

Hopkins • Tschetter • Sulzer  
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# Landlord News

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## Has Your Medical Marijuana Policy Gone To Pot?

Medical Marijuana (“MM”) dispensaries are popping up on every corner. The MM dispensaries are growing like weeds because the number of people having MM cards or pot cards is rapidly increasing (up over 400% from last year). With the number of people holding cards, you will encounter a resident or prospective resident with a valid registry card issued by the Colorado Department of Health & Environment (“pot card”). Because we have been flooded with situations regarding MM scenarios, this month’s newsletter discusses the pros and cons of potential MM policies.

Many clients have requested lease or addendum



language from us to address MM situations. We can provide you with appropriate language, so that you can enforce your policy. However, for us to address your specific situation, you

must first decide on your medical marijuana policy. You have three policy options to choose from: prohibit all marijuana use, including the use of medical marijuana, or allow medical marijuana, if the resident’s use is necessary as a reasonable accommodation under fair housing laws or allow medical marijuana use if the resident has a valid pot card.

Developing a MM policy is difficult because of the conflict between state and federal law. Under federal law, marijuana is illegal because it remains a class one controlled substance. However, under Colorado law, marijuana is legal if you have a medical marijuana card. The conflict between federal and state law creates strong legal arguments to support different medical marijuana policies. However, because the conflict remains unresolved, the enforceability and potential legal liability of the different policies has not been determined.

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## Congress Considers Boosting Funding For Fair Housing Testing

Recently, a congressional subcommittee heard testimony on proposed legislation that would provide \$20 million in funding to expand HUD’s fair housing testing program nationwide.

The Housing Fairness Act of 2009 (H.R. 476) would provide HUD



with greater resources to enforce existing fair housing laws and to study housing discrimination as well as segregation in local communities, according to a statement by the bill’s sponsor, Rep. Al Green. It also would require HUD to issue regulations to federal grantees that ensure government monies do not fund segregation and perpetuate discrimination. According to the National Fair Housing Alliance, there are more than 4 million violations of fair housing laws that go unreported every year.



The \$20 million nationwide testing program envisioned by H.R. 476 would lead not

only to greater enforcement efforts...but would also deter discrimination. **H.R. 476 would authorize more than double the amount currently spent on testing, giving landlords and real estate agents a much greater likelihood of being tested.** Proponents of this legislation believe that an increased risk of being caught leads to greater compliance with Fair Housing Law.

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For example, a total prohibition policy is legally defensible because marijuana, including MM, remains illegal under federal law. If an activity is illegal, you should be allowed to prohibit it entirely with no exceptions, and should not be required to condone a resident's illegal behavior. The illegality of MM under federal law is also the primary argument why you shouldn't have to allow MM use as a reasonable accommodation under fair housing laws. In order for a resident to be granted a



reasonable accommodation under fair housing laws, the resident must be disabled within the meaning of fair housing laws, must need the accommodation, and the accommodation must be

reasonable. A resident's request for you to be complicit in the resident breaking federal law is not reasonable.

The downside of a total prohibition policy is uncertainty of outcome, potential legal costs, and accompanying liability risks. If a disabled resident asks you to waive your pot prohibition policy and you refuse, the resident may file a discrimination charge with the Colorado Civil Rights Division ("CCRD") or a lawsuit. While it is difficult to fathom the CCRD issuing a probable cause determination in a MM case (the CCRD finds that probable cause exists to support the conclusion that you committed housing discrimination by not waiving your pot prohibition policy), such a determination is not outside the realm of possibility. If you have a no-exception pot prohibition policy, and deny exceptions even for disabled residents who make reasonable accommodation requests, you will only know the outcome of legal challenges when the CCRD or a court issues a ruling. Even if you win

these legal battles, you still will have incurred significant legal costs. You will also experience significant productivity losses for the time and effort your company has to spend in fighting, or defending the case.



Recent rulings and other information have only made the outcome of MM cases even more uncertain. The City of Centennial recently filed suit to shut down a marijuana dispensary. In this case, an Arapahoe County District Court Judge ruled (at least for the time being) that federal law doesn't automatically overrule or supersede state law and therefore the dispensary could not be closed down. In one of our recent Denver County Court evictions, while not determinative of the outcome of the case, a Denver County Court Judge indicated that

the court was not persuaded by the federal supremacy argument. Additionally, after the Obama administration indicated its intent not to zealously enforce federal marijuana laws, the Denver Regional office for HUD has signaled that they will not argue federal or at least they won't press federal preemption.

