



# UNDERSTANDING LEGAL ISSUES

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## PURPOSE

Learning the local, state, and federal laws pertaining to multi-unit housing

## OUTCOMES

- Legal cases on smoke-free multi-unit housing exist
- States have specific laws about tobacco and multi-unit housing
- Federal laws exist to protect renters exposed to secondhand smoke
- Smoke-free multi-unit housing policies are legal and are not discriminatory
- Permitting smoking has more legal liabilities than prohibiting smoking

# WHAT LEGAL ISSUES ARE RELATED TO SMOKE-FREE HOUSING?

Legal issues related to smoke-free policy adoption in multi-unit housing continue to be an important topic of discussion when working with property managers or meeting with renters. The primary legal concerns include:

- State law coverage of residential properties;
- Federal housing law;
- Discrimination;
- Liability;
- Reasonable accommodation requests for disabilities;
- Policy enforcement; and
- Subsidized housing special concerns.

It's unlikely that your organization will require you to offer legal advice to managers and renters; however, you will be looked to as a credible resource for managers and renters, so it's important that you know how to answer questions related to legal concerns.

## EXISTING LAWS AND SMOKE-FREE POLICIES

### *State and local laws*

As more states adopt smoke-free policies covering public places, the intrusion of secondhand smoke through multi-unit housing buildings becomes more noticeable. Renters are becoming more assertive about requesting smoke-free living as the evidence of the harm posed by secondhand smoke continues to build.

State clean indoor air or smoke-free laws may have an impact on smoke-free policies for multi-unit properties. Most state-level laws addressing indoor public places include a broad definition of what an indoor public place is; this definition frequently includes a listing of examples of public places that are encompassed by the definition.

In state laws with language similar to Minnesota's Clean Indoor Air Act, the indoor common areas of multi-unit housing properties are required to be smoke free. The state law may also cover other areas that are part of an apartment complex such as places of employment.

Most state smoke-free laws have a "place of employment" definition. Therefore, if the apartment complex has a rental office or other areas that are frequented by employees (such as a utility room), then those areas have to be smoke-free, as well. State laws generally do not control for drifting smoke, so if smoke drifts from apartment units

## KEY TERMS:

**LEASE:** *A legal agreement between a property owner or manager and a renter that gives the renter the right to occupy a unit in exchange for payment of rent and agreeing to various rules of conduct. State laws determine whether the lease can be oral or must be in writing.*

**PROPER NOTICE:** *The legally required amount of time that a property owner or resident is required to provide to the other party prior to a change in tenancy.*

**WAIVE:** *To give up a claim or a right.*

**BREACH OF LEASE:** *When a renter or property owner breaks a rule or otherwise violates a rental agreement.*

**EVICTION:** *A court process to remove a resident or otherwise recover possession of real property by a legal process.*

**DISCRIMINATION:** *Treating a person differently due to their race, color, creed, national origin, marital status or other select characteristics. Reserved for characteristics that are considered innate, immutable and for categories of persons that have historically experienced discrimination.*

into a common area, most laws do not prohibit that, but rather just address the activity of smoking in the common area.

## KEY TERMS (CON'T):

**DISABILITY:** *A physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such impairment.*

**COVENANT OF QUIET ENJOYMENT:** *A condition of the lease in which a renter agrees to reside in the unit without disturbing other tenants.*

**NUISANCE:** *A condition or situation (such as loud noise or foul odor) that interferes with the use or enjoyment of property.*

**WARRANTY OF HABITABILITY:** *In a residential lease, a warranty from the landlord to the tenant that the leased property is fit to live in and that it will remain so during the term of the lease; also termed covenant of habitability.*

**RURAL DEVELOPMENT:** *Rural Development properties are supported by the Department of Agriculture (DOA). The DOA provides very low rates of interest or no interest loans to promote the development of housing that is offered at affordable rates. Also known as Section 515 properties.*

### *Federal statutes*

The federal government is becoming more active in promoting smoke-free policies for the properties that they subsidize, but currently no federal statute or regulation requires properties to remain smoking permitted or become smoke free.<sup>5</sup> The Department of Housing and Urban Development (HUD) also does not have any regulations

that mandate the “grandfathering” of current residents who smoke.<sup>5</sup>

The Department of Agriculture administers a program to encourage development of affordable housing in rural areas. The Department offers no interest or very low-interest loans to property developers if they agree to make their units available at affordable rates for a specific term of years. This program is called Rural Development, or Section 515. The Department of Agriculture does not have any regulations controlling smoke-free policies or grandfathering for the properties that they administer.<sup>6</sup>

Federal statutes that may be involved in addressing secondhand smoke transfer in multi-unit properties are statutes that prohibit discrimination in housing based on a disability. Three acts are generally used: the Federal Rehabilitation Act, the Americans with Disabilities Act, and the Federal Fair Housing Act. The one that could be used in most housing situations is the Fair Housing Act because it applies to almost all types of housing.

Under these statutes, the term “disability” means:

- a physical or mental impairment that substantially limits one or more major life activities;
- a record of such an impairment; or
- being regarded as having such impairment.<sup>7</sup>

Certain health conditions, such as asthma or chronic obstructive pulmonary disorder (COPD), may be of a severity that they could be considered disabilities. If so, and the conditions are exacerbated by exposure to secondhand smoke, then a resident with a disability could be entitled to a reasonable accommodation to ensure equal access to housing.<sup>8</sup> Discrimination actions, based on a claim that a request for a reasonable accommodation was denied, have been successful.<sup>9</sup>

## DISCRIMINATION

A concern frequently raised by property managers in reference to smoke-free policies is whether the policies are discriminatory. Managers are sensitive to the legal protections afforded rent-

ers and suspect that the activity of smoking may somehow be protected, or that a person's status as a smoker may be protected. As you will learn in the following section, these concerns are unfounded.

*Smoking is not a protected activity*

The Constitution, federal, state, and local laws provide some protection to select activities that

are considered a fundamental privacy right, or that are deemed to be socially beneficial.<sup>10</sup> "Activities that are specially protected under the fundamental right to privacy include marriage, procreation, abortion, contraception, and the raising and educating of children."<sup>12</sup> Several federal and state court opinions have held that smoking is not a fundamental privacy right so units of government and private entities may regulate the activity.<sup>13</sup>

## CASE STUDY:

# THE MINNESOTA CLEAN INDOOR AIR ACT

The Minnesota Clean Indoor Air Act (MCIAA) took effect in 1975. Sections of the MCIAA were amended in 2007 under the state's Freedom to Breathe Act.<sup>1</sup> The MCIAA prohibits the smoking of tobacco products in indoor public places. The law outlines several thorough definitions so that proprietors understand exactly which areas of their property need to be smoke free.

In the MCIAA, "public place" is defined as "any enclosed, indoor area used by the general public, including, but not limited to, restaurants; bars; any other food or liquor establishment; retail stores, and other commercial establishments; educational facilities other than public schools...; hospitals; nursing homes; auditoriums; arenas; meeting rooms; and common areas of rental apartment buildings."<sup>2</sup>

"Indoor area" is also defined in the MCIAA. It is defined as "all space between a floor and a ceiling that is bounded by walls, doorways, or windows, whether open or closed, covering more than 50 percent of the combined surface area of the vertical planes [wall space] constituting the perimeter of the area, whether temporary or permanent. A [standard] window screen is not considered a wall."<sup>3</sup>

Because of these definitions, the MCIAA prohibits smoking in indoor common areas of rental apartment buildings. "Common areas are building spaces that are or can be used by any of the tenants. Indoor common areas include rental offices, entrances, hallways, laundry rooms, party rooms, exercise rooms, public restrooms, and indoor swimming pool areas."<sup>4</sup> In Minnesota, indoor common areas of owner-occupied multi-unit housing such as condominiums and townhomes are not covered by the MCIAA because the Minnesota Department of Health's interpretation of the law is that common interest community common areas are part of each owner's unit, and therefore are considered private residences not covered by the MCIAA.

### *Smokers are not a specially protected category of people*

Legal protections based on personal characteristics are limited to very few general categories of persons. The most commonly recognized categories are those based on race, national origin, ethnicity, gender, and religion. In order for a characteristic to be eligible for protection, courts generally look to see if the category is “inherent,” (an inherited characteristic), “immutable” (a characteristic that cannot be changed) and has been subject to historical discrimination. Courts have not found that smokers as a category of persons have these characteristics, and therefore, special legal protection has not been extended to smokers.<sup>4</sup>

### *An addiction to nicotine is not a disability*

Questions may arise as to whether a smoker’s addiction to nicotine can be considered to be a disability under any of the federal or state disability statutes. If the addiction was determined to be a disability, then the smoker may be able to request a “reasonable accommodation.” This issue was decided in a case involving a prisoner requesting an accommodation to smoke in his cell when the prison adopted a smoke-free policy.<sup>12</sup> The court decided that it would be absurd to consider all smokers disabled because that would cover about 25% of the population.<sup>12</sup>

### *Managers can avoid discrimination claims*

Even though smokers are not a suspect class of persons deserving of legal protection, property owners should implement the smoke-free policy by prohibiting the activity of smoking and not by refusing to provide residency to smokers. The smoke-free multi-unit housing movement’s purpose is not to target smokers but to prevent nonsmokers from being exposed to secondhand smoke, so the smoke-free policy is about the smoke, not the smoker.

