California Apartment Association

Quality Housing • Ethics • Professionalism

January 8, 2016

Department of Fair Employment & Housing
Fair Employment & Housing Council
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758

Re: Working Draft of Fair Housing Regulations in January 1, 2016 Agenda

Dear Councilmembers:

The California Apartment Association (CAA) is the largest statewide rental housing trade association in the country, representing more than 50,000 owners and operators who are responsible for nearly two million rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing and to promote and aid in the availability of high quality rental housing in California. CAA represents its members in the legislative, regulatory, judicial, and other state and local forums.

While CAA welcomes the opportunity the regulations provide for the clarification of the Fair Employment and Housing Act, many of the provisions in the working draft exceed the Council's regulatory authority, conflict with, or are unsupported by, the statute or legal precedents, and would create confusion and uncertainty in the rental housing industry.

Occupancy Standards

The working draft contains three versions of "occupancy standards." The following comments apply to each of them. First, CAA believes that the Council has exceeded its regulatory authority in this area, and second, the specific occupancy standards proposed in the regulations are very problematic.

Regulatory Authority of the Council: Occupancy standards are a fair housing issue because overly strict standards can have a discriminatory effect on a protected class, i.e., families with children. As with other discriminatory effect/disparate impact claims, determination of the discriminatory effect is not the end of the inquiry. A neutral policy only runs afoul of fair housing laws if it is not supported by a sufficient business need.

Accordingly, the FEHC's authority with respect to regulating occupancy standards is limited to the context of "discriminatory effect". Setting an absolute standard, and holding a landlord liable for violation of the standard is a misuse of regulatory authority. The FEHC has not been granted the authority to create new offenses that do not exist under the FEHA.

CAA does support the identification of a reasonable standard by the Council that can serve as a safe harbor, i.e., a policy that is no more restrictive than the safe harbor, is rebuttably (or conclusively) presumed not to be discriminatory against families with children. This would allow owners and managers of rental housing some assurance that a safe harbor policy will protect them from litigation, while it also allows other owners to set a different standard appropriate to their property, where they believe that conditions warrant it. Those standards must be evaluated using the discriminatory effect/disparate impact analysis, not automatically rejected as illegal. Neither the legislative history of the FEHA, nor the federal fair housing act, indicate any intent to provide for the development of an occupancy code. See: http://www.hud.gov/offices/fheo/library/occupancystds.pdf (the "Keating Memo").

CAA understands that maximizing occupancy of all existing rental housing is viewed as a solution to the lack of affordable housing, however, the FEHC's authority with respect to the standards is limited to determining whether a standard operates unreasonably to limit or exclude families with children.

Proposed Occupancy Standards

While CAA does support the creation of a reasonable occupancy standard that can serve as a safe harbor from claims of discriminatory effect claims, the standards set out in the working draft are not workable.

In the context of the federal FHA, the "Keating memo" takes a well-reasoned approach for evaluating an occupancy standard to determine whether it operated to unreasonably limit or exclude families with children. Rather than set a hard and fast limit, violation of which constitutes unlawful discrimination, and compliance with which does not, HUD will start with a 2 person/room guideline and then look at factors such as room and unit size, and other limiting factors such as the capacity of septic, sewer or other building systems. CAA requests the Council consider adoption of this type of guideline. Previously, the Department of Fair Employment and Housing used 2 person/bedroom, plus one additional person as an enforcement guideline. CAA also finds that to be a reasonable approach. This 2+1 standard is what CAA has consistently recommended to its members as the "best approach," with some caveats (unusually large or small rooms, other physical limitations due to building systems, etc.). To date, this standard has been met with general acceptance, due to its reasonability and also ease of application.

By contrast, the standard proposed in the working draft would more than double the number of tenants allowed in an average apartment under the former DFEH guideline, i.e., doubling the number of residents in any apartment community. This will have a tremendous impact on a property's facilities, including exercise rooms, swimming pools and parking, water and sewer usage, trash and recycling, as well as the impact on other residents. It will also have a cumulative effect on the surrounding community, parks, parking and traffic, when the population in rental housing multiplies.

More residents mean significantly higher water usage. Due to the drought, owners of residential rental property are facing significantly increased expenses for water (and penalties for excessive use) and have limited ability to pass those costs and penalties through to residents. Very few multifamily properties are separately metered, so the owner can either include the water in rent, or use a Ratio Utility Billing System to allocate the cost of water to each unit (based on various factors). Including the water in rent cannot address the impact of additional occupants, unless the owner can increase the rent based on the number of occupants. Increased occupancy will not only result in increased water bills, but also will likely result in the imposition of ongoing penalties on the owner, as the amount of water allocated to a property is not based on the type of occupancy loads proposed by the Council.

