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## **Tobacco Smoking at Residential Rental Properties**

### **I**

#### **INTRODUCTION**

The anti-smoking movement has been gathering steam in California and throughout the country ever since secondhand smoke was declared a human carcinogen a decade ago. Heartened by their success in gaining passage of state laws and local ordinances that restrict smoking in the workplace and many other indoor and outdoor public areas, anti-smoking advocacy groups have turned their attention to smoking in multi-unit housing. Many communities have passed ordinances restricting smoking in multi-unit common areas and requiring set asides of certain numbers of units as smoke free. Recent surveys indicate that over 80 percent of renters in California prefer housing with smoke-free areas, but in the past, residents have been reluctant to ask for non-smoking areas because it had not been required by law.

As the new local ordinances have received nationwide media coverage, property owners are receiving complaints from non-smokers about smoking in common areