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## NO-SMOKING POLICIES IN APARTMENTS

Smoking bans have become the indisputable norm in the workplace and are now a clear trend in restaurants, entertainment venues and even hotels. In July 2006, the country's largest hotel chain, Marriott International, banned smoking in all of its U.S. and Canadian rooms. Multifamily firms are now considering portfolio-specific and property-specific smoking bans, as well as less restrictive policies that limit smoking to certain floors or buildings within a community.

What is optional now may not be for long. This month, the Calabasas, CA City Council joined several other California cities in restricting smoking in apartments. The Calabasas ordinance, which is scheduled to go into effect on February 16, requires at least 80 percent of apartment buildings to be permanently designated nonsmoking. Owners have until 2012 to comply. The trend is actually more common in public housing than privately owned apartments at this point; at least 47 public housing agencies have banned smoking on their properties. This issue of the *Property Management Update* reviews the key financial and legal issues related to smoking bans and offers best practices for implementing one.

### Legal Considerations

One of the biggest reasons many apartment firms have been hesitant to adopt smoke-free policies is a mistaken belief that restricting a resident's ability to smoke on the property or within their apartment could violate the law. However, there is no "right to smoke" and smokers are not a protected class under fair housing laws. In fact, firms can actually reduce their legal liability by restricting or banning smoking.

It is well settled among state and federal courts that the act of smoking is not a protected activity under the U.S. Constitution. The courts have ruled that even if a policy singles out or places particular burdens on smokers, individually or as a group, the policy does not in and of itself violate the Constitution's Equal Protection Clause (*NYC Clash Inc. v. New York*, 315 F. Supp. 2d 461 (S.D.N.Y. 2004)). Other courts have said simply that "there is no state or federal constitutional right to smoke" (*Kurtz v. City of North Miami*, 653 So.2d 1025 (Fla.1995)) and "[t]here is no more a fundamental right to smoke cigarettes than there is to shoot up or snort heroin or cocaine or run a red light (*Fagan v. Axelrod*, 550 N.Y.S.2d 552, 559 (1990)).

An addiction to tobacco, nicotine or smoking is not considered to be a disability under the Fair Housing Act or the Americans with Disabilities Act. In fact, the U.S. Department of Housing and Urban Development (HUD) has specifically stated that smokers are not a protected class under federal fair housing regulations. While HUD has not promulgated a policy with regard to smoking, it has said that it leaves the authority to regulate smoking in multifamily dwellings to individual property owners as long as those policies are consistent with applicable state and local laws. According to HUD, rules restricting smoking in rental housing must be "reasonable" and express a legitimate concern for the safety of residents and the condition of individual apartment units and the property generally. For example, a reasonable policy would "grandfather" existing residents or amend leases upon renewal, not during an existing lease term. Federally assisted properties that are required to use the HUD model lease, however, must obtain prior approval of a smoke-free lease amendment just as any other lease amendments must be approved.

In contrast to conventional wisdom, apartment owners may be held more legally liable by allowing smoking than by restricting it. Residents have become more knowledgeable about the risks of secondhand smoke and savvy about pursuing legal options to protect their health. State courts have ruled against apartment owners and have ordered significant rent reductions and other penalties under the nuisance, warranty of habitability, and quiet enjoyment theories of law. In addition, the courts have held that an apartment resident with severe breathing difficulty that is exacerbated by secondhand smoke may actually be entitled to a reasonable accommodation under the Fair Housing Act.

Firms that decide to restrict or ban smoking should consider implementing a prospective policy at lease renewal and for new leases instead of trying to amend current lease agreements. The lease language should make clear the purpose of the policy, define proscribed activities and spell out owner and resident responsibilities. Importantly, lease language should limit an owner's liability for violations of the policy when the owner takes all reasonable steps to enforce the policy. The lease should not create an express or implied warranty that a property's smoking policy will increase safety, enhance

habitability or improve air quality. Finally, the lease should clearly define what constitutes a resident breach of the smoking policy and the consequences of a breach.