Similar limitations apply to an owner's ability to pass through other costs, such as trash, that will increase due to expanded occupancy.

Basing the occupancy standard on square footage makes compliance very difficult. Landlords will have to measure every single unit, since there may be small variations between similar units, and opportunities for error are great. In addition, different methods are used to calculate square footage, and depending on the layout of a unit, space within a living room or bedroom may not be usable as a sleeping area. For example, if a living room has doors opening into the kitchen, two bedrooms, a bathroom, the rear yard and the front yard, it doesn't make sense to count the space directly in front of each doorway as a potential sleeping area. CAA recommends that any occupancy standard be based instead on easily determined factors such as number of bedrooms and other spaces, with the caveat that unusually large or unusually small rooms or units would warrant a different standard.

Occupancy Standards: Distinctions re: Children

The proposed occupancy standards contain a couple of exceptions relating to babies and children. It is unclear why these exceptions are needed, since the purpose of the expansive standard is to make the units available to families with children. I.e., the overall number is high, so that a family can have children. In addition, there are no exceptions for babies and children in the occupancy standards that exist for health and safety purposes. Those additional children will be going down the same stairwell as everyone else if there is a fire. Perhaps the Council should consider allowing owners to set occupancy standards as they choose, but create a rule that children are not counted. In that context, an exception for children would make sense.

The standard in Section 11098.4(a)(4) indicates that the addition of a new child to the residence, through birth or adoption creates an exception to the occupancy standard if the residents of the unit are already at the maximum. How many children may the residents add? If there are already 5 women in a 550 square foot efficiency, could each resident have a baby without exceeding the occupancy standard? Does this exception last until the children are 18 years old?

Similarly, the standard in 11098.4.1 states that infants under 24 months of age do not count as "persons" under the occupancy standard at all. Is there no limit on the number of infants or toddlers?

Resident's Right to Operate Daycare

Another factor that will affect the number of persons actually in an apartment is the current legal right that a resident has under California law to operate a family day care home in residential rental property. While these children will not be spending the night, during the day, there may be 8 additional children in the unit. No minimum unit size is required for the resident to operate a daycare business. This may mean that all the people who sleep in the unit cannot come into the premises until the children leave, without exceeding the health and safety limits for the unit. CAA's paper regarding daycare in residential rental property is attached for your reference.

Boarders

It is also unclear how this occupancy standard would apply to an owner renting out a room in an owner-occupied single family home or apartment. Is the owner required to accept a family of two adults and two infants? Or may the owner limit the unit to one boarder in order to qualify for the exemption to FEHA's anti-discrimination provisions. Section 11098.4 (c) (exemptions). The *Roommates.com* case states that tenants looking for roommates are exempt from fair housing laws (not advertising), however, the specific narrow exemption in the law for property owners looking for roommates suggests that owners are not fully exempt from FEHA. *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.,* 489 F.3d 921 (9th Cir. 2007) *rev'd in part, vacated in part, aff'd in part,* 521 F.3d 1157 (9th Cir. 2008)(en banc).

Discrimination in Terms and Conditions

Section 11098.7 of the working draft and FEHA both prohibit the imposition of different lease terms based on membership in a protected class. Does this section prohibit increased rent based on the number of occupants (not familial status of those occupants)?

Section 11098.23 Disability Definitions – Controlled Substances – Marijuana

CAA strongly disagrees with the Council's interpretation of the Compassionate Use Act and the FEHA with respect to medical marijuana. The CUA only decriminalized medical marijuana, it did not create a right to use or grow it in the place of a patient's choosing. Use and cultivation of marijuana remain illegal under federal law and it is not reasonable for an owner to risk seizure of the property to accommodate a resident.

From a practical standpoint, the issue is drifting smoke (just like with cigarettes) and the complaints of other tenants, some of whom may have their own "competing" disabilities that are adversely effected by smoke and must be accommodated by the landlord. Many residents are also concerned about exposure to themselves or their children. Marijuana (and tobacco smoke) are both listed on the Proposition 65 list of chemicals that cause cancer and/or reproductive harm, and if owners are required to allow smoking, they will have to provide a warning regarding toxic exposure to other residents and all persons coming onto the property, including visitors to the user's apartment. CAA has received a number of calls recently from landlords whose tenants are concerned with "third hand" marijuana exposure discovered by the tenants who are wiping walls and finding they are covered with marijuana residue. The additional issue relates

to a tenant who grows marijuana on the property; this poses a great risk of damage to the property from water and mold, as well as making the property very attractive to criminals searching for drugs. CAA's Issue Insight regarding medical marijuana is attached.

Disability – Inquiries that may be made

Under Section 11098.24(c), it is unclear what exactly landlords may ask applicants. CAA's Compliance Committee has consistently decided against putting a question asking on the application asking whether an applicant will need a reasonable accommodation. It would be helpful if this section provided clear examples of what can and cannot be asked.

Process for Requesting an Accommodation/Modification and the "Interactive Process"

The working draft confuses the process of a tenant who makes a request with the interactive process that is required once the owner believes the request is unreasonable. The interactive process does not come into play until after the disability and need have been established – either by being obvious or by the tenant or applicant providing sufficient verification. An owner's failure to respond to a request promptly and the owner's undue delay in considering the request, are considered a failure to accommodate, not a failure to engage in the interactive process. The verification process and the communications between the owner and the tenant in completing the request are not part of the "interactive process." The duty to engage in the interactive process is triggered when the request is complete (i.e., disability and need are established) and the landlord has determined that for some reason the requested accommodation is unreasonable. (See HUD/DOJ Joint Statement on Reasonable Accommodations, Section 7) The interactive process does not begin "immediately . . . upon receipt of a request" as stated in the working draft at 11098.28(b).

This section also indicates that delay beyond 30 days in the interactive process establishes a rebuttable presumption that the landlord has denied an accommodation. Because the process for verifying disability and need is lumped into the "interactive process" in the working draft, it is unclear what happens if the delay is the fault of the tenant. What if the owner asks for verification and the tenant does not respond. At what point can the request be presumed to be withdrawn?

Section 11098.26 Reasonable Accommodations- Examples

The two examples provided are not particularly helpful as they do not reflect the real issues that arise. Example 1(a) provides the example of a blind resident who needs a seeing eye dog. The resident does not need to request a reasonable accommodation in this instance. California law clearly allows signal, service, and guide dogs in residential rental property, whether they belong to a disabled resident or a resident who is a trainer. Civil Code 54.1. Suggesting that these residents must go through the reasonable accommodation process is confusing.

The second example, could be expanded to elaborate on the issue that generally arise with respect to parking-related accommodation requests. The issues CAA usually hears are (1) there is no parking space available that meets the resident's need because all parking spaces are already assigned to other residents, (2) there is no parking space to create a larger van accessible spot, or (3) the resident wants to use the "public accommodation" parking space available for the public at the leasing office. Providing examples incorporating these scenarios would be helpful.

Assistive Animals Presumptively Reasonable

Section 11098.26(c) provides that requests for assistive animals shall be deemed presumptively reasonable and shall be granted unless the housing provider can demonstrate "undue hardship." This presumption jumps ahead of the first steps in the reasonable accommodation process, which is establishing the disability of the requestor and the need for the animal, if they are not obvious. As "assistive" animals are most often requested by individuals who have a disability that is not obvious (unlike for example, a blind person with a service dog), these steps should not be disregarded.

Oddly, subsection (d), authorizes verification only of the disability, not the need for the accommodation. Under the usual process, once the disability and need have been verified, the landlord must grant the accommodation unless it is unreasonable, i.e., it would impose an undue financial or administrative burden on the housing provider or would fundamentally alter the nature of the provider's operations. The request may also be denied if: "(1) the specific assistance animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or (2) the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation." http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf If the presumption changes this process, it is exceeding the scope of the authority granted by the statute. In addition, the proposal indicates that the request is presumptively reasonable unless it poses an "undue hardship," as opposed to an undue *burden*. What does this mean? Is it the Council's intent to eliminate the exception for accommodations that are unreasonable because they would fundamentally alter the provider's operations? CAA's members have received many requests relating to assistive animals that would constitute "fundamental alteration" (clearing up the animal's waste, walking the animal, etc.).

"Assistive animals" are already perceived by other residents as the most abused accommodation. Owners who allow pets get requests for accommodations from the residents who don't want to pay a pet deposit or obtain insurance, and in "no pet" buildings, an owner's attempt to enforce that policy is nearly always met with a request for an accommodation, often based on verification obtained by the tenant from a "doctor" on the internet. Simply letting it slide, is usually a more practical and economical response than an owner challenging in court whether or not the tenant has a disability and really needs the animal. Creating a presumption

that all of this is reasonable will simply aggravate the situation. Requests for assistive animals should be subject to the same process and reasons for denial as any other request for a reasonable accommodation.

Safety Concerns about Specific Animals and Insurance Issues

It is unclear from Section 11098.26, what, if any, affirmative steps a landlord can take to evaluate the safety of a particular animal before it is allowed on the property, and allowed "one free bite". It would be helpful to expressly give owners the ability to make inquiries to prior landlords, the animal's veterinarian, etc.

