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# CONTROLLED SUBSTANCES: LAW AND POLICY ISSUES 101

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# Controlled Substances

Questions arise largely regarding three (maybe soon to be four) different controlled substances, for different reasons.

- Marijuana/cannabis: many states and tribes are decriminalizing or legalizing, raising questions about whether and how Indian housing programs can regulate, prohibit, test, etc. (Similar decrim/legalizing efforts beginning re: psilocybin aka “magic mushrooms”)
- Opioids: Vast increase in illegal use, and resulting addiction, overdose, and death, creating ripple effects throughout tribal communities, with impacts on housing programs.
- Methamphetamines: Not only illegal, but use and manufacture create health and safety hazards for tenants, communities, and employees.



## What are the basic applicable legal requirements?

Drug Free Workplace Act: applicable to tribal housing programs as employers

NAHASDA Section 207 lease requirements: language required regarding “drug-related criminal activity”

Indian Civil Rights Act: regarding limits on drug-testing



# Drug Free Workplace Act

Applies to Tribal housing programs because of use of federal funds.

Requires a Drug Free workplace

But largely leaves it up to the employer to ensure how, aside from those basic requirements.



# Drug Free Workplace Act

## 41 USC 8102

### **Specific requirements:**

Publish a statement and give to every employee: notifying employees that manufacture, distribution, use or possession of controlled substances is prohibited in the workplace, and specifying the sanctions that will be used for violations

Statement must also inform employees that:

- They must abide by the terms of the statement; and
- They must notify the employer of any criminal drug statute conviction for a violation occurring in the workplace, no later than five days after the conviction



# Drug Free Workplace Act 41 USC 8102

## Specific requirements:

Establish a drug-free awareness program that advises employees about:

- the dangers of drug abuse in the workplace
- the policy of maintaining a drug free workplace
- available counseling, rehab and EAPs, and
- the penalties that may be imposed for violations



# Drug Free Workplace Act

## 41 USC 8102

### Specific requirements:

- Notify HUD within 10 days after receiving notice from an employee or otherwise receiving actual notice of a conviction;
- Imposing a sanction on, or require the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee convicted of crime involving drugs in the workplace; and
- Make a good faith effort to continue to maintain a drug-free workplace



# Drug Free Workplace Act

## In sum:

It largely leaves it up to the Tribe/TDHE to ensure how to maintain a drug-free workplace, aside from those basic requirements.

Does not require drug-testing (does not prohibit it either).

Requires action if an employee is arrested for using crime involving drugs in the workplace – but can be counseling/diversion rather than automatic termination.





## NAHASDA Section 207

### Requirement to include this language in all leases:

(6) provide that the owner or manager may terminate the tenancy of a resident for any activity, engaged in by the resident, any member of the household of the resident, or any guest or other person under the control of the resident, that—

- (C) is criminal activity (including drug-related criminal activity) on or off the premises



## NAHASDA Section 207

### Unpacking that language:

(6) provide that the owner or manager may terminate the tenancy

- Does not require that you terminate for drug-related criminal activity; only that you must give yourself the option to do so through the language in the lease
- Does not require that you screen tenants for prior drug-related activity
- Does not require that you drug test



## NAHASDA Section 207

### Unpacking that language:

- (C) is criminal activity (including drug-related criminal activity) on or off the premises
  - Does not require a criminal conviction, just criminal activity
  - Can set a standard that is based on civil proceedings
  - Or can require a conviction
  - Need not be on the premises



## NAHASDA Section 207

### ***HUD v. Rucker, 535 U.S. 135 (2002)***

Established that a public housing landlord could evict a family for drug-related activity of a member of the household (relying on same language as in Section 207)

Even if the head of household did not know of and could not control the activity.

Even if the activity did not occur on the premises.

The same rationale would apply to Tribal housing, but would depend on Tribal Court precedent.



## Indian Civil Rights Act



Provisions of U.S. Constitution do not apply to Indian tribes. *Talton v. Mayes*, 163 US 376 (1896)

In 1968, after four years of debate, Congress adopted the Indian Civil Rights Act.

25 USC 1302 imposed many of the same restrictions on tribes as are found in the U.S. Constitution's bill of rights.

## Indian Civil Rights Act



In 1978, U.S. Supreme Court ruled in *Santa Clara Pueblo v. Martinez*, 436 US 58 (1978) that tribes cannot be sued in federal court to enforce ICRA

Except for limited instances of habeas corpus

Enforcement of ICRA is thus a matter of Tribal Courts and interpretation in Tribal forums.

