

How to Adopt No Smoking Policies for Your Building(s)

By Esther Schiller

Several years ago, a statewide survey in California showed that more than 85% of apartment renters and owners/managers in California agreed that secondhand tobacco smoke is harmful to people. Based on our more recent surveys, that percentage has increased. Apartment owners know that tobacco smoke is also harmful to an apartment unit. The small particles in the smoke can stick to surfaces, such as walls, ceilings, rugs, windows and even the ventilation system. Scientists have a name for that: third-hand smoke. Studies are showing that third-hand smoke may be even more dangerous than secondhand smoke. Also, hot ashes can burn holes in rugs and damage counter tops. The cost of preparing a unit for the next tenant after it has been smoked in can be three to five times as much as preparing it when the previous resident was a non-smoker.

What can an apartment owner do? The answer is easy. Adopt a no smoking policy for your building. Current state law in California requires no smoking in enclosed common areas of most apartment buildings. Plus there is a new state law that supports an apartment owner who goes beyond that, and requires no smoking in units, on balconies and patios, and even in outdoor common areas.

People who smoke are not protected by state or federal Fair Housing Laws. They are, in fact, in the same category as people with pets or people who drink beer. They are a consumer group. In addition, the act of smoking is not protected by privacy laws. In fact, landlords have always been able to establish rules for the protection of their property and the no smoking rule is legitimate.

“Smoking has not been identified as a fundamental liberty interest or as affording a ‘right to privacy’ by the Supreme Court. Smokers have not been considered a ‘suspect class’ under equal protection law, such that they would receive constitutional protection against discrimination. Smokers are also not identified as a protected class under any federal or California civil rights or anti-discrimination law.” (Opinion of Seth Merewitz, Special Counsel, Thousand Oaks Redevelopment Agency, February 5, 2004.)

The next question is how to do it. How does one begin the process of creating a non-smoking building or non-smoking premises? There are two ways to approach the change. You could decide to transition your building over time. When a tenant moves out, advertise your vacant unit as “non smoking”, “no smoking building” or “smoke-free building”. The term ‘no smokers’ would not be a good choice since many people who smoke choose not to smoke in their own unit. With buildings under rent control, this is the only method at this time for transitioning to a smokefree policy.

Notify prospective tenants that you are transitioning your building to non-smoking including the units, balconies and patios. A small portion of the outdoor common area could be designated as the “smoking-permitted area,” but it needs to be located far

enough away from the building so that your residents are not disturbed by drifting tobacco smoke. It should also not be located by the swimming pool or the children's play area. Most important, inform your current residents that you are transitioning to a non-smoking policy.

Require all of your new tenants to sign a no smoking lease addendum. With this approach, you would be allowing people to continue to smoke in their units until they move out.

Another way to make the change to non-smoking is to give every tenant notice that in 30, 60, or 90 days, smoking will no longer be permitted in the units, on balconies and patios, and in the common areas except for the designated smoking area outside. (People can also smoke in their cars if the tobacco smoke will not drift into the windows of your residents.) For residents with leases, the no smoking rule would begin once the lease comes to an end. Some of your residents who smoke may choose to move. However, one or two may refuse to stop smoking in their unit. The no smoking rule should be enforced like any other rule that you have taken the time and thought to adopt.

The problem with tobacco smoke (and all smoke) is that it expands to fill the space available to it. It can drift from one apartment to another through the plumbing, the electrical system, and through microscopic cracks in walls and floors. It can also enter an apartment from people smoking outside, and that is the reason for requiring no smoking on balconies and patios.

In January, 2006, the California Air Resources Board (ARB) identified tobacco smoke as a Toxic Air Contaminant with no safe level of exposure "as dangerous as the worst industrial air pollutants." According to the Air Resources Board, tobacco smoke "may cause and/or contribute to death or serious illness." Exposure to secondhand tobacco smoke can cause cancer, heart disease, eye and nasal irritation and asthma. It is particularly dangerous for children and the elderly. Although fewer than 12% of California adults are still smoking, tobacco use by just a few tenants in a building can affect almost everyone in the building.

Attorneys have suggested that apartment owners have the responsibility to provide a healthy environment for their residents. Also, apartment owners have a contractual obligation to maintain the lease space in a manner that can be used by the tenant. When one tenant's smoking is interfering with another tenant's use and enjoyment of the leased premises, that could be considered a violation of the contractual obligation to provide a useable space.