The most frequent question CAA receives from its member relating to the threat posed by assistive animals relates to breed (or no-pet) restrictions imposed by the landlord's insurance company. It would be helpful if the Council could explain whether such a restriction means that the requested accommodation places an undue financial or administrative burden on the owner. CAA has heard from many of its members that their insurance companies are requiring breed restrictions, and, therefore, they cannot grant the accommodation requests for pit bulls and other such breeds. Several years ago, HUD issued a policy statement on dangerous breeds and insurance. This document provides information to HUD's investigators on how to view a landlord's defense of undue burden due to the insurance breed restriction issue. Essentially, HUD does consider that it may be a valid defense, as described in the memo at this link: http://1.usa.gov/1jW4XqF.

CAA has also heard from some attorneys that they have had some success with getting insurance companies to make an exception to the breed restriction when the animal is a service or companion animal for a disabled person. The argument is that insurance companies also have fair housing obligations. It would be helpful it the Council's regulations address the obligations of insurance companies under FEHA.

Presumption that Guests are Disabled and That Their Animals are Reasonable Accommodations

There is nothing in the statute that supports a presumption that a resident's guests or other invitees are all disabled and need assistive animals, and need to bring them on the property. Persons who need to bring their assistive animals onto the property should be subject to the same process as any other person requesting a reasonable accommodation.

Species of Animal Required for Accommodation

It would be helpful it Section 11099.29(c.) required the verifier of the need for the accommodation to specify not only the species of animal required, but the number of animal(s) required.

Proof of Disability: Qualified Health Care Provider:

While CAA would support limiting the persons that can provide information to verify a tenant or guest's disability or the necessity of an accommodation or modification to "qualified health care providers" as described in Section 11098.29 (e), the HUD/DOJ Joint Statements include a wider variety of possible verifiers, including "a peer support group, a non-medical service agency, or a reliable third party." A landlord who allows a tenant to provide verification from only a "qualified health care provider" as defined in these regulations, would still be subject to enforcement by HUD.

What would be helpful would be for the Council to clarify the level of personal knowledge the verifier must have about the tenant's disability and their need for a particular accommodation or modification. There are many websites where tenants can easily obtain documentation supporting their request without having a personal relationship with the verifier. For example, in the medical marijuana context, California law now requires doctors to conduct an "appropriate prior examination" of the patient, prior to prescribing marijuana. If the Council were to provide guidance as to what is reasonable documentation of a tenant's disability and need, that would be very helpful.

Reasonable Modifications

Section 11098.25 (b) states that the "landlord shall act in good faith to assist the resident in the process necessary to obtain any required building permits." Section 21 of the HUD/DOJ Joint Statement on Reasonable Modifications states that a "housing provider may also require that the tenant obtain any building permits needed to make the modifications . . . " is unclear whether the proposed language means that the owner must not unreasonably stand in the way of the resident obtaining a permit (for example, providing consent, if consent of the property owner is required) or whether the Council suggests that the owner has some affirmative duty to help the resident get the permit. Such an affirmative duty is not supported by the law. http://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf

In addition, the proposal at subpart (c) states that "[o]nce a modification is properly constructed and installed in a common area, the landlord shall be responsible for the upkeep and maintenance of the modification." This is inconsistent with Section 13 of the HUD/DOJ Joint Statement on Reasonable Modification which states that:

> The tenant is responsible for upkeep and maintenance of a modification that is used exclusively by her. If a modification is made to a common area that is normally maintained by the housing provider, then the housing provider is responsible for the upkeep and maintenance of the modification. If a modification is made to a common area that is not normally maintained by the housing provider, then the housing provider has no responsibility under the Fair Housing Act to maintain the modification.

Senior Housing

The provisions regarding the exception to familial status discrimination for senior housing omit any reference to the Unruh Act, which contains requirements that in some instances are more stringent, and should, therefore, apply.

Familial Status – Pool Rules

Section 11098.41 provides as an example of a permissible rule that is the minimum necessary to eliminate substantial risk to the health and safety of children, a rule stating that children under 10 must be accompanied by an adult when using a pool. However, this directly conflicts with existing California law that requires the posting of a sign that prohibits children under the age of 14 from using the pool without an adult in attendance. See 24 Cal. Code Regs 3120B. CAA receives many questions regarding this type of rule, most commonly with respect to the use of exercise equipment. Clarification would be helpful.

