

SMOKE-FREE MULTI-UNIT HOUSING: LEGAL ISSUES AND IMPLICATIONS



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Maryland Smoke Free Apartments



www.mdsmokefreeapartments.org

Why Create a No-Smoking Policy?

Soaring Demand

- ❑ 3/4 of renters say that all “other things being equal” they would choose a building where smoking is prohibited
- ❑ 9 out of 10 people do NOT smoke in their apartment (smokers and non-smokers)

Lower Costs

- ❑ Lower maintenance and repair costs
- ❑ It costs between \$500 - \$3,000 more to rehab a smoker’s apartment.
- ❑ Lower insurance premiums
 - Insurance companies offer up to a 10% discount for smoke-free buildings

Reduce Risk of Fire

- ❑ Cigarette smoking is among the leading causes of fires in multi-unit buildings
- ❑ In 2008, lighted tobacco products caused an estimated 114,800 fires, 680 civilian deaths and \$737 million in direct property damage

Why Create a No-Smoking Policy?

Health Effects

- ❑ There is no risk-free level of exposure to secondhand smoke (“SHS”)
- ❑ Filters and ventilation systems cannot eliminate exposure of non-smokers to SHS
- ❑ SHS causes 30 times more lung cancer deaths than all regulated air pollutants combined
- ❑ Thirdhand smoke, or tobacco smoke residue that imbeds into surfaces, contains the same deadly chemicals as SHS and lingers for weeks or months.

Reduce Liability

- ❑ The National Multi-Unit Housing Council warns: “apartment owners may be held more legally liable by allowing smoking than by restricting it.”
- ❑ State courts are increasingly ordering rent reductions and other penalties for failure to protect tenants from SHS.

Is it Legal?

- ▣ There is NO constitutional right to smoke
- ▣ Under Common Law, a landlord can restrict tenant activities as long as no constitutional right is violated
- ▣ Neither federal nor state law prohibits private property owners and associations from adopting smoke-free policies for all parts of their properties

Tenant Rights

There is **NO** legal “right” to smoke

- ❑ There is no fundamental right to smoke under the Constitution
- ❑ The act of smoking is entitled to only a minimal level of protection under the Equal Protection Clause

No smoking policies do **NOT** violate a tenant’s right to privacy

- ❑ The constitutional right to privacy only applies to marriage, intimate relationships and rearing of children
- ❑ Property owners have a legal right to restrict smoking in their buildings

No smoking policies do **NOT** discriminate against smokers

- ❑ Smoking is a chosen behavior, not an inherent characteristic like gender or race. Subsequently, smoke-free housing policies are not discriminatory.
- ❑ Addiction to nicotine or smoking is not considered a disability under the Americans with Disabilities Act (ADA)

Who Has the Authority to Make Housing Smoke-Free?

- ▣ No state or federal law prohibits smoking in private residences
 - In September, CA enacted a law expressly permitting landlords to prohibit smoking, or the use of any tobacco products, in their buildings.
 - A small number of states have enacted legislation prohibiting smoking in common areas of multi-unit housing
- ▣ In every state private landlords, condominium associations and public housing authorities can prohibit smoking in individual units as well as common areas
- ▣ Currently, 12 states have laws that totally preempt local smoke-free legislation. However, in the remaining 38 states local governments can pass smoke-free housing legislation.

Legal Claims

- ▣ Property owners not only have the right to prohibit smoking, but may in fact be liable for failure to do so when another tenant is affected by SHS
- ▣ Tenants adversely affected by SHS can seek relief under a variety of legal theories



Legal Claims: Preliminary Measures

Before taking legal action:

- ▣ **Ask the smoker** to refrain from smoking in the building
- ▣ **Familiarize yourself with lease provisions** or policies governing the complex
- ▣ **Notify the landlord** – Many landlords are unaware of the problems caused by SHS or their authority to prohibit or restrict smoking in the building
- ▣ **Document the problem!** Aggrieved residents should document:
 - What is the issue?
 - Where does the SHS originate?
 - How does the smoke affect you?– i.e. letter from a physician attesting to the effect of the SHS on the resident's health
 - Did you lose use of a room or were you forced to leave because of SHS?
 - Measure SHS Exposure

Legal Claims: Breach of Contract

Nuisance Clause

- ❑ Most rental and condominium agreements prohibit tenants from engaging in any activity that interferes with another tenant's "peace or well being."
- ❑ Smoke drift may constitute a nuisance clause violation if the smoke causes others discomfort or health problems.



