

# OWNERS, DEVELOPERS & MANAGERS

By Jack Fersko, Greenbaum, Rowe, Smith & Davis LLP

## The challenge of leasing to a cannabis facility

As of this writing, 41 states and the District of Columbia and Puerto Rico have legalized the sale of marijuana for medical purposes and 21 states and the District of Columbia have legalized the sale of marijuana for adult (recreational) use. Cannabis sales topped \$25 billion in 2021 and are expected to grow to a \$90 billion industry by 2026. A significant factor is the revenue generated by these sales for state and local governments.



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Here in New Jersey, with only 12 distribution facilities operating during that time period, \$200 million in cannabis sales were generated from April 21, 2022 through July 31, 2022. During the third quarter of 2022 alone, adult use cannabis sales generated \$7.7 million in tax revenue.

Although the marijuana business is illegal under federal law, businesses in this industry sector must still pay federal income taxes. While businesses usually are entitled to claim certain deductions, such deductions for a marijuana business are constrained by §280E of the IRC, which prohibits all business deductions, even those that are not per se illegal such as rent, telephone and salaries.

Although marijuana-related businesses have been legal for some time now, the field remains in its infancy. Still, a number of important issues have already been identified that will need to be addressed

### The art of making a great sandwich. . .

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• Leveraging technology to gather maintenance data for each multifamily unit

#### Summary

There's more to investing in multifamily real estate than acquisitions and dispositions. Similar to the art of making a great sandwich, a lot of work goes into increasing the value of a property asset. Experienced owner-operators understand this and have processes in place to ensure properties are well maintained, positioned correctly in the market, and managed by a top-tier team. MAREJ

in every commercial and industrial real estate transaction. To begin, there is limited availability of title insurance. In addition, there are unique challenges when it comes to traditional insurance, as sources for insurance are limited, policies are usually written by surplus lines carriers, coverage is expensive, and careful consideration is needed to ensure the policy will cover a loss. Evaluation also must be given to additional forms of coverage, including insurance for bud tenders, crop loss and situations where a tenant uses

an armed guard.

A landlord must first evaluate whether to engage in such a transaction and must evaluate what will be involved: lender considerations; tenant's licensing status at the state and municipal levels, local land use requirements, tenant's financial wherewithal and operational experience, property neighbors, and landlord's willingness to open its financial history to New Jersey's regulatory commission.

In addition, among a host of issues, landlords and tenants need to evaluate: (a) lease

commencement (including time for a tenant to secure state and local licenses, interim payment obligations, termination rights and potential litigation); (b) use of cash; (c) scope of a tenant's permitted use (including the particular operational license, impacts of a multi-tenanted facility, odors, and energy requirements); (d) what constitutes a default vs. a right of termination (including receipt of a license, loss of a license, federal enforcement action, failure to pay local taxes, and third party suits); (e) the proper structure

for a compliance with law provision in light of the federal illegality of cannabis, and potential ISRA triggers; and (f) maintenance, repair, replacement and restoration obligations.

While the cannabis industry offers exciting business opportunities, it must be entered with a keen understanding of the issues and practical solutions in order to move a transaction forward.

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