rules, policies, and practices when necessary to allow people with disabilities the equal opportunity to use and enjoy their homes.

### Marijuana Bans and Accommodation

“If an association is considering a ban, it’s got to be prepared for the possibility that someone could invoke the fair housing laws and claim a medical necessity,” says Kelly Richardson, a principal with Richardson Harman Ober PC, a California law firm known for community association expertise. “I’m not seeing this issue near as much I expected at this point, though.”

That could be due to the rise of alternative delivery systems for marijuana, including edible products and vaping devices.

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***“Associations can ban the smoking of marijuana and still permit legal users of medical marijuana to use it in another form.”***

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**Phaedra Howard**, an attorney with Hellmuth & Johnson PLLC in Minneapolis

“Associations can ban the smoking of marijuana and still permit legal users of medical marijuana to use it in another form,” says Phaedra Howard, an attorney with Hellmuth & Johnson PLLC in Minneapolis. “A disabled person would then have to show that there is a medical reason why they need to smoke it instead of using it in another form before an association would be faced with potentially having to make an accommodation for them.”

It’s important to remember, though, that not every requested accommodation is reasonable. “It doesn’t have to be the exact accommodation an owner requests,” says Jennifer Horan, a shareholder in the Naples, Fla., office of Becker & Poliakoff who’s board certified in condominium and planned development law.

She points to a federal district court case in Michigan where the court ruled that a resident in federally subsidized housing with multiple sclerosis wasn’t entitled to use medical marijuana in her rental unit as a reasonable accommodation under the FHA. The court stated that requiring a housing provider to grant a reasonable accommodation to use marijuana would require the provider to violate federal law.

“If you want to push for a drug-free community, and you’re relying on federal law,” Horan says, “that’s your most aggressive argument — that you can’t grant accommodation to use marijuana because we’re essentially violating federal law by allowing it.”

### Accommodation Negotiations

Richardson counsels associations to engage in the so-called interactive process with owners seeking accommodation for their medical marijuana use, even if not strictly required to do so by law.

“In California at least, the state fair housing agency looks to see if the housing provider tried to work with the resident to [resolve the problem](#). For example, did you explore whether an edible, aerosol, or vaporizer might be adequate substitutes for smoking? Would the smoking create a nuisance for other owners? The interactive process is the only way to really know if an accommodation is reasonable.”

Paul Windust, a principal with Berding Weil, a California law firm that specializes in HOA issues, says associations should error on the side of accommodating. “We usually advise associations to give disability a wide berth unless it’s demonstrably false. The law on this area is so nebulous that it’s a very risky proposition to go to court.” ■



## Marijuana Use by Employees: Off-Duty, On-Duty, and Zero-Tolerance Policies

Community association managers don't only manage associations — they also [manage employees](#). The wave of marijuana legalization has led to many questions among employers about what they can, and can't, do in terms of regulating their employees' use of marijuana on and off the job. The answers vary greatly depending on the particular state law involved.

### Drug-free Workplaces

When it comes to marijuana and your employees, one thing is clear regardless of where you operate: You can ban marijuana use in the workplace, much as you can ban on-the-job alcohol consumption. "It's legal to drink, but you can't show up at work drunk," points out attorney Michael Kim, of Chicago's Michael C. Kim and Associates.

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***"The Illinois law (which takes effect Jan. 1, 2020) explicitly recognizes the rights of employers to maintain drug-free workplaces and warns those using marijuana off-site that they aren't immunized against drug tests."***

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**Michael Kim**, of Chicago's Michael C. Kim and Associates

Many state laws legalizing marijuana explicitly allow such policies. "The Illinois law (which takes effect Jan. 1, 2020) explicitly recognizes the rights of employers to maintain drug-free workplaces and warns those using marijuana off-site that they aren't immunized against drug tests," Kim says.

"They still have to be able to meet the requirements of the job, and, if you have a drug-free workplace policy, it's enforceable."

California's marijuana law similarly states that it doesn't restrict the ability of employers to:

- Maintain a drug-free workplace,
- Have policies prohibiting employees' and prospective employees' use of marijuana, or
- Comply with state and federal laws.

Some states have so-called "lawful activities" statutes that prohibit employers from firing an employee based on his or her lawful out-of-work activities. The Colorado Supreme Court, though, has held that an activity, like marijuana use, that's illegal under federal law isn't a lawful activity for purposes of the state protection.

Note, though, that Nevada and New York City recently passed laws addressing the role of marijuana in the *hiring* decision. The Nevada legislation makes it illegal for employers to fail or refuse to hire a candidate because of a failed test for marijuana. The New York ordinance prohibits employers from requiring a prospective employee to submit to a marijuana test as a condition of employment. (Both include exceptions for certain safety-sensitive jobs.) It's likely that more jurisdictions will move in this direction in the future.

If you have or decide to adopt a drug-free workplace policy and are located in a state that has legalized marijuana, it's important to clearly identify marijuana as a prohibited substance — don't simply rely on language referring to "illegal drugs."

You should state that marijuana use is strictly prohibited, whether on the job or recreationally outside of work, and carefully describe your drug-testing policies, procedures, and penalties. It's also advisable to cite the safety-related reasons for the ban. Make sure every employee knows of the policy, including new hires, and enforce it consistently.

## Reasonable Accommodation of Medical Marijuana Use

Just as [fair housing](#) laws require housing providers to reasonably accommodate people with disabilities, federal and state employment laws require employers to reasonably accommodate qualified workers with disabilities. Such workers may legally use medical marijuana to deal with their disabilities.