Based on the new identification of tobacco smoke as a Toxic Air Contaminant, tobacco smoke could be considered a nuisance. A nuisance is:

"That which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him; e.g. smoke, odors, noise, or vibration...includes everything that endangers life or health,or

anything that works a hurt, inconvenience or damage.” (Black’s Law Dictionary, sixth edition)

However, in communities with rent control, the provision to evict for nuisance may not be available. Consult your attorney.

On the other hand, if a resident is injured or made seriously ill by involuntary exposure to tobacco smoke in one of your buildings and chooses to take legal action, your insurance coverage might not cover that liability. The pollution exclusion in the Commercial General Liability policy (CGL) could cause coverage to be denied for claims resulting from exposure to secondhand smoke because tobacco smoke is considered a pollutant in those policies.

In the same survey mentioned in the beginning of this article, nearly 60% of renters and 69% of owners/managers stated they believe that secondhand smoke can drift from one apartment to another. In fact, that has since been proven by scientific studies. In addition, 82% of apartment residents in California would prefer to live in a non-smoking building, or at least in the non-smoking section. Creating a non-smoking building or a non-smoking section in a larger building is good for business and good for the health of the community. *(Survey source: Goodwin Simon Strategic Research-Statewide surveys of 602 apartment residents in 2004 and 300 apartment owners/managers in 2005. Surveys available at <http://www.californialung.org/thecenter>)*

Electronic Cigarettes

Recently, we have been receiving questions about allowing the use of electronic cigarettes in buildings with smokefree policies. Scientists have shown that the heated liquid inside the e-cigarette forms an aerosol (not a water vapor) which contains high concentrations of ultrafine particles. When inhaled, these particles are trapped in the lungs.

Also, in addition to the nicotine, flavoring agents and propylene glycol in the e cigarette liquids, they also contain toxic chemicals that can cause cancer, birth defects and other reproductive harm. Scientists have shown that people breathing the e-cigarette aerosol absorb nicotine at the same levels as breathing the secondhand smoke of conventional cigarettes. At the very least, the smoke from an e-cigarette can cause breathing problems.

There is still a lot that is not known about electronic cigarettes. The long-term effects of use or exposure to the aerosol are not known. Some cities, including Long Beach, Los Angeles, and Santa Monica have passed laws regulating e-cigarettes in the same manner that regular cigarettes are regulated. Scientists have not yet studied whether the smoke from the e-cigarette will travel from unit to unit like secondhand smoke from a regular cigarette. Also, it isn’t known whether the smoke from e-cigarettes will enter units when people use them on balconies, patios and in courtyards, like secondhand smoke from regular cigarettes.

However, scientific investigations have found plausible risks with regard to electronic cigarettes. If they are being used in an apartment or condominium building, there may be a possibility of causing harm to residents of nearby units. Just as landlords do not have to allow the use of regular cigarettes on their property, they can also refuse to allow the use of electronic cigarettes as well.

Smoking Marijuana for Medical Purposes: Allow It? Don't Allow It?

According to the State of California, marijuana smoke can cause cancer. And just like cigarette smoke, marijuana smoke will move from unit to unit through an apartment building or condominium complex. In 2009, the California Office of Environmental Health Hazard Assessment added marijuana smoke to the Prop. 65 list of substances that California regulators say cause cancer. The Office found that marijuana smoke contains 33 of the same harmful chemicals as tobacco smoke.

The use of marijuana for medical purposes is legal in California, but marijuana use is still considered illegal under the Federal Controlled Substances Act. Although a tenant may request a “reasonable accommodation” under Fair Housing laws, to smoke marijuana in a non-smoking building, we suggest as a compromise that marijuana can also be inhaled using a vaporizer or ingested using foods available in medical marijuana stores. It may also be possible to find recipes for preparing marijuana in cooked foods.

Although there may still be some confusion about what constitutes a smokefree building, our definition is no smoking anywhere on the premises except in a carefully designated outdoor area. And if tenants complain that they are breathing smoke from that designated smoking-permitted area, it should be eliminated. A no-smoking policy should also include hookah and cigars.

For additional information, please visit www.smokefreeapartments.org or call the Smokefree Apartment House Registry at 818/363-4220. FAX: 805-498-6417

Esther Schiller is the Director of the Smokefree Apartment House Registry, a free vacancy listing service for owners of smokefree buildings.

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