The reasons for adopting a total prohibition policy are numerous. We have seen an explosion in the number of resident complaints about secondhand cigarette smoke. Some communities have gone to a no-smoking policy as a result. The likelihood of other residents complaining about pot smoke is at least as great, if not greater. The possibility exists that MM cardholders will start dealing. The potential problems associated with a resident trafficking in drugs are so obvious to not warrant extensive discussion.

Allowing MM use if the resident qualifies for a reasonable accommodation under fair housing laws is the middle ground between a total prohibition and a total allowance policy. Specifically, you prohibit marijuana use including



the use of medical marijuana, unless the resident qualifies for a reasonable accommodation under fair housing laws. The rationale for such a policy is fairly straightforward. Pot is illegal, but disabled residents are entitled to exceptions to rules, policies, practices, and services if an exception is necessary for the disabled resident to use and enjoy the community on the same basis as a non-disabled individual. Given the conflicts between federal and Colorado law, and the possibility of a discrimination charge, this policy attempts to lower liability, but not open the floodgates.

This policy also attempts to address potential abuses in the current MM system. The media reports that it is not difficult to procure a MM card. Under fair housing laws, a resident must have a physical or mental impairment that substantially limits a major life activity to be disabled and therefore qualify for a reasonable accommodation. Just because a resident has a pot card, doesn't mean the resident is disabled under fair housing laws and entitled to a reasonable accommodation. Only disabled residents are entitled to reasonable accommodations. You do not have to accommodate non-disabled residents.

If a resident's disability is not obvious and they request an exception to your no-drug policy because they have a pot card, you may request appropriate documentation that the resident is disabled as defined by fair housing laws. Remember, you can't ask for the resident's medical file, or detailed information regarding the

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resident's medical condition. However, through the use of an appropriate reasonable accommodation request form or letter, you can ask for the resident's health care provider to opine that the resident meets the definition and needs the accommodation. Remember, you can never ask for a doctor's note or other medical documentation from the resident if the resident's disability is obvious. For example, if a resident is wheelchair bound, has a pot card, and wants you to waive your no-pot policy, you can't ask the resident to provide documentation regarding disability in evaluating the resident's request.

However, depending on the circumstances, you may require the resident to provide appropriate documentation regarding the resident's need for an accommodation. Just because someone is in a wheelchair, doesn't mean they automatically need to smoke pot. The legal definition of "necessary" under fair housing laws is not precise. Generally an accommodation is necessary if the accommodation lessens the impact of the resident's disability. In other words, if you give the resident what they are asking for (the accommodation), the accommodation ameliorates the disability. Remember, if a resident with a MM card doesn't meet the disability and needs tests under fair housing laws, you do not have to accommodate them by making an exception to your no-drug policy. Specifically, some residents may be caretakers with a license to grow pot. Generally, these individuals are not disabled, and therefore would not be entitled to an accommodation.



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Once adopted, a policy that allows MM

use if a resident meets the disability and needs tests may be difficult to change. The three elements a resident must meet to be granted a reasonable accommodation are disability, need, and reasonableness. If you allow it now but later change course, a resident may argue that your previous policy that allowed MM use if disability and need were met, conceded that MM marijuana use was "reasonable". A substantial increase in neighbor complaints, traffic to the resident's apartment, or crime, however, would support the argument that your early position was in error, and in fact MM use doesn't meet the "reasonableness" requirement.

Some of our clients allow MM use without any restrictions, as long as the resident has a valid MM card. These clients reason that since the law is uncertain, they are going to take the least risky position. By allowing MM use, you won't get sued, or incur legal costs to defend

lawsuits or discrimination charges. Unlike a prohibition policy, you don't have to worry whether a court will rule in your favor based on marijuana being illegal under federal law. Unlike a MM policy that restricts use to those residents who are entitled to reasonable accommodations under fair housing laws, you don't have to worry whether you properly denied a resident's request for a reasonable accommodation. To control abuse and ensure compliance with Colorado laws regarding the use of medical marijuana, we have created a Medical Marijuana Addendum for our clients to address these issues.