The federal Americans with Disabilities Act doesn't protect illegal drug use, though, and marijuana remains illegal under the federal Controlled Substance Act. Thus, federal courts repeatedly have refused to require employers to allow marijuana use as a reasonable accommodation.

It's a different story under some state disabilities laws, though. In several states that have legalized medical marijuana (including Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Oklahoma, Rhode Island, and West Virginia), laws require some degree of accommodation of medical marijuana use outside of work.

State court rulings also have required accommodation of medical marijuana use outside of the workplace. In a Massachusetts case, for example, the state's high court ruled that an accommodation that would permit the employee to continue to be treated with medical marijuana in her home wasn't per se unreasonable.

The court noted, though, that the employer had an obligation, before terminating the employee, to participate in an interactive process with her to determine whether an alternative, equally effective medication was available that wasn't prohibited under the employer's drug policy.

Still, of the states that have legalized medical marijuana, most don't yet have statutes that protect employees from being fired or rejected for a job because of a positive marijuana test or being registered on a medical marijuana database. And no legal authority requires you to accommodate medical marijuana use on the job.

## Time to Dump Testing?

Employers typically have conducted drug testing of workers out of concerns about the risk of workplace accidents and reduced productivity. While the safety concerns may be valid, the usefulness of drug testing to address them is questionable. After all, urine tests for marijuana don't indicate the current level of impairment; rather, they show only that marijuana has been consumed at some point in the past 30 days or so.

As to productivity, off-hours marijuana use doesn't seem likely to affect a worker on the clock any more than recreational alcohol use does. "We've not had an issue at all," says Paul Grucza, director of education and client engage-

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***“Marijuana legalization hasn’t caused production or delivery of service issues.”***

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**Paul Grucza**, director of education and client engagement for CWD Group, Inc.

ment for CWD Group, Inc., an association management company in the Pacific Northwest. “Marijuana legalization hasn’t caused production or delivery of service issues.”

Moreover, your policies can put you at a competitive disadvantage in a tight job market. Strict drug testing and use rules could drive qualified employees to more lenient employers.

It’s also possible to find a happy medium with a formal policy that isn’t overly harsh. “We have a drug-free program here,” Grucza says. “The only difference with it now is that if a drug test finds evidence of marijuana in the system, it’s not grounds for immediate termination.

“We tell the employee we found it and let them know it’s federally still a crime so we’re putting them on notice that they need to be mindful of that.”

And if an employee who tests positive requests to use marijuana a reasonable accommodation? “We would honor that request but develop guidelines about how they could use it,” he says.

### **Legal Advice is a Must**

Regardless of the approach you want to take with your employees’ marijuana use, it’s imperative that you consult a local employment attorney. The state laws are shifting rapidly, both by legislation and court decisions, and you can’t afford to get it wrong. ■

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The calls related to the coronavirus started coming earlier and earlier, says Sandra Gottlieb, a founding partner of California homeowner association law firm SwedelsonGottlieb. “As the death counts climbed in the United States, people were panicking. It was ratcheting up every single day, and I heard the terror.” In the midst of a public health...

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Q: Several community members, and, occasionally some guests, use wheelchairs. Because of the size and design of some of the common areas, the walls have been dented, paint has been scratched on the walls and doors, and corners and doorways have been nicked. There has also been damage to carpets and wood floors from wheelchairs. It has been expensive to repair wall and floor damage caused by those wheelchairs to the common areas. What can I do to prevent this damage?

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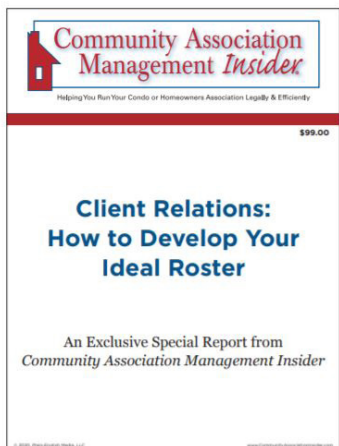
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### **Managing Smoking, Pets, and Other Nuisances**

Regardless of where you're located, or how long you've been in the business, the same types of problems tend to crop up over and over, don't they? It's not the big emergencies that make you pull your hair out, but the everyday hassles that start to grate when you get lots of people living together in the same community. Things like pet issues. And smoking. And the other chronic niggling nuisances that, over time, become a real pain in the neck. Which is why we've pulled together this Special Report specifically about managing these sorts of challenges. [Download now »](#)



### **Client Relations: How to Develop Your Ideal Roster**

Strong relationships with your community association clients are always important — but not always easy — to maintain. As a manager, you don't have to settle for rocky treatment from clients that are overly demanding, unappreciative, or even abusive. Concessions can be made for exceptionally trying times, of course, but wouldn't you rather develop solid, productive, and mutually satisfying relationships with your clients? This exclusive Special Report aims to help you do just that. It provides valuable guidance on how to identify and land the right clients, establish and enforce boundaries, manage poor conduct, and leverage happy clients. [Download now »](#)



## **Up in Smoke: Association Management Issues in the Age of Marijuana Legalization**

Those states with legal marijuana have seen it rapidly commoditized, with new businesses such as delivery services cropping up and becoming a part of homeowners' daily lives. Not surprisingly, the proliferation of pot has begun to have repercussions for community association managers, both as property managers and employers. Whether you live in a state where marijuana is fully legal, partially legal, or on the cusp of some degree of legalization, you need to know what that means on the ground.

This Special Report takes an in-depth look at some of the most pressing marijuana-related issues for community association managers and their clients and provides expert guidance on how to mitigate the associated risks. [\*\*Download now »\*\*](#)

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