SUMMARY
On November 8, 2016, California voters approved Proposition 64 which allows individuals over 21 years of age to possess, grow for personal use, and use marijuana for recreational purposes in the state. The question arises, can landlords prohibit the use of medical or recreational marijuana on rental properties? Under the proposition, landlords can prohibit the recreational use of marijuana on rental properties.

Proposition 215 which was approved by voters in 1996 legalizes medical use of marijuana by patients with a medical prescription given by a primary caregiver in California. However, restricting the use of medical marijuana on a rental property is more complicated because of conflicts within federal and state laws. A landlord that refuses to meet a tenant’s reasonable accommodation to use marijuana for medical purposes could face legal action for violating the state’s Fair Employment and Housing Act (FEHA). But, federal law still classifies all marijuana as an illegal controlled substance, the smoke from marijuana is still considered a carcinogen under the state’s Prop. 65 law. Both propositions do not permit medical or recreational marijuana users to disturb other tenants’ or neighbors’ right to quiet enjoyment.

Landlords may establish rules regarding marijuana use on their rental property, it is important that the landlord establish those rules early on and clearly communicate those rules with existing and prospective tenants, and disclose their marijuana policies in their rental agreements. However, landlords must be aware that if they deny or evict a tenant due to their medical marijuana use, the denial or eviction should be based on reasons that will not trigger a fair housing violation under FEHA.

Cannabis products come in various forms and can be consumed by the user without smoking or vaporizing. It is again the landlord’s discretion, but they may allow non-smoke forms of cannabis to be used by tenant for medical use (reasonable accommodation) or for recreation. It is always recommended that the owner or manager consult with an attorney for the appropriate course of action.

Proposition 64 – CA Marijuana Legalization Initiative
Proposition 64, also known as the California Marijuana Legalization Initiative, will allow adults 21 years of age and over to legally possess up to 1-ounce of marijuana or 8 grams of cannabis concentrates, cultivate up to 6 plants indoors or outdoors of their home as long as they comply with local ordinances, and use marijuana or cannabis concentrates recreationally with certain restrictions. Proposition 64 still prohibits possession or use of marijuana on or within 1,000 feet of a day care or youth centers, or
schools - licensed day care centers operating on rental properties are covered under this provision. Landlords may prohibit the use of marijuana entirely if there is a licensed day care facility on the rental property. Use of marijuana in public places is also prohibited, but it can be used on private property with permission. Importantly, Proposition 64 allows landlords to establish their policies permitting or prohibiting the possession, cultivation, and use of recreational marijuana on their rental properties. Similar to recreational marijuana laws already enacted in states like Colorado and Washington, California’s Proposition 64 also contains a provision that prohibits smoking or use of marijuana where smoking tobacco already is prohibited.

Proposition 215 – Use of Medical Marijuana on a rental property
California’s Proposition 215, known as the Compassionate Use Act, was approved by voters in 1996. Prop. 215 legalizes the medical use of marijuana by patients with a prescription given by a primary caregiver. It also allows the patient to cultivate a limited amount of plants for personal use. Cannabis products do come in various forms and can be consumed by the user without smoking or vaporizing; it is up landlord if they want to allow those products on their rental property as a tenant’s reasonable accommodation. With respect to passage of Proposition 64, Proposition 64 does not affect Proposition 215.

Due to the present conflicts with state and federal law, landlords should treat a tenant’s use of medical marijuana cautiously. Based on approval of Proposition 215, the state’s Fair Employment and Housing Act (FEHA) allows a disabled individual’s use of medical marijuana as a reasonable accommodation. A landlord must be careful how they deny a tenant’s reasonable accommodation to use marijuana for medical purposes or face the risk of being sued for violating the tenant’s right to a reasonable accommodation under the FEHA.