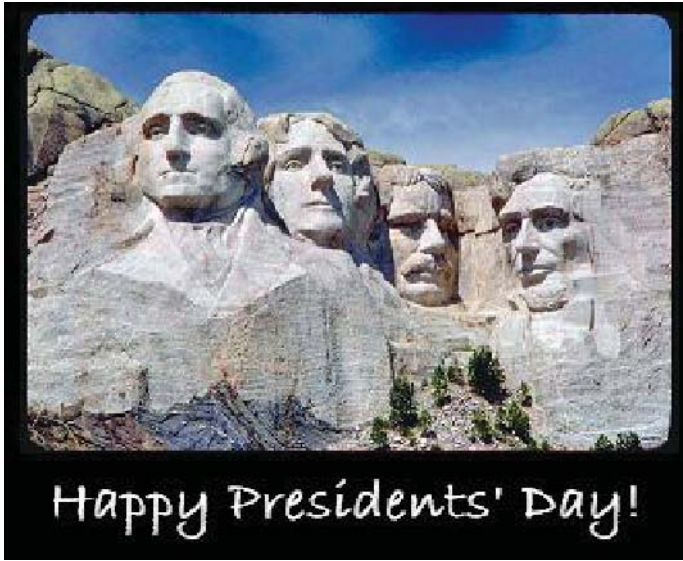
Please be aware, that the risks of a total allowance policy may be greater than some have concluded, or at least these risks won't be

fully known for some time. Prior to MM, almost all of our clients had strong drug free policies. Not always, but in most cases, a strong rationale exists for a given policy when we see a uniformity of a policy among our clients. The solid reasons for a drug free policy are too numerous to be discussed at length. However, some reasons are obvious. Residents involved in drug use may be significantly less reliable than other residents; Residents using drugs may be involved in drug dealing; Drug use and trafficking attracts crime or results in crime.

Because the law is unclear and contradictory, you cannot adopt a risk free MM policy. You will have to consider the relevant factors, and weigh the associated risks. A total prohibition policy might result in litigation, and a court ruling that federal law does not supersede Colorado's medical marijuana laws. Allowing medical marijuana use as a reasonable accommodation has the same risks for non-disabled residents. Additionally, as when evaluating any reasonable accommodation request, you are exposed to the risk that the accommodation for a disabled resident will be wrongfully denied. Because you may not want to be the test case on any of these issues, you may opt for a total allowance policy.

If you open the gates to marijuana use and avoid being sued for denying MM use or reasonable accommodation requests, you may be taking a chance that even worse consequences may result, e.g. greater crime and associated costs, and even lawsuits resulting from the crime. What if you allow MM use, and the resident using MM starts dealing. The drug dealing results in serious crime, and another resident gets killed by stray gunfire. At the end of the day, only the owner and you can decide what risks and related costs you are willing to accept.





Happy Presidents' Day!

**Announcement:**

Arapahoe County court will no longer be hearing Eviction cases at the Aurora 15400 E. 14th Pl. Aurora, CO 80011 location. All cases will now be heard at the Littleton courthouse, located at 1790 W. Littleton Blvd., Littleton, CO 80120.