Basing the policy on smoking can also help to reduce the potential risk of a lawsuit. Certain classes of individuals that do receive legal protection due to a personal characteristic also tend to smoke at a much higher rate than the general population; Native Americans and individuals

with mental illness smoke at approximately twice the rate of the general population.<sup>13,14</sup> Refusing tenancy to a smoking individual in these protected categories could potentially result in a claim of discrimination. The prospective renter could claim that the refusal was actually based on their status as someone in a protected class and that the alleged reason of being a smoker was just a pretext. To avoid this type of “disparate treatment” claim, property owners should not base a rental decision on whether a person smokes or not. Make the residency contingent on adhering to the non-smoking policy so that a smoker can still live in a smoke-free building as long as he does not smoke in smoke-free areas of the property.

### *A note about federally subsidized housing*



In federally subsidized properties, rental decisions cannot be made based on an individual’s status as a smoker. A notice that was issued in 2011 by the Department of Housing and Urban Development regarding smoking in project-based Section 8 and other subsidized properties contained the following guidelines regarding inquiries about a resident’s smoking status:

The O/A [owner/agent] must **not** have policies that:

- Deny occupancy to any individual who smokes or to any individual who does not smoke who is otherwise eligible for admission.
- Allow the O/A to ask at the time of application or move-in whether the applicant or any members of the applicant’s household smoke. However, if the O/A has established a smoke-free building as of a certain date, the O/A must inform applicants after that date that the building is a totally smoke-free building. The O/A must not maintain smoking or nonsmoking-specific waiting lists for the property.
- Allow the O/A to ask at the time of recertification, whether the tenant or any members of the tenant’s household smoke.
- Require existing tenants, as of the date of the implementation of the smoke-free housing policies, to move out of the property or to transfer from their unit to another unit.<sup>15</sup>



VOLUNTARY SMOKE-FREE POLICIES FOR MULTI-UNIT PROPERTIES ARE LEGAL AND ENFORCEABLE IN EVERY STATE.

## LIABILITY

Because of the recognized and significant health risks posed by exposure to secondhand smoke, managers are rightly concerned about their exposure to liability based on their policies regarding secondhand smoke.

### *Liability risks for smoking permitted properties*

A manager that continues to permit smoking in the building, or anywhere on the property, faces the risk of potential lawsuits or federal administrative action. Successful legal actions have been brought across the country based on common law claims of nuisance, breach of the warranty of habitability, or trespass. Courts have found that the intrusion of secondhand smoke into individual residential units may rise to such a level as to make the unit unsuitable for habitation, or to severely affect the non-smoking resident's use and enjoyment of the property. However, even though the overwhelming scientific evidence has established that any amount of exposure to secondhand smoke is dangerous, courts have not been consistent in finding exposure a nuisance.

Renters with severe health issues, such as asthma or COPD, may risk serious health consequences if exposed to secondhand smoke. These individuals may also be considered disabled under federal or state disability statutes. If they are determined to be disabled, then they are entitled to a reasonable accommodation to allow them to access their

dwelling unit without being exposed to secondhand smoke. The determination of whether an individual is disabled is decided by administrative agencies on a case-by-case basis, as is the reasonable accommodation that will be granted. Requests for reasonable accommodations to alleviate exposure to secondhand smoke have been successful, and in one case, the required solution was the implementation of a smoke-free policy for the building.<sup>9</sup>

### *Liability for smoke-free properties*

Because smoke-free policies are a relatively new concept for multi-unit housing properties, some managers are concerned that adoption of these policies may expose them to new and potentially unidentified liability risks. A common hypothetical scenario raised by managers concerns the marketing of the property as being "smoke free." Managers are concerned that they may be subject to liability claims if they cannot guarantee that their property is consistently smoke free. What if a violation of the policy is occurring that they are not aware of, and a resident gets sick? Would the manager be liable because the property was represented as being "smoke free?"