Legal Claims: Common Law Remedies

Warranty of Habitability and Covenant of Quiet Enjoyment

- ▣ These legal theories require landlords to provide safe housing that is fit for occupancy and free from ongoing disturbances.
- ▣ Most states provide these warranties by statute or common law. In addition, both are commonly implied in a residential lease.
- ▣ In successful cases, plaintiffs have been awarded:
 - Rent reductions/reimbursements
 - Monetary damages for cleaning costs and medical bills
 - An injunction to stop neighbor from continuing to smoke onsite

Legal Claims: Common Law Remedies

Constructive Eviction

- ❑ Occurs when a landlord, by acting or failing to act, makes an apartment unfit for occupancy or deprives a tenant of the use of the unit and the tenant moves out
- ❑ The lease is terminated and the tenant may seek damages against the landlord.

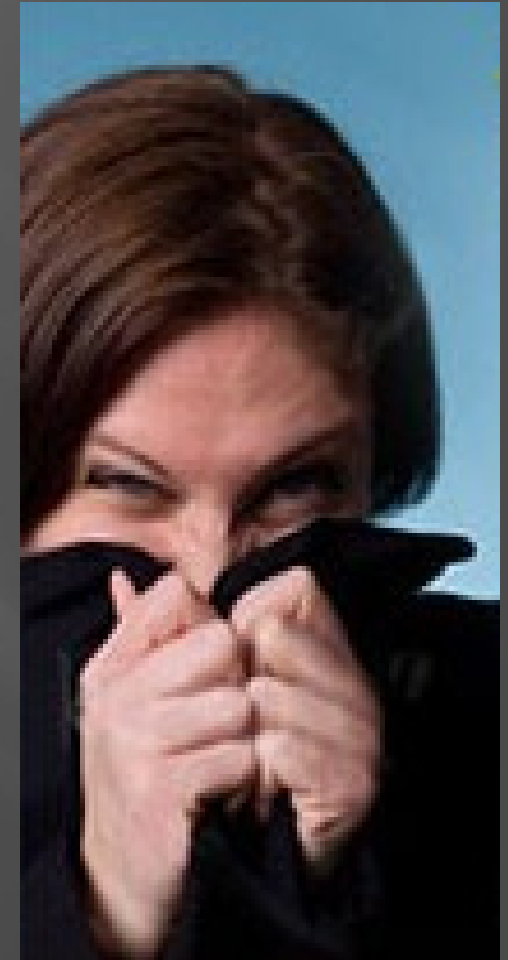
Trespass

- ❑ An improper physical interference with one's person or property that causes injury to health or property
- ❑ There is no legal consensus among the states whether a substance (e.g. gas, smoke) can trespass, and if so, what substances qualify.

Legal Claims: Common Law Remedies

Nuisance

- ❑ A private nuisance is defined as anything that *substantially interferes* with the enjoyment of life or property. Nuisance includes all tangible intrusions on another's property, including noise, odor and light.
- ❑ Several courts have found that smoke drift can constitute a nuisance. However, the plaintiff must show the existence of repeated conduct and harm to his person or property
- ❑ A nuisance action may be brought against the offending tenant or the landlord if he was aware of the conduct and failed to take action.



Legal Claims: Disability Laws



The Americans with Disabilities Act and Fair Housing Act

- ❑ Allows persons with disabilities to seek reasonable accommodations from landlords in order to address SHS health hazards.
- ❑ To qualify as disabled, the affected tenant must show a *severe and long-term* hypersensitivity to cigarette smoke that substantially limits one or more major life activities.
 - Chronic breathing problems or chemical sensitivity qualify as disabilities; however, addiction to smoking does not.
- ❑ State disability laws provide individuals suffering from the effects of SHS with an additional avenue to seek legal redress.

HUD Policy

- ▣ In July 2009 HUD issued a notice encouraging public housing authorities (PHA) to adopt smoke-free policies
- ▣ In September 2010, HUD encouraged owners participating in Multifamily Housing rental assistance programs (i.e. Section 8, rent supplement, etc.) to adopt smoke-free housing policies and implement the following guidelines:
 - Owners must provide at least 30 days notice to existing tenants
 - “Grandfathering” of smoking tenants is permitted, but not required
 - No individual can be denied occupancy because they smoke
 - Repeated violations of the non-smoking policy may result in eviction
- ▣ Over 250 Public Housing Authorities in 27 states have implemented smoke free policies
 - Boston, Massachusetts became the latest (and largest) city to ban smoking in public housing, beginning in September 2012

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Additional Resources

Global Advisors on Smokefree Policy

- ▣ <http://www.njgasp.org/>

Tobacco Control Legal Consortium

- ▣ <http://www.tclconline.org/>

The Center for Social Gerontology

- ▣ <http://www.tcsg.org/>

Smoke-Free Apartment House Registry

- ▣ <http://www.smokefreeapartments.org/>

MD Smoke-Free Apartments

- ▣ www.mdsmokefreeapartments.org

Presenter

William Tilburg, J.D.

Legal Resource Center for Tobacco Regulation, Litigation and Advocacy

University of Maryland School of Law

500 West Baltimore Street

Baltimore, MD 21201

wtilburg@law.umaryland.edu

(410) 706-0580

tobacco@law.umaryland.edu