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With Retail Marijuana a Reality, Some Considerations for Business

Colorado voters approved Amendment 64 to the Colorado Constitution in November of 2012, and on January 1, 2014, Colorado became the first state in the country where recreational marijuana was available for purchase from state-licensed stores. The recreational marijuana industry's debut is generally considered to have gone relatively smoothly, with police reporting few violations of state law, despite large crowds and long lines at many retail marijuana stores. Still, state and local authorities will certainly be watching developments closely, as the initial hype and attention subside, and the existence of state-sanctioned marijuana sales becomes a part of the economic landscape of Colorado.

The January 1 launch followed the U.S. Department of Justice's issuance of a policy guidance memorandum on August 29, 2013. While marijuana remains illegal under federal law, the memorandum indicated that, as a matter of prosecutorial discretion, federal authorities would take a cautious, but hands-off approach toward the development of recreational marijuana industries in Colorado and the State of Washington (which approved laws similar to Colorado's in 2012), provided that the industries were closely regulated by state authorities. Additionally, the Department of Justice made clear that, where certain critical federal law enforcement priorities are implicated (distribution to minors, involvement of criminal organizations, guns/violence, etc.), federal authorities would not hesitate to prosecute marijuana businesses, regardless of their status under state law.

This federal policy guidance could be reversed at any time. If that were to happen, it is possible that even a few high-profile federal prosecutions of state-licensed marijuana businesses would cause the entire industry to fold. However, unless the recreational marijuana industry is perceived to be creating significant public safety problems, or having other adverse impacts on the federal priorities identified in the August 2013 memorandum, it appears likely that federal authorities will allow Colorado's and Washington's experiments to play out, at least through the end of the Obama administration. After that, it is difficult to predict what might happen, though candidates for president will likely have to disclose

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their positions on the issue before the 2016 presidential election.

Medical marijuana dispensaries have been widespread in Colorado since late 2009, and the use of recreational marijuana has been decriminalized since the beginning of 2013. Accordingly, while property owners, managers, lenders, and others have had to consider the implications of Colorado's marijuana laws for some time now, the advent of a recreational marijuana industry, along with the national and international attention to the issue, has refocused many businesses on the importance of addressing the issue.

In that context, commercial real estate lenders appear to be proceeding with particular caution. Many are including express prohibitions relating to marijuana activities in deeds of trust and other loan documents, even if such activities would have already been prohibited under covenants generally prohibiting "illegal activities" or activities that violate any "local, state or federal law, ordinance, or regulation." Landlords are often taking similar approaches, in both the commercial and residential context. Though there were significant problems in the early days of Colorado's medical marijuana boom in 2009-2010, the marijuana business licensing process has largely eliminated the risk that a commercial landlord's space will be used for a state-sanctioned marijuana cultivation or retail operation without a landlord's consent. However, many residential landlords remain concerned about in-home personal cultivation operations and consumption of marijuana at their properties, which do not require state approval and can sometimes occur without the landlord's knowledge or consent. Those persons who own or control property are expressly entitled under Amendment 64 to determine marijuana policies for their properties. Accordingly, it can be helpful for landlords to include clear language in their leases regarding their marijuana policies, both to set tenant expectations, and to provide clear remedies and relief to landlords that discover prohibited marijuana activities at their properties.

Homeowners' associations have dealt with similar issues, with many weighing whether to establish rules governing the cultivation or consumption of marijuana within their communities. Consumption in common areas is clearly prohibited under state law, but the authority of an HOA to ban cultivation or consumption of marijuana inside a private unit is less clear. It appears a use restriction in a declaration of covenants that addresses these activities would be enforceable, but there are different views on the issue, and it has not yet been tested by the courts.

Beyond purely real estate-related issues, with marijuana so much more widely available, and with the stigma of marijuana use diminishing somewhat, all businesses in Colorado may be considering how to handle their employees' off-duty use of marijuana. These are decisions that employers will have to make in light of their particular circumstances. However, Amendment 64 clearly allows employers to prohibit their employees' use of marijuana, whether on-duty or off. While courts have been willing to enforce these prohibitions in the medical marijuana context, this week, the Colorado Supreme Court agreed to hear an appeal that will address whether employers can prohibit off-duty use of marijuana by medical patients. It is not clear whether the case will impact rules applicable to recreational marijuana, but this case will be watched closely.

Regardless of one's support of or opposition to Amendment 64, the decriminalization of adult-use of marijuana and the development of a recreational marijuana industry are raising new issues and challenges for businesses in Colorado. If they have not already, now is a good time for businesses to consider these issues, and to develop proactive policies to

mitigate risk and potential surprises.

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