Housing and Development Law Institute
Legal Resource For Public Agencies

HDLI MESSENGER

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WHAT'S HAPPENING AT HDLI?

HDLI's next SPRING CONFERENCE entitled "Current Disability, Accessibility and Reasonable Accommodations Issues Affecting PHA Applicants, Residents, and Employees" takes place May 5 and 6, 2005 in Washington. Register now!

Come to the Spring Conference a day early on May 4, 2005 and participate in another HDLI EMPLOYMENT LAW TRAINING conducted by the law firm of Epstein, Becker & Green. You may register separately on the Spring Conference registration form.

ON-SITE CUSTOMIZED FAIR HOUSING TRAINING! No traveling necessary! Contact HDLI at (202) 289-3400 for more details on fair housing training on-site at your agency. See attached flyer.

The newest edition of the INDEX TO HUD REGULATIONS through 12/31/04 is available for purchase! Order now!

The following Q&A comes from a recent member inquiry:

Q: Our state law allows people to use marijuana for medicinal purposes, but our public housing lease bars, without qualification, the manufacture and use of all controlled dangerous substances. Can we evict someone who admits to possessing marijuana but claims it is for medicinal purposes?

A: No. This query demonstrates the conflict between the federal Controlled Substances Act, 21 USC §801 et seq. (CSA) and some state laws that permit the manufacture and/or use of marijuana used for medicinal purposes.

California is the leading state where the use of marijuana for medicinal purposes is both sanctioned and encouraged. State law allows seriously ill persons, their primary caregivers, and persons who collectively cultivate marijuana, to make and use marijuana if done for personal, noncommercial medicinal use. *See* Compassionate Use Act of 1996, Cal. Health & Safety Code §11362.5 et seq. All one needs is a physician's written or oral recommendation or approval. There are a series of cases pending now in the Ninth Circuit Court of Appeals challenging the contitutionality of the CSA as applied to medicinal marijuana users. The federal Government has used the Commerce Clause of the U.S. Constitution as authority for attempting to make the manufacture and use of marijuana criminal in jurisdictions, such as California, where such actions otherwise would be legal.

Now pending in the U.S. Supreme Court is a 2003 decision from the Ninth Circuit that held that the CSA is an unconstitutional exercise of Congrees' Commerce Clause authority when applied to intrastate, noncommercial, cultivation, possession and use of marijuana for medicinal purposes on the advice of a physician, and where it is legal under state law. *See* ***Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. Dec. 16, 2003)**. *Raich* involved two very seriously ill women who used marijuana as a medical treatment for pain on advice of their physicians. After DEA agents raided their homes and destroyed their marijuana plants, the women sued the federal Government in federal court. They sought a declaration that the CSA was unconstitutional as applied to them and a preliminary inunction against future violations of their rights, and advanced states' rights arguments. The trial court denied the injunction based on prior Ninth Circuit precedent that had upheld the CSA in the face of Commerce Clause challenges in suits involving drug trafficking. On appeal, the Ninth Circuit reversed, holding that the women's actions were clearly distinguishable from the drug trafficking cases and did not enter the stream of commerce.

In states that have enacted laws permitting the use of marijuana for medicinal purposes, unless and until the U.S. Supreme Court reverses the Ninth Circuit precedent, it might be wise to permit residents whose physicians have recommended their use of marijuana to grow and use it in accordance with state law. Of course, you should condition your approval as necessary to maintain the health and safety of other residents.