A landlord can still deny the tenant’s request and better contest a legal challenge if they can substantiate that the tenant’s use of medical marijuana could:
- Burden the landlord and subject them to personal and financial risks.
- Subject the landlord to possible criminal prosecution, and conflict with the property’s crime-free policies. Federal law still classifies marijuana as an illegal Class I Controlled Substance. The landlord should be observant of the tenant’s activities and use on the rental property. While the tenant is exempt from “criminal liability” under Proposition 215 in California, any use or cultivation of marijuana is still considered a criminal act under federal law regardless. The landlord can argue that any use of marijuana could be abetting illegal activity on the rental property and could subject the landlord to possible criminal prosecution and forfeiture of their property.
- Create a nuisance to other tenants and neighbors by infringing on their right to quiet enjoyment. Under state law, marijuana smoke is still considered a
carcinogen and toxic to humans under California’s Proposition 65, *Safe Drinking Water and Toxic Enforcement Act of 1986*. Current state law already allows a landlord to limit or prohibit smoking on their rental property. Like tobacco smoke, marijuana smoke can travel or linger into other rental units and common areas disturbing other tenants’ right to quiet enjoyment. And, cultivating marijuana on the rental property could increase the chance of mold or mildew forming on the property.

- Violate state law under Proposition 64 which prohibits marijuana use within 1,000 feet of a day care or youth centers, or school, or because there is a licensed daycare facility operating on the rental property. Landlords should contact their local government to learn about any ordinances that restrict smoking in their jurisdiction.
- For Public Housing Developments, the U.S. Department of Housing and Urban Development issued Final Rule 5597-F-03 on November 30, 2016. The rule prohibits smoking on the property nationwide – the ban applies to all areas and units on the property, and 25 feet from leasing/administrative offices.

With the landlord’s discretion, the landlord can permit or allow tenants use of cannabis concentrate such as edibles that do not create smoke or vapor for recreation, or for medical use as a tenant’s reasonable accommodation.

**Permission/Prohibition of recreational marijuana on rental properties**

**Landlords have the choice to permit, limit, or prohibit entirely the possession, cultivation, and recreational or medical use of marijuana on their property.** But, the landlord as soon as possible should create a clear policy on medical and recreational use of, and the cultivation of marijuana for their rental property, and communicate their policy with new and existing tenants through noticing and disclosure in rental agreements if they haven’t created such a policy. For banning use of medical marijuana, the landlord should be careful to have such policies in place because they still could potentially face a fair housing violation or risk civil litigation for violating the tenant’s right to a reasonable accommodation under the FEHA.

Landlords may establish no marijuana smoking policies similar to no tobacco smoking rules on their rental properties. SDCAA member managers and owners should include some or all of the forms and addendums in their rental agreements to further justify prohibiting the recreational use of marijuana on their properties:

- SDCAA *InfoLink Rental Form 251 – Non-Smoking Addendum* - the landlord declares that smoking on the rental property is restricted or prohibited entirely; this addendum covers all types of vaporizing (“Vaping”) devices.
• SDCAA InfoLink Rental Form 254 – Anti-Crime Housing Addendum – landlord can declare their rental property as crime-free property by adding this addendum to their rental agreement that informs tenants they cannot engage in any illegal activity such as possessing, using, and/or cultivating/manufacturing of drugs or engaging in any other illegal activity on the rental property. Violating the property's crime free policy could be grounds for the tenant's eviction.

• SDCAA InfoLink Rental Form 257 – Apartment Rules & Regulations – this document declares that tenants are not allowed to commit noise or acts that disturb tenants or infringe on their right to quiet enjoyment. Propositions 64 and 215 do not grant a tenant the right to disturb or become a nuisance to other tenants or neighbors, and tenants caught violating the property's no-smoking or anti-drug policies or disturbing other tenants can be cause for eviction.

• SDCAA InfoLink Rental Form 269 – Mold and Mildew Addendum – In states like Colorado where growing cannabis is permitted for personal use, rental owners and managers are being advised to add this form in their rental agreements. Tenants that cultivate marijuana inside their unit are more likely encounter mold and mildew issues. Growing marijuana requires a lot of water and energy, and tenants could be using growing apparatus and techniques that could increase the heat and humidity within the rental unit and therefore could increase the chance of mold and mildew growth. This form informs tenants they must try to prevent mold and mildew growth in their unit and they could be held responsible for injuries or property damage if their activity causes mold or mildew growth.

SDCAA members can obtain these forms on the SDCAA website at www.SDCAA.com by logging onto the Members Only Login and selecting InfoLink Rental Forms hyperlink under Quick Links. It is always recommended that owners or managers consult with an attorney for the appropriate course of action.