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Landlord-tenant bar busy tackling 'legal pot' issue

Bolstered no-smoking policies are only seen as partial solution

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Recreational marijuana may have won the approval of Massachusetts voters in November, but it has created headaches for residential landlords, property managers and their attorneys.

"We get lots of complaints in both smoke-free and 'smoking' buildings from tenants who are upset that other tenants are smoking marijuana," said Boston attorney Kenneth A. Krems. "We get more complaints about the smell of marijuana than we do about the smell of cigarette smoke."

Krems represents more than 20 companies that collectively manage approximately 15,000 apartments in eastern Massachusetts. He also co-chairs the Residential Landlord/Tenant Section of the Real Estate Bar Association, so he's well aware of what a hot-button issue recreational marijuana has become for colleagues like Jordana Roubicek Greenman.

Greenman, who typically represents landlords as part of her Boston real estate practice, said she currently has two clients who want to rid themselves of an upstairs tenant who frequently smokes marijuana. The situation is complicated by the fact that the homeowners have two young children and also care for an elderly parent.

"When they bring their kids home or when the mother has friends over for bingo, they're embarrassed. But short of busting down the door, it's really hard to prove," Greenman said.

Reexamining lease terms

Voters by a 54-46 percent margin passed Question 4, the Regulation and Taxation of Marijuana Act in November. Following the vote, the Legislature pushed back the sale of recreational marijuana by six months, delaying the licensing of retail cannabis stores until July 2018.

However, the personal use, possession and cultivation of marijuana became legal Dec. 15. Under the law, anyone 21 and older can possess up to one ounce of marijuana outside the home, and those of legal age can possess up to 10 ounces of marijuana in the home. The use of marijuana in public remains illegal, as does the possession or use of marijuana in public housing and other venues such as schools.

For landlords, the key provision is G.L.c. 94G, §2(d)(1), which provides that the recreational marijuana law shall not be construed to "prevent a person from prohibiting or otherwise regulating the consumption, display, production, processing, manufacture or sale of marijuana and marijuana accessories on or in property the person owns, occupies or manages."

The statute provides one exception for edible marijuana, prohibiting a lease agreement from banning the consumption of marijuana "by means other than smoking on or in property," unless the failure to do so would cause the landlord to violate federal law.

Quincy attorney Adam D. Fine served on the committee that drafted the language of Question 4. Fine doesn't believe the recreational marijuana law fundamentally changed the relationship between landlords and tenants because that relationship remains primarily governed by contract.

"If anything, it makes clear that landlords have the power to do certain things. If they want to be cautious, they can codify prohibitions in their leases," said Fine, managing partner of Vicente Sederberg, a national law firm that advocates for the legalization of marijuana and represents commercial clients in the marijuana industry.

The state's recreational marijuana law does bring the terms of any given residential lease front and center.

According to Krems, while the majority of apartment buildings in Massachusetts still allow smoking, most new buildings are smoke-free and many existing buildings are being converted to smoke-free.

And while a smoke-free lease addendum arguably would apply to ban the smoking of marijuana, Krems said landlords should be revising their leases to explicitly prohibit such conduct.

"Marijuana users are very creative, and the use of this vapor technology is arguably not smoking."

— Jordana Roubicek Greenman, Boston

"The possession and use of marijuana is still a federal crime, and, for that matter, even things that are legal can be prohibited by a landlord," he said. "Unless they don't mind, I would certainly recommend that landlords revise their leases to prohibit the use and smoking of marijuana, even if it's in a building where it's OK to smoke cigarettes."

Fine agreed that no-smoking clauses in leases are probably sufficient to cover the smoking of marijuana.

"If you have a general non-smoking provision, it doesn't matter the substance," Fine said. "But landlords would be wise to specifically refer to cannabis."

While general nuisance clauses in leases may be used against tenants, specific contract language addressing marijuana would be more effective, he added.

Greenman said she thinks smoking marijuana falls within the definition of "smoking" in a typical no-smoking lease clause. But she agrees that landlords are wise to amend their leases to remove any doubt. In fact, Greenman has first-hand experience with a landlord who wanted to "get ahead of the game."