To date, no cases have been brought by a renter of a smoke-free property alleging negligence or any other legal claim based on a failure of the management to guarantee a smoke-free environment. Including disclaimer language in the smoke-free lease addendum can help to protect the property

owner. Model language usually includes provisions that the property owner is not guaranteeing a smoke-free environment, but just making a best effort to provide a smoke-free property. Additional provisions can also assist the manager with enforcement. Language can be included that places some responsibility on all residents to participate in the enforcement of the policy by agreeing to notify the property management of any infractions. (See the “Model Smoke-Free Lease Addendum” in the Sample Tools section).

## LEGAL TIPS FOR POLICY IMPLEMENTATION & ENFORCEMENT

Voluntary smoke-free policies for multi-unit properties are legal and enforceable in every state. Property owners have the right to enforce restrictions on smoking as they would restrictions on other activities, such as loud noise or pet ownership.

When speaking with property managers, you can suggest three tips to help with implementation and enforcement:

- **Prepare everyone:** Property owners should ensure that all residents and employees are prepared for the smoke-free policy. This can be done by hosting presentation sessions and conducting a survey. Plenty of notice should be provided to everyone involved so that they have time to adjust to the change and make decisions on whether to stay or not.
- **Document everything:** The property owner should have detailed language in the smoke-free policy that defines the coverage of the policy (the areas that are covered) and all the enforcement steps. Infractions should be documented with written notices.
- **Enforce every violation:** Make sure that infractions that occur are enforced consistently (in every case), uniformly (against

Property managers should enforce a smoke-free policy in the same manner as other lease provisions.



all parties that violate the policy), and in a timely manner (soon after the violation occurs). This will help ensure that the courts will uphold the policy.

## OTHER CONCERNS FROM MANAGERS

### *Providing a smoking shelter*

Many managers mistakenly believe that providing a shelter where smoking is allowed is a fair way to meet the needs of all of their renters. The decision to provide a smoking shelter is entirely up to the manager, but you should inform managers that smoking shelters are often costly to build and maintain, may increase cigarette litter and noise on the property, and might create areas where a lot of smoke can easily drift into the building through open windows and doors. No state laws and no federal laws require managers to provide designated smoking areas or shelters. However, most state indoor air laws have a specific definition of what an “indoor” space is, so if you are working with a manager who wants to provide a shelter, educate him on that definition so that the shelter is not considered an “indoor” common area.

### *Medical marijuana*

If you live in a state that allows for the use of medical marijuana, you may have managers asking if they have to allow renters to smoke marijuana even when the building has a smoke-free policy. Marijuana is still classified federally as a Schedule 1 controlled substance so its possession and use remains a federal crime. The Department of Housing and Urban Development’s position on medical marijuana can be summarized as follows:

- Prospective residents who are known current users of medical marijuana cannot be accepted as residents in subsidized properties;
- Requests for reasonable accommodations allowing an individual to use medical marijuana cannot be approved; and
- The housing authority or owner/agent of a subsidized property has discretion on a case-by-case basis on whether to pursue an eviction action against a current resident who is using medical marijuana.

Therefore, managers do not have to allow renters to smoke marijuana in their units, even if the renter claims medical reasons.

### *Chapter References*

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2 Minn. Stat. § 144.413 subd. 2 (2012)

3 Minn. Stat. § 144.413, subd. 1a. (2012).

4 *Freedom to Breathe in Rental Apartment Buildings*. Saint Paul: Minnesota Department of Health, 2007. PDF.

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6 Thompson, K. “Interpretation of the Rural Development’s Policy as to the Establishment of Smoke-free Multi-residential Properties Assisted by USDA Rural Development.” Letter to Warren Ortland, Staff Attorney at the Public Health Law Center. 9 Oct. 2008. N.p.: n.p., n.d. N. pag. Web. Jan. 2013. <<https://dl.dropbox.com/u/23584390/HUD%20Letters/Rural%20Development%20Letter.pdf>>.

7 42 USC § 12102 Sec.3

8 The Department of Housing and Urban Development And The Department Of Justice. *Reasonable Accommodations under The Fair Housing Act*. Washington: The Department Of Housing And Urban Development and the Department of Justice, 17 May 2004. pdf.

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10 “Protected Activity.” *Black’s Legal Dictionary*. 7th ed. N.p.: n.p., n.d. 1238. Print.