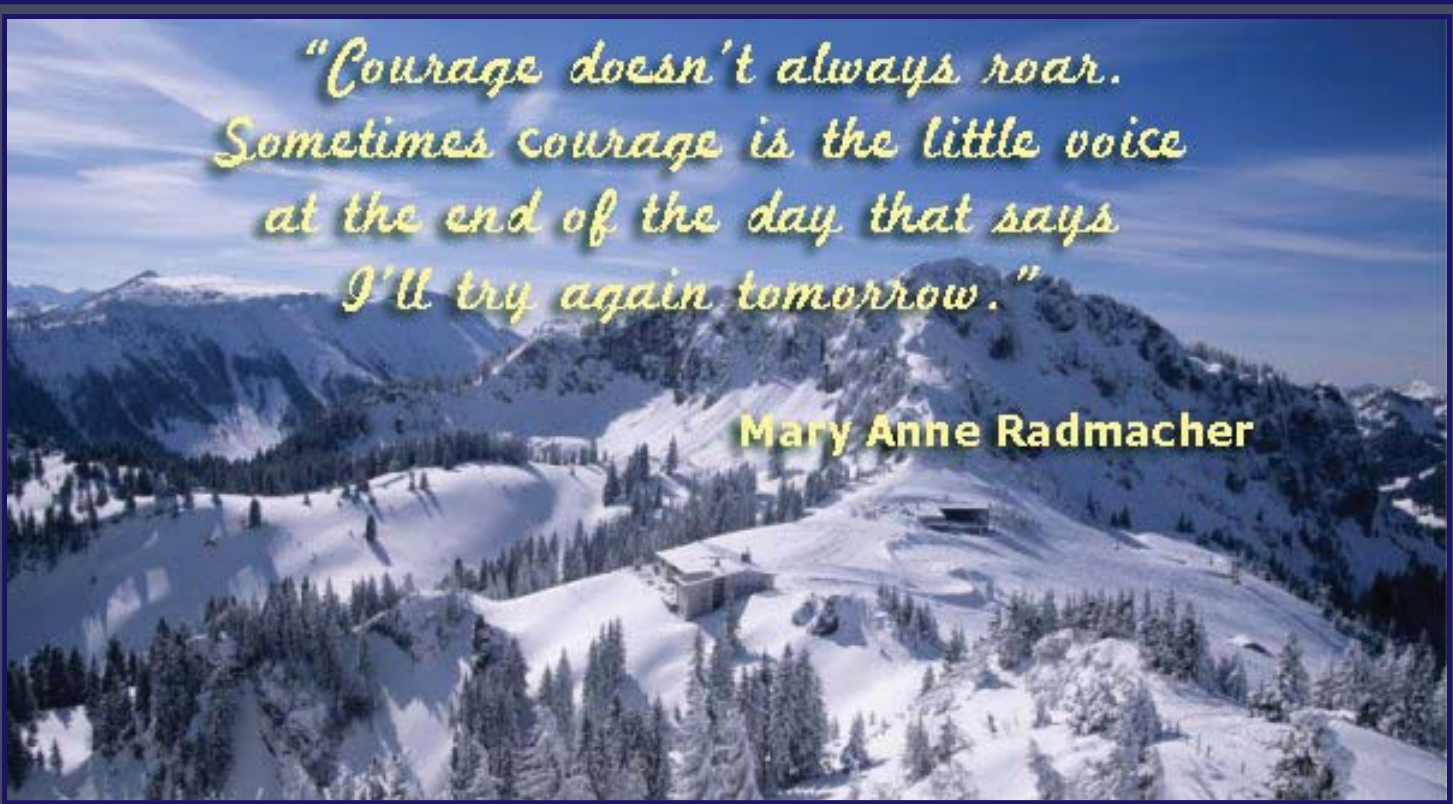
**IMPORTANT HTS FEBRUARY DATES**

- February 10th                      Basic Evictions  
HTS Conference Center  
3600 South Yosemite Street  
Lower Level  
8:30 a.m. - Noon
  
- February 12th                      AASC Trade Show  
Crowne Plaza Hotel  
2886 South Circle Drive  
Colorado Springs, Colorado  
8:00 a.m. - 4:00 p.m.
  
- February 15th                      **All Courts Closed**  
**Presidents' Day Holiday**
  
- February 19th                      South Client Lunch  
Dave & Busters  
S. Colo Blvd. Denver, Colorado  
11:30 a.m. - 1:00 p.m.
  
- February 24th                      Collections Workshop  
HTS Conference Center  
3600 South Yosemite Street  
Lower Level  
8:30 a.m. - Noon



*"Courage doesn't always roar.  
Sometimes courage is the little voice  
at the end of the day that says  
I'll try again tomorrow."*

**Mary Anne Radmacher**



# Why, Why, Why?

Why do we press harder on a remote control when we know the batteries are almost dead?

Why do banks charge a fee on 'insufficient funds' when they already know there is not enough money?

Why does someone believe you when you say there are four billion stars; but have to check when you say the paint is still wet?

Why does Superman stop bullets with his chest, but ducks when you throw a revolver at him?

Why do Kamikaze pilots wear helmets?

If people evolved from apes, why are there still apes?

Why is it that no matter what color bubble bath you use the bubbles are always white?

Why do people constantly return to the refrigerator with hopes that something new to eat will have materialized?

Why do people keep running over a string a dozen times with their vacuum cleaner, then reach down, pick it up, examine it, then put it down to give the vacuum one more chance?

Why is it that no plastic bag will open from the end on your first try?

How do those dead bugs get into those enclosed light fixtures?

When we are in the supermarket and someone rams our ankle with a shopping cart then apologizes for doing so, why do we say, 'It's all right?' Well, it isn't all right, so why don't we say, 'That really hurt, why don't you watch where you're going?'

Why is it that whenever you attempt to catch something that's falling off the table you always manage to knock something else over?