Greenman returned home from a trip in early January to find a note from the landlord taped to each tenant's door. The "Happy New Year!" notice included a reminder that the building was a non-smoking property and explained that the landlord considered "smoking" to include the inhaling and exhaling of marijuana.

Greenman said lease addendums also should address users who take marijuana in a vaporized form.

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"Marijuana users are very creative, and the use of this whole vapor technology is arguably not smoking," she said.

But Fine isn't so sure the statute as written would permit a landlord to ban a tenant from using vapor technology.

"If it's not affecting the property or the neighbors, what's the landlord's interest in barring activity that is legal under state law?" Fine asked.

Banning cultivation?

The new marijuana law also allows people to cultivate up to six marijuana plants for personal use, and up to 12 plants per household. Plants must be out of public view under the law.

Greenman said cultivation could present a nuisance to other tenants because of the distinctive odor of marijuana plants.

"If you have six plants budding at one time, that smell is going to leak out into the hall and common areas," she said.

Although an advocate of marijuana rights, Fine said he understands that some tenants might have a problem with marijuana-smoking or marijuana-growing neighbors.

"Marijuana has a strong odor to it, and some people don't like it," he acknowledged. "I've met a lot of people who really don't like it at all."

Perhaps even more important than tinkering with no-smoking clauses, Fine suggested that landlords specifically address in their leases the growing of marijuana.

"The act does allow for growing of marijuana, and that might be a novelty people might want to try," he said.

Krems said landlords who foot the bill for certain utilities should be concerned about excess electricity and water usage by tenants who cultivate plants in their apartment. He said he expects landlords to include lease terms that prohibit or restrict the cultivation of marijuana.

Fine agreed.

"The one thing that is [consistent] with marijuana growing is that you use a fair amount of water and even more electricity," he said. "It's not a new problem for landlords, but now that there is a state authorization for it, [cultivation] would probably be the most important issue I would focus on."

No easy task

The revision of leases is the easy part. According to Krems, the real problem is enforcing no-smoking policies against marijuana users.

"Tenants can complain, and there can be the smell of marijuana in a hallway or even in a tenant's apartment, but you don't know whether it's coming from next door, from across the hall, or from downstairs," he said.

Krems said he instructs clients to have building managers, maintenance workers and security guards try to pinpoint the source of the marijuana by patrolling hallways or noting evidence of drug activity whenever they're invited into a unit.

However, getting enough evidence to take action against a particular tenant can be a frustrating experience, and more difficult than most people think, he said.

When there's doubt, Krems recommended sending out notices informing tenants that there have been complaints and reminding them that smoking marijuana constitutes a violation of the lease, warranting eviction.

Landlords should understand they can't change a tenant's lease midway without an agreement to do so, Greenman said. For that reason, she suggested that landlords who want to insert a marijuana clause before a lease is up to offer their tenants some type of consideration, such as offering to pay their gas bill, so that they can't later claim they were forced to accept an unwanted lease term.

And, she said, landlords should follow Massachusetts' "30-day rule," which generally requires the expiration of a full rental period before an added lease term can take effect.

Federal complication

What about the landlord who doesn't mind marijuana-smoking tenants?

Krems advised against landlords marketing their properties as "marijuana friendly." Not only could it make it harder to rent a unit when so many tenants still object to marijuana use, but there's also the risk of drawing attention from federal prosecutors.

"You don't know what kind of action the U.S. attorney might take under the direction of the Trump administration to try to shut that down," he said.

Of course, landlords with federally subsidized housing may not have a choice over prohibiting marijuana use on their property, given that marijuana remains illegal under federal law.

"If [a tenant] is found to be using marijuana in a federally subsidized unit, they should be losing their certification [for the subsidy]," Greenman said. "Similarly, landlords that explicitly allow that to go on could lose the contract with the Section 8 entity."

For those landlords who have a mix of government subsidized and non-subsidized housing, Greenman said there are other complications to consider. She suggested a scenario involving a three-unit property where the landlord has one Section 8 tenant and two "market" tenants.

If the property allowed smoking, the two market tenants would be allowed to smoke marijuana, while the Section 8 tenant would be prohibited because it would violate federal law.

"Now you're potentially running up against a Section 8 tenant who's claiming discrimination for not being treated the way other tenants are being treated," she said. "So it's a dicey thing." MLW