Thank you for your consideration of our comments and suggestions. Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,

California Apartment Association

By
Heidi Palutke
Research Counsel

Attachments: CAA White Paper – *Family Child Care Homes at Rental Property*
CAA Issue Insight – *California Medical Marijuana & Cultivation Laws*

Family Child Care Homes at Rental Property

I
Introduction

Over the past three decades, journals and studies have reported that local communities throughout the nation are experiencing a shortage of accessible and affordable day care for young children. California is reported to have thousands of school children under the age of ten who go home after school to an empty house and spend several hours of the day, unsupervised, until their parents arrive home from work. The high demand for child day care is a direct result of the increasing number of double-income households; millions of children under the age of six live in households where both parents work.

Although a large number of families pursue placement for their children in day care centers, many families now use family child care homes as an alternative. A family child care home is preferred over a day care center mainly because it provides a more family-oriented environment in which children can grow and develop. A large number of these family child care homes are established at residential rental property. Many times, a family child care home is mistaken for a child day care center. But unlike day care centers, family child care homes are explicitly allowed by law to operate in residential areas, and the regulations governing their operation are limited.

The legal community has interpreted current law as providing protection for any residential tenant who wishes to offer family day care within a rental apartment or home. Rental property owners, however, have raised concerns about the increased liability they face when day care is operated on the premises by a resident. At the same time, neighboring tenants often complain of excess noise and traffic.

In 1981, the Legislature built a foundation on which the operation of family day care homes now rests. That foundation consists of definitions for small and large family day care homes and preempts, in part, local communities from interfering with their operation. Through policies and definitions, the state has specifically set up a protective shield for anyone who wishes to operate small and large family day care homes. With these laws, the legislature has drawn a line between day care homes (with minimal regulation) and day care centers (with comprehensive laws governing their establishment).

When the legislature passed the laws, it declared that family day care homes for children were to be allowed in normal residential surroundings so as to give children the home environment that is conducive to healthy and safe development. The laws provide that it is the public policy of this state to provide children in a family day care home the same home environment as provided in a traditional home setting.

The Legislature declared this policy to be of statewide concern with the purpose of occupying the field to the exclusion of municipal zoning, building, and fire codes and regulations governing the use or occupancy of family day care homes for children and the law intended, with some exceptions, to prohibit any restrictions relating to the use of single-family residences for family day care homes for children.

Today, California laws and regulations allow for the operation of family day care homes at residential rental property. Both small family day care homes (up to eight children) and large family day care homes (up to 12 children) can be operated by a tenant without the approval of the property owner. A tenant can care for two additional children in a large family day care home, but they must first obtain the written consent of the property owner. Below is an overview of the law.

II
Requirements for Day Care Homes at Rental Property

The legislature specifically provided in the law that every provision in a written instrument entered into relating to real property that intends to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of real property for use or occupancy as a family day care home for children, is void and every restriction or prohibition in any such written instrument as to the use or occupancy of the property as a family day care home for children is void. Every restriction or prohibition entered into, whether by way of covenant, condition upon use or occupancy, or upon transfer of title to real property, which restricts or prohibits directly, or indirectly limits, the acquisition, use, or occupancy of such property for a family day care home for children is void. The law does, however, provide some requirements for family day care homes operated at rental property.

What Owners Can and Cannot Do:

- Never refuse to rent to prospective tenants because they inform you that they will operate a day care home. Never evict tenants simply because they operate a family day care home.
- Require that a day care provider give you notice that they are operating, or plan to operate, a day came home at the rental property.
- If the day care provider maintains liability insurance or a bond, request to be added as an additional insured to their liability insurance policy or bond. Owners are required by law to pay for any additional premium assessed for the coverage.
- If a day care provider chooses not to carry liability insurance or a bond, owners can require that they maintain a file of affidavits signed by each child's parent, informing the parents that the day care provider does not carry insurance.
- You can require that the family day care home provider pay an increased security deposit for the operation of the family day care home. It is not considered discriminatory that residents who operate a day care home pay a higher security deposit than other residents. All security deposits collected by the owner from the day care provider, however, cannot exceed the maximum allowable under existing law (two months' rent for an unfurnished unit and three months' rent for a furnished unit).

The Specifics:

Notice to the Landlord - A prospective family day care home provider, who resides in a rental property, must give 30 days' written notice to the owner of the rental property or their agent prior to the commencement of operation of the family day care home. A family day care home provider in operation on rental or leased property must notify the landlord or property owner in writing at the time of the annual license fee renewal.

Security Deposit - The property owner may require the family day care home provider to pay an increased security deposit for operation of the family day care home. The increase in deposit may be required notwithstanding that a lesser amount is required of tenants who do not operate family day care homes. In no event, however, can the total security deposit charged exceed the maximum allowable under existing law.

