

# Up in Smoke

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The history of marijuana use in the United States is long and colorful, however, the law surrounding marijuana use and marijuana businesses exists in shades of gray.

Marijuana is a schedule 1 Controlled Substance under the 1970 Controlled Substances Act and its production, distribution, possession and use is illegal under federal law. More than half of the states in the United States have adopted laws that “decriminalize” marijuana possession and use under state law while it remains illegal under federal law. While each state has taken a unique approach, the three most common are:

**Decriminalization:** A person found in possession of small amount marijuana for personal consumption is not arrested and is subject to no prison time. In many states with “decriminalization” laws, possession of marijuana is treated like a minor traffic violation.

**Medical (medicinal use) Marijuana:** Approximately 28 states and the District of Columbia allow for medical use of marijuana. The law varies from state to state but allows for possession and use if certain requirements are met and a physician makes a recommendation for use.

**Recreational Use:** Approximately 8 states have allowed for adult recreational use of marijuana.

Each state that has decriminalized or legalized marijuana has taken a different approach to how much marijuana it is legal to possess and how it is cultivated and sold. Real estate professionals need to be aware of the laws surrounding cultivations and sale and how it impacts real estate.

Regardless of state law, marijuana production, distribution, possession and use remains illegal under Federal law. Under the Obama Administration, the Federal Department of Justice issued the Cole Memorandum which outlined eight Controlled Substances Act enforcement priorities in those states that have decriminalized or legalized marijuana possession.

1. Prevent distribution to minors.
2. Prevent cannabis revenues from going to support criminal enterprises.
3. Prevent diversion to states where it is not legal.
4. Prevent cannabis activity from being used as a cover for trafficking of other illegal drugs or illegal activity.
5. Prevent violence and the use of firearms in the production and distribution.
6. Prevent drugged driving.
7. Prevent growth of cannabis on public land.
8. Prevent cannabis use/growth on federal property.

Many real estate practitioners and marijuana industry participants developed business arrangements which fell in line with the priorities of the Cole Memorandum. However, the Trump Administration in a Memorandum from Attorney General Sessions released on January 4,

2018 repealed the Cole Memorandum. In the Sessions Memorandum, United States Attorneys are called upon when deciding “which cases to prosecute to weigh all relevant considerations.”

In 2014, the Rohrabacher-Farr Amendment was passed as an addition to a funding bill. This amendment prohibits the use of certain federal funds to prosecute medical marijuana businesses, caregivers and patients that are in compliance with state regulations for the production, distribution, possession and use of marijuana. It is important to note however that this amendment does not prohibit prosecutions in all situations.

From the perspective of a real estate practitioner the decriminalization and state regulation of marijuana complicates some transactions. If you are negotiating a lease of property being used for the sale or cultivation of marijuana, there are many things you need to keep in mind:

- Zoning
- Planned Unit Development Rules
- Acknowledgment of illegal activity contract clauses,
- Permitted use contract clauses,
- Early termination rights,
- Clauses prohibiting smoking or illegal drug usage,
- Tenant improvement clauses