Yet many Tribal Courts rely on federal case law to interpret scope of these rights.

# Drug Testing: Employee Applicants

## Administering drug tests: Applicants.

- A Tribe/TDHE could require that applicants for employment pass a drug test as part of their application.
- Cases on drug-testing in employment. Lots of case law on both sides of question of whether it is constitutional and in what context.
- It is seen as involving the 4<sup>th</sup> amendment protection against unlawful search and seizure, because drug tests involve submitting samples of their blood, hair, saliva, or urine to be analyzed for presence of controlled substances.
- Testing on applicants is generally upheld if there is consent, if it is applied consistently, across the board, if it is a part of your written policies, if the process and standards are clear.



# Drug Testing: Employees

## Administering drug tests: Employees.

- Many Tribes/TDHEs seek to carry out drug-testing of employees.
- Cases on drug-testing in employment are much stricter once a person is employed
- Random testing generally prohibited unless in a position that implicates public safety (airline pilots, truck drivers, heavy equipment operators).
- Periodic testing with advance notice has been upheld if it is done across the board and all employees are subject to such testing.
- Reasonable suspicion testing is also generally allowed if there are clear guidelines for what constitutes reasonable suspicion, and corroboration of same (slurred speech, stumbling, smell alcohol, observe drugs)
- Post-accident testing also generally upheld.





## Drug Testing: Tenant Applicants

### Administering drug tests: Applicants.

- A Tribe/TDHE could require that applicants for tenants/homebuyers pass a drug test as part of their application for Indian housing.
- But drug testing has never been legally challenged in housing context.
- Closest analogy: drug testing in employment.
- Such testing on applicants would likely be upheld if there is consent, if it is applied consistently, across the board, if it is a part of your written policies, if the process and standards are clear, and it is not random.



# Drug Testing: Tenants

## Administering drug tests: Tenants.

- Some Tribes/TDHEs require that tenants/homebuyers pass a drug test as part of ongoing tenancy.
- Drug testing has never been legally challenged in housing context.
- Likely to be more controversial and subject to legal challenge
- Would likely be upheld if there is consent, if it is applied consistently, across the board, if it is a part of your written policies, if the process and standards are clear, and it is not random.
- Reasonable suspicion testing might be upheld, depending on how it is tied to harm to community/neighbors, and if there are safeguards.
- Random testing would likely be struck down. Maybe periodic testing with notice?



# Drug Testing: Units

## Administering drug tests: Units.

- Mainly to test for methamphetamine contamination, because it poses a public health and safety issue, and also because it involves damage to the Tribe/TDHE property.
- Again, random testing likely to be struck down.
- Periodic testing with advance notice likely to be upheld.
- Reasonable suspicion testing would likely be upheld, but have to have safeguards.
- To evict based on a drug test of the unit, need to establish a baseline – test a move-in. Or periodic test that first shows zero and a subsequent test shows positive.



# Drug Testing: Units

- **Make “routine inquiries/inspections” part of the leases and policies for rental and homebuyer properties.**
  - NAHASDA authorizes Tribes/TDHEs to undertake such inquiries; in fact, the Act requires that units built or maintained with federal funds be regularly inspected.
  - Inspections can include meth testing. There must be language in the rental agreement, however, and searches are subject to the Fourth Amendment’s prohibition against unreasonable searches and seizures. A similar analysis seems likely under ICRA, which applies to Indian tribes.
  - Local law enforcement are tempted to “piggyback” on NAHASDA inspections as it permits access to units without obtaining a search warrant. This violates a tenant’s Fourth Amendment and ICRA rights. However, evidence obtained in this manner is often inadmissible in court.



# Drug Testing: Units

Using information from testing for eviction.

- However, a positive meth test may not support eviction. The tenant may argue that the previous tenant contaminated the unit. The Tribe/TDHE bears the burden of proof.
- However, the Tribe/TDHE may rebut these arguments by:
  - (1) consulting an expert to assess the meth levels;
  - (2) establishing a baseline for tribal housing, i.e., test the unit pre/post move in/out for meth levels;
  - (3) testing air filters that are periodically replaced during the tenant's occupancy;
  - (4) testing the tenant's personal belongings *with* consent.