Liability Insurance - All family day care homes for children must maintain in force either liability insurance covering injury to clients and guests in the amount of at least one hundred thousand dollars ($100,000) per occurrence and three hundred thousand dollars ($300,000) in the total annual aggregate, sustained on account of the negligence of the licensee or its employees, or a bond in the aggregate amount of three hundred thousand dollars ($300,000).

A family day care home that maintains liability insurance or a bond, and that provides care in premises that are rented or leased or uses premises that share common space governed by a homeowners' association, must name the owner of the property or the homeowners' association as an additional insured party on the liability insurance policy or bond if all of the following conditions are met:

- The owner of the property or governing body of the homeowners' association makes a written request to be added as an additional insured party.
- The addition of the owner of the property or the homeowners' association does not result in cancellation or nonrenewal of the insurance policy or bond carried by the family day care home.
- Any additional premium assessed for this coverage is paid by the owner of the property or the homeowners' association.

Affidavits - In lieu of the liability insurance or the bond, the family day care home must maintain a file of affidavits signed by each parent with a child enrolled in the. The affidavit must state that the parent has been informed that the family day care home does not carry liability insurance or a bond according to standards established by the state. If the provider does not own the premises used as the family day care home, the affidavit must also state that the parent has been informed that the liability insurance, if any, of the owner of the property or the homeowners' association, may not provide coverage for losses arising out of, or in connection with, the operation of the family day care home, except to the extent that the losses are caused by, or result from, an action or omission by the owner of the property or the homeowners' association, for which the owner of the property or the homeowners' association would otherwise be liable under the law. These affidavits must be on a form provided by the Department of Health Services and must be reviewed at each licensing inspection.

III
Day Care Homes Defined

Small Family Day Care Home means a home that provides family day care for 8 or fewer children, including children under the age of 10 years who reside at the home. A small family day care home may provide care for more than 6 and up to 8 children, without an additional adult attendant, if all of the following conditions are met:

- At least two of the children are at least six years of age.
- No more than two infants are cared for during any time when more than six children are cared for.

- The licensee notifies each parent that the facility is caring for two additional school age children and that there may be up to seven or eight children in the home at one time.

- The licensee obtains the written consent of the property owner when the family day care home is operated on property that is leased or rented.

All of the following applies to small family day care homes.

- The use of single-family residence as a small family day care home is considered a residential use of property for the purposes of all local ordinances.

- No local jurisdiction can impose any business license, fee, or tax for the privilege of operating a small family day care home.

- Use of a single-family dwelling for purposes of a small family day care home does not constitute a change of occupancy.

Large Family Day Care means a home that provides family day care for 7 to 14 children, including children under the age of 10 years who reside at the home.

A large family day care home can provide care for more than 12 children and up to and including 14 children, if all of the following conditions are met:

- At least two of the children are at least six years of age.

- No more than three infants are cared for during any time when more than 12 children are being cared for.

- The licensee notifies a parent that the facility is caring for two additional school-age children and that there may be up to 13 or 14 children in the home at one time.

- The licensee obtains the written consent of the property owner when the family day care home is operated on property that is leased or rented.

All of the following apply to large family day care homes:

- A city, county, or city and county cannot prohibit large family day care homes on lots zoned for single-family dwellings, but can do one of the following:

- Classify these homes as a permitted use of residential property for zoning purposes.

- Grant a nondiscretionary permit to use a lot zoned for a single-family dwelling to any large family day care home that complies with local ordinances prescribing reasonable standards, restrictions, and requirements concerning spacing and concentration, traffic control, parking, and noise control relating to such homes, and complies regulations adopted by the State Fire Marshal. Any noise standards must be consistent with local noise ordinances.

- Require any large family day care home to apply for a permit to use a lot zoned for single-family dwellings. The zoning administrator will review and decide the applications. The use permit must be granted if the large family day care home complies with local ordinances, if any, prescribing reasonable standards, restrictions, and requirements concerning spacing and concentration,

traffic control, parking, and noise control relating to such homes, and complies with regulations adopted by the State Fire Marshal. Any noise standards must be consistent with local noise ordinances.

- Use of a single-family dwelling for the purposes of a large family day care home does not constitute a change of occupancy.

- Large family day care homes are considered single-family residences for the purposes of the State Uniform Building Standards Code and local building and fire codes, except with respect to any additional standards specifically designed to promote the fire and life safety of the children in these homes adopted by the State Fire Marshal pursuant to this subdivision.

IV
Legislative Review

Over the past 15 years, attempts have been made to toughen the laws and regulations that govern day care homes. Rental property owners, specifically, attempted to effect minimum square footage requirements, and to reduce the liability they face when day care is operated in multi-story residential buildings.