In winter why do we try to keep the house as warm as it was in the summer when we complained about the heat?

How come you never hear father-in-law jokes?

HTS "HATS ARE OFF" TO A NEW WORLD OF OPPORTUNITIES WITH THE AASC ON FRIDAY FEB 12TH

2010 Education Conference & Expo  
Crowne Plaza Hotel  
2886 S. Circle Drive  
Colorado Springs, CO  
8:30 a.m. - 4:00 p.m.

DON'T MISS OUT ON ALL THE FUN



STOP BY THE HTS BOOTH AND SAY HELLO!



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## FED Filing Deadlines - February 2010

All notices received by 10:30am on the date specified will be filed for the corresponding court date.

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
1 <b>Court Date: 2/8/10</b> Adams Denver Douglas El Paso	2 <b>Court Date: 2/9/10</b> Arapahoe Broomfield Jefferson Weld	3 <b>Court Date: 2/10/10</b> Adams Denver Douglas	4 <b>Court Date: 2/11/10</b> Broomfield El Paso Jefferson	5 <b>Court Date: 2/12/10</b> Adams Arapahoe Boulder Denver Fort Collins Loveland
8 <b>Court Date: 2/16/10</b> Arapahoe Broomfield Jefferson Weld	9 <b>Court Date: 2/17/10</b> Adams Denver Douglas	10 <b>Court Date: 2/18/10</b> Broomfield El Paso Jefferson	11 <b>Court Date: 2/19/10</b> Adams Arapahoe Boulder Denver Fort Collins Loveland	12 <b>Court Date: 2/22/10</b> Adams Denver El Paso
15 <b>Presidents' Day - Courts Closed</b>	16 <b>Court Date: 2/23/10</b> Arapahoe Broomfield Jefferson Weld	17 <b>Court Date: 2/24/10</b> Adams Denver	18 <b>Court Date: 2/25/10</b> Broomfield El Paso Jefferson	19 <b>Court Date: 2/26/10</b> Adams Arapahoe Boulder Denver Fort Collins Loveland
22 <b>Court Date: 3/1/10</b> Adams Denver Douglas El Paso	23 <b>Court Date: 3/2/10</b> Arapahoe Broomfield Jefferson Weld	24 <b>Court Date: 3/3/10</b> Adams Denver Douglas	25 <b>Court Date: 3/4/10</b> Broomfield El Paso Jefferson	26 <b>Court Date: 3/5/10</b> Adams Arapahoe Boulder Denver Fort Collins Loveland

## 2010 Events Calendar

### Luncheon Dates

MONTH	DATE	CLASS
JANUARY	14TH	COLORADO SPRINGS Ritz Grill
JANUARY	15TH	NORTH Dave and Buster's - Westminster
FEBRUARY	19TH	SOUTH Dave and Buster's - Denver
MARCH	18TH	COLORADO SPRINGS Ritz Grill
MARCH	19TH	NORTH Dave and Buster's - Westminster
APRIL	16TH	SOUTH Dave and Buster's - Denver
MAY	21ST	NORTH Dave and Buster's - Westminster
JUNE	17TH	COLORADO SPRINGS Ritz Grill
JUNE	18TH	SOUTH Dave and Buster's - Denver
JULY	16TH	NORTH Dave and Buster's - Westminster
AUGUST	20TH	SOUTH Dave and Buster's - Denver
SEPTEMBER	17TH	NORTH Dave and Buster's - Westminster
OCTOBER	21TH	COLORADO SPRINGS Ritz Grill
OCTOBER	22ND	SOUTH Dave and Buster's - Denver

### Workshop Dates

MONTH	DATE	CLASS
JANUARY	20TH	BASIC FAIR HOUSING
FEBRUARY	10TH	BASIC EVICTIONS
February	24TH	COLLECTIONS WORKSHOP
MARCH	10TH	ADVANCED FAIR HOUSING
APRIL	14TH	NON-MONETARY EVICTIONS
MAY	12TH	BASIC FAIR HOUSING
MAY	27TH	COLLECTIONS WORKSHOP
JUNE	9TH	BASIC EVICTIONS
JULY	14TH	ADVANCED FAIR HOUSING
AUGUST	11TH	NON-MONETARY EVICTIONS
SEPTEMBER	15TH	BASIC FAIR HOUSING
OCTOBER	13TH	BASIC EVICTIONS
NOVEMBER	10TH	ADVANCED FAIR HOUSING