# Marijuana/Cannabinoids



- Listed as a Schedule I drug under the Controlled Substances Act. Thus an illegal controlled substance under federal law.
- However a number of states and tribes have decriminalized or legalized marijuana for medical and recreational uses.
- Does State or Tribal law govern here? Not necessarily.
- Can still condition employment or tenancy on not using marijuana.
- Can still evict based on possession, use, manufacture, or distribution of marijuana even if legal under state or tribal law.
- But can also exercise discretion not to evict or condition employment on marijuana use.

# Marijuana/Cannabinoids

- Is medical use of marijuana protected?
- Again: under the federal controlled substances act, marijuana is a Schedule I drug, meaning that as a matter of federal law marijuana has no known medical uses.
- So you can still evict or terminate employment even if the tenant or employee is using marijuana under state or tribal law for medically-approved purposes.
- However, again, you need not do so.
- But, given that marijuana is a federal controlled substance, it would be advisable not to include marijuana exemptions in your written policies for housing or for employment.



# Psilocybin

- Being voted on today in Denver (decriminalization, not legalization).
- May be on the ballot in Oregon in 2020.
- The same analysis and procedures would apply to psilocybin, if legalized, as apply to legalized marijuana.





# Opioids

- Abuse of and death-by-overdose from opioids has reached epidemic proportions.
- Indian Country is being disproportionately hard hit.
- Includes misuse of prescription opioids (Oxycontin being the most well known) as well as illegal opioids (heroin, fentanyl).
- Highly addictive; highly disruptive; can be fatal.
- Thousands of lawsuits filed against manufacturers and distributors.
- Many are joined in a Multi-District Litigation proceeding in N.D. Ohio.



# Opioids

- MDL is not a class action: each suit is still an individual suit.
- Matters are consolidated for pre-trial issues such as motions to dismiss and discovery, as well as for settlement.
- Over a hundred tribes are in the MDL.
- There are two tribal “bellwether” cases proceeding. Survived motions to dismiss.
- Will be moving into discovery and trial.
- Ongoing settlement discussions, but not really substantive negotiations.
- Parties are still too far apart.



# Opioids

- Will likely take a trial and outcome to get negotiations more serious.
- Including not just past damages, but also abatement going forward.
- Judge has indicated that he is very focused on abatement.
- What kind of things can be done to stop or slow down the crisis?



# Meth

- Listed as a Schedule I drug.
- A synthetic drug sold as capsules, pills, or powder and it can be injected, smoked, snorted, or swallowed.
- Associated with serious, sometimes permanent or deadly, health conditions, including aggression, psychotic behavior, potential cardiac and neurologic damage, and violence.
- Poses threats to public health and safety, to other tenants, to employees, and to the units themselves.



# Meth Hazards

Three hazards are interrelated, but raise important and distinct concerns.

- **ENVIRONMENTAL HAZARDS:** Contamination by meth's component ingredients are toxic, corrosive, and deadly to the environment.
- **PUBLIC SAFETY AND PROPERTY DAMAGE:** The manufacture and use of meth creates various public safety issues and risks of damage to life and property.
- **HEALTH CONCERNS:** Meth poses significant health hazards not only to those who use it, but to those exposed to residue or to contamination.



# Meth: Liability Issues

Addressing the use and manufacture of meth in Indian housing imposes substantial time and financial burden on Tribes/TDHEs.

- One key area is liability for damages – and sovereign immunity may not provide the legal barrier against such liability.
  - Tribal housing authorities, the majority of which have “sue and be sued” language in their charters, have been held to possess the same sovereign immunity as the tribe. There have been cases, however, holding to the contrary, including a Ninth Circuit case.
  - Inter-tribal consortiums have been held to possess the same sovereign immunity as their individual component entities. But, again, there is a case with a holding to the contrary.



## Meth: Liability Issues

If tribal sovereign immunity does not bar suit, Tribes/TDHEs may be held liable for harm, under tort law

- if the Tribe/TDHE knew of the danger;
  - failed to disclose it, or take proper precautions,
  - tenant was harmed due to leasing premises contaminated with meth.
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- The trend in case law evidences applying ordinary principles of negligence (i.e., Did the Tribe/TDHE act reasonably?)





# Questions or comments?

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