While numerous bills have been introduced in an attempt to strictly regulate day care homes and to mandate insurance, few have been successful. Below is a limited example of the legislation that has been attempted by legislators since the establishment of the state's family day care policies and laws.

AB 1491 (Allen) - This bill would have required the Assembly Office of Research to compile a report on laws and regulations concerning the responsibilities of various state agencies and to identify conflicting regulations that set different standards or requirements for child care. The bill failed passage. (1989)

AB 1637 (Burton) - The bill would have required the State Department of Social Services to conduct a 3-year pilot project for the purpose of licensing day care on floors above the second floor of multistory buildings. The bill passed the Assembly on a 72 to 3 vote but failed in the Senate (1989).

AB 1715 (Friedman) - This bill would have prohibited an insurer from arbitrarily refusing to accept an application or issue a policy of homeowners' insurance solely because the applicant had a license to operate a family day care home at the location for which insurance was sought. The bill was sponsored by the Southern California Women's Law Center. Opposition came from numerous insurance providers. The Governor vetoed the bill (1989).

AB 2189 (Murray) - This bill would have declared the need to establish "high quality" child care programs. The bill required the Legislature to convene a task force to determine the feasibility and content of new regulations to be adopted by the State Department of Social Services that would set measurable standards for quality in licensed child care programs. The bill was vetoed by the Governor (1989).

SB 644 (Watson) - This bill, sponsored by CAA, would have required day care providers who offered their services in a rented or leased premises to name the property owner as an additional insured. This bill failed passage (1989).

SB 2682 (Hart) - This bill required insurers that issue policies of homeowner's insurance to also make available liability coverage for licensed family day care homes. The Governor vetoed the bill (1989).

SB 2293 (Watson) - This bill, sponsored by CAA, required day care providers to name the property owner as an additional insured. Signed by the Governor (1990).

AB 606 (Richter) - The bill would have required a family day care home that provides care in premises that are rented or leased in a common interest development, or that uses premises in a development sharing common space governed by a homeowners' association, to maintain liability insurance, thereby eliminating the current option of obtaining a waiver. The bill would have required a family day care home to notify the property owner and the homeowners' association that family day care services are being or will be provided and would require the home to name the property owner and homeowners' association as additional insured parties on the insurance policy upon receiving a written request. The bill failed passage (1995).

AB 1484 (Martinez) - This bill, sponsored by CAA, required day care providers who operate their business at rental property to carry liability insurance. It passed the Assembly 66 to 4, but failed passage in the Senate Health and Human Services Committee (1995).

AB 1819 (Hall) – This bill prohibits the smoking of tobacco in a private residence that is licensed as a family day care home. Signed by the Governor (2014).

Resources:

- Health and Safety Code Section 1596.775 et seq.
- Health and Safety Code Section 1596.78
- Health and Safety Code Section 1596.795
- Health and Safety Code Section 1597.30
- Health and Safety Code Section 1597.40
- Health and Safety Code Section 1597.44
- Health and Safety Code Section 1597.45
- Health and Safety Code Section 1597.531
- CAA Form 28.0 – Daycare Addendum

ISSUE Insights
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California Medical Marijuana & Cultivation Laws

Over a decade has passed since Proposition 215, the Compassionate Use Act (CUA) was passed by the California voters (November 1996). The CUA gives a person who uses marijuana for medical purposes (with a physician's recommendation) a defense to certain state criminal charges involving the drug, such as possession or cultivation.[1]

In 2015, the California Legislature passed and the Governor signed bills to create an oversight and licensing program for individuals who cultivate marijuana.[2] Cities and counties are authorized to issue or deny permits to cultivate marijuana, and they may inspect cultivation sites. Cities and counties must have land use regulations that regulate or prohibit the cultivation of marijuana by March 1, 2016, or the state will be the sole licensing authority in that area. All indoor and outdoor cultivation sites must be conducted in accordance with state and local laws relating to land conversion, grading, electricity usage, water usage, and the like.

The law provides that a person who applies for a license to cultivate or distribute marijuana must certify that he or she is in compliance with all local ordinances and regulations and must provide evidence of the legal right to occupy and use the proposed location, including written approval from the property owner if the licensee does not own the property.[3]

There are exemptions to the licensing provisions of the state's cultivation law. It does not apply to qualified patients who cultivate marijuana for their own personal use, so long as the cultivation does not exceed 100 square feet and if they do not sell, distribute, donate, or provide marijuana to any other person or entity. The provisions of the law also provide for a licensing exemption for primary caregivers who cultivate marijuana so long as the area they use to cultivate marijuana does not exceed 500 square feet, and they cultivate marijuana exclusively for the personal medical use of no more than five qualified patients for whom they are the primary caregiver. At the same time, however, these state law exemptions do not prevent a city, county, or city and county from regulating or banning the cultivation, storage, manufacture, transport, provision, or other activity by the exempt persons.