11 Graff, S. Tobacco Control Legal Consortium, There is No Constitutional Right to Smoke: 2008 (2nd edition, 2008).

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13 McClave, A., L. McKnight-Eily, S. Davis, and S. Dube. “Smoking Characteristics of Adults With Selected Lifetime Mental Illnesses: Results From the 2007 National Health Interview Survey.” *American Journal of Public Health* 100.12 (2010): 2464-472. Web.

14 Centers for Disease Control and Prevention. “Vital Signs: Current Cigarette Smoking Among Adults Aged ≥ 18 Years—United States, 2005–2010.” *Morbidity and Mortality Weekly Report* 60.33 (2011):1207–12.

15 U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Coordinating Center for Health Promotion, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.

## CHAPTER CONCLUSIONS:

### *State Laws:*

- No state law prohibits the voluntary adoption of smoke-free policies by private market-rate properties.
- State laws may already prohibit smoking in certain portions of multi-unit residential properties, such as common areas, offices and utility rooms.
- State disability statutes may be a tool to help residents with disabilities stop their exposure to secondhand smoke intrusion.

### *Federal Laws:*

- No federal law requires that multi-unit properties, subsidized or not subsidized, remain smoking-permitted, or that the property be smoke-free.
- Federal disability statutes may be helpful in reducing or alleviating exposure to secondhand smoke for individuals with disabilities.

### *Discrimination:*

- The activity of smoking does not receive constitutional protection, nor is it protected under any federal, state or local law.
- An individual's status as a smoker is not a category of persons that receives any legal protection.

### *Disability:*

- An individual's status as a smoker is not a disability because an addiction to nicotine is not a disability.
- Because of the health risks posed by secondhand smoke, courts are unlikely to grant reasonable accommodations allowing individual residents to smoke in their unit in violation of a smoke-free policy.

### *Liability:*

- Residents bothered by secondhand smoke intrusion have successfully brought legal claims against property owners and other neighbors based on claims of nuisance or the breach of the warranty of habitability.
- Residents with severe health conditions have successfully used the federal disability statutes to request reasonable accommodations to prevent exposure to secondhand smoke.

### *Policy Implementation and Enforcement:*

- Property owners should follow state and local notice requirements when adopting a smoke-free policy.
- Property owners should implement the policy based on prohibiting the activity of smoking and not on prohibiting smokers.
- Smoke-free policies should be enforced the same as any other material term of the lease, and the policy should be enforced uniformly, consistently and in a timely manner.
- Violations of the provisions of a smoke-free policy have resulted in successful eviction actions against residents.

### *Subsidized Housing Special Considerations:*

- Implementation of a smoke-free policy, and enforcement of the policy, is subject to special requirements if the property is federally subsidized.

## PRACTITIONER'S CHECKLIST:

# DO YOU KNOW THE LEGAL CONCERNS REGARDING SMOKE-FREE HOUSING?

- Have you identified the local and state laws that pertain to multi-unit housing in your area?
- Do you know what your state's rental notification requirements are?
- Do your landlord educational materials emphasize that smoke-free policies are legal and non-discriminatory?
- Do you have talking points prepared to address landlord concerns like discrimination, nuisance, liability, and enforcement?
- Do you have local resources identified that you can refer landlords and renters to for legal help regarding smoking in multi-unit housing?

## SAMPLE TOOLS

- *Model Smoke-Free Lease Addendum*
- *Policy enforcement tip sheets*
- *HUD Notices regarding smoke-free policies in publicly-owned multi-unit housing*

## RESOURCES

- *Americans with Disabilities Act:* [www.ada.gov/cguide.htm](http://www.ada.gov/cguide.htm)
- *Federal Fair Housing Act:* [www.ada.gov/cguide.htm](http://www.ada.gov/cguide.htm)
- *Federal Rehabilitation Act:* [www.ada.gov/cguide.htm](http://www.ada.gov/cguide.htm)
- *Public Health Law Center (PHLC):* [www.publichealthlawcenter.org](http://www.publichealthlawcenter.org)
- *Tobacco Control Legal Consortium (TCLC):* <http://www.publichealthlawcenter.org/programs/tobacco-control-legal-consortium>
- *U.S. Department of Agriculture (USDA) Rural Development:* [www.rurdev.usda.gov](http://www.rurdev.usda.gov)
- *U.S. Department of Housing and Urban Development (HUD):* [www.hud.gov](http://www.hud.gov)