### **Financial Considerations**

In addition to legal questions, apartment firms also cite revenue-related concerns that could result from alienating prospective and current residents. But recent resident surveys indicate that a majority of renters would actually prefer to rent an apartment in a smoke-free community. In addition, about half say that they have moved or would move because of secondhand smoke. Smoking bans can also increase net operating income by reducing expenses. It is markedly more expensive to turn a unit where a smoker resided. Some estimates suggest that cleaning walls, carpets, appliances and fixtures exposed to smoke can add \$400 to \$3,000 to unit turnover costs, depending on the length of residency and how much the resident smoked in the unit.

Reducing fire incidents is another important consideration with cost-saving implications. According to recent research by the Department of Homeland Security's National Fire Incident Reporting System (NFIRS), 40 percent of apartment fire deaths are attributable to smoking, and 16 percent of non-fatal fire-related injuries are the result of smoking. Restricting smoking even in some apartment units can help owners reduce the extremely costly risk of sustaining a fire. Complete or partial smoke-free policies, which reduce a firm's risk of fire damage and human injury, may also reduce property insurance premiums, although no statistics are readily available to indicate what kind of premium advantage firms with smoking bans enjoy.

### **Best Practices for Implementing a Smoke-Free Policy: Communication is Key**

The key to any successful smoke-free policy is a strategic communications plan. First, firms should consider conducting a resident survey and hosting a community meeting to discuss a new smoking policy well in advance of implementing such a change. A survey will help firms determine how many residents actually smoke in their apartments and common areas so they can assess how a particular community could be impacted by new rules. It will also help firms decide whether smoking restrictions should be applied to all or some apartment units, common areas or outdoor space.

Surveys and community meetings are also valuable ways for firms to identify what issues residents really care about, where residents are willing to compromise and where they are not. Residents will also be more amenable to new smoking rules if they have been invited to communicate their perspective on the matter and are advised of the new rules before they are put into practice.

It is important to ensure that community managers, leasing consultants, and other site-level staff are knowledgeable about any smoking policy. It is equally important that they are well trained in communicating the policy to prospective residents, current residents and guests, both as an enforceable lease provision and as a community amenity. As with any change to community rules, a new smoking policy must be "sold." Site staff should be prepared to present all of the positive aspects of the new rules. For example, discussions with residents and/or written brochures might cover the scientific conclusion that there is no safe level of secondhand smoke and how allowing smoking actually impacts all residents by increasing fire hazard, threatening residents' personal property and increasing operating costs (and thus rent) because of higher cleaning costs. To build good will, encourage resident compliance and speed up implementation, communities could offer incentives to those who are willing to go "smoke free" prior to their lease renewal. Prospective residents should be advised of a community's smoking policy in writing at the time of an application, if not before. Residents should also be reminded that there is no legal right to smoke, even in a leased apartment.

Achieving resident buy-in is essential to enforcement, since residents likely will be the most effective means of identifying violators of the policy. Residents need to understand and feel positive about the policy, and they should feel comfortable communicating potential violations to community staff.

### **Conclusion**

Property managers say complaints about secondhand smoke in apartment communities are on the rise. According to the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE), enhanced ventilation and air cleaning mechanisms cannot wipe out the potential health effects of secondhand smoke. A 2005 ASHRAE document states: "At present, the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity." Forward-thinking apartment firms should consider whether limiting smoking is a sound business strategy.

*The information presented in this Update is not intended to be legal advice. It is intended to assist firms in understanding this issue area, but it may not apply to the specific fact, circumstances or business situations of all firms. For specific legal advice, consult your attorney.*

*For more information on this Property Management Update, contact NMHC's Vice President of Employment Policy & Special Counsel, Betsy Feigin Befus, at 202/974-2339 or at [ebefus@nmhc.org](mailto:ebefus@nmhc.org).*