Notwithstanding California's law on cultivation and use, it provides that activity related to cannabis use is subject to federal prosecution, regardless of the protections provided by state law.

Most rental agreements prohibit illegal activity generally and the use of drugs specifically. However, owners of residential rental property are faced with disabled residents who seek an accommodation for their medical marijuana use or residents with a prescription who are growing marijuana on their balconies. These situations often first come to the owner's attention when neighboring residents complain about marijuana smoke on the premises.

To date, federal and state court judges have sided with property and business owners who have refused services or accommodations to individuals who smoke and/or possess marijuana for medical purposes. The California Legislature continues to grapple with this topic and the state courts continue to receive complaints from individuals who claim they have the legal right to use marijuana. Guidelines recently issued by the State Attorney General state that medical marijuana use is prohibited where "smoking is prohibited by law."[4] This is significant, as more local ordinances regulating smoking in and around rental units are passed. Residential rental property owners with tenants or applicants who wish to possess, use, or grow medical marijuana on the premises, should consult with counsel on how best to proceed.

Below is an overview of the recent cases that shed some light on how this issue continues to evolve.

Federal Law May Be Enforced Even If Medical Marijuana Does Not Cross State Lines

In 2005, the U.S. Supreme Court held that Congress has the authority to prohibit local cultivation and use of marijuana, notwithstanding the fact that it is allowed by state law. The defendants in *Gonzales v. Raich* argued that the federal government had no authority to regulate marijuana that is produced and consumed locally because it does not cross state lines. The court held that Congress' power to regulate interstate markets for medicinal substances encompasses the portion of those markets that are supplied by drugs produced and consumed locally because the Constitution authorizes the regulation not only of interstate commerce, but of activities that substantially affect interstate commerce. As a result, compliance with California's Compassionate Use Act is not a defense to a federal marijuana related crime.

Fair Employment and Housing Act (FEHA) Does Not Require Reasonable Accommodation for Medical Marijuana in the Employment Context

In the Supreme Court case of *Ross v. Ragingwire Telecommunications*, the employee was fired when a drug test revealed his marijuana use, which had been prescribed by his physician for chronic pain. The Court held that:

> California's voters merely exempted medical uses and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the CUA suggests the voters intended the measure to address the respective rights and duties of employers or employees.

The court further held that "FEHA does not require employers to accommodate the use of illegal drugs" and that the CUA does not give "the plaintiff a right to use marijuana free of hindrance or inconvenience, enforceable against third parties."[5] The same reasoning could be applied to a case where an applicant or resident seeks an accommodation for medical marijuana use in rental housing. However, it is unclear whether a sheriff in a particularly pro-medical marijuana community would carry out an eviction in those circumstances.

The case suggests that the CUA does not require an owner to allow the growing, smoking and/or possession of medical marijuana in residential rental property as a reasonable accommodation for a disabled person.

Housing Authority Not Required To Allow Illegal Drug Use as Reasonable Accommodation

In 2006, a federal district court in Washington State held that a housing authority was not required to make a reasonable accommodation to allow a Section 8 tenant to use medical marijuana pursuant to Washington State law. The court held that the housing authority had no duty to accommodate an illegal drug user because "reasonable accommodations do not include requiring [the housing authority] to tolerate illegal drug use or risk losing HUD funding for doing so. This case, *Assenberg v. Anacortes Housing Authority*, has been appealed to the 9th Circuit Federal Court of Appeals, which jurisdiction includes California. In an unpublished opinion, the 9th Circuit Federal Court of Appeals, upheld the lower court's decision, finding that it would not be reasonable to require public housing authorities to violate federal law. *Assenberg v. Anacortes Housing Authority*, 268 Fed.Appx. 643 (9th Cir. 2008)

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[1] The California Attorney General recently issued medical marijuana guidelines which state "California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition. Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, August 2008. Available at http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf

[2] AB 243, Chapter 688, Stats 2015; AB 266, Chapter 689, Stats 2015; SB 643, Chapter 719, Stats 2015.

[3] The American Medical Marijuana Association (AMMA) has announced that it will file a lawsuit, alleging that the Legislature and the Governor violated the State Constitution by amending a voter approved Prop. 215 when it approved the 2015 legislation

[4] See note 1.

[5] State legislation (AB 2279 (Leno, D-San Francisco) that would have protected medical marijuana users from discrimination in employment was vetoed by the Governor in September 2008.