

Protect Your Property from Tobacco Smoke *by Esther Schiller*

A recent survey showed that more than 85% of apartment renters and owners/managers in California agree that tobacco smoke is harmful to people. It's also harmful to an apartment unit. The small particles in tobacco smoke can stick to surfaces, such as walls ceilings, and even the ventilation system. 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.

Adopt a No Smoking Policy

What can an apartment owner do? The answer is easy. Adopt a no smoking policy for your building. Current state law requires no smoking in enclosed common areas of most apartment buildings. But there is no law that prevents an apartment owner from going beyond that, and requiring 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. Landlords can 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.)

How to Transition Your Building

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.

Notify prospective tenants that you are transitioning your building to non-smoking including the units, balconies and patios. We suggest, if at all possible, that a portion of the outdoor common area be designated as the “smoking 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, the children’s’ play

area, or the barbeque area. Most important, tell your current residents that you are transitioning to a non-smoking policy.

Make certain that all of your new tenants sign a no smoking lease addendum or that you have made “no smoking” part of the house rules. 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.) 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.

Can You Be Liable?

The problem with tobacco 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. This means it is 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.

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 should 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, gives offense to senses... or obstructs reasonable and comfortable use of property... An offensive annoying, unpleasant, or obnoxious thing or practice; a cause or source of annoyance, especially a continuing or repeated invasion or disturbance of another’s right, or anything that works a hurt, inconvenience or damage.”
(Black’s Law Dictionary, sixth edition)*

Even in communities with rent control, there is a provision under the law to evict for nuisance.

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 it is a pollutant.

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 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 www.californialung.org/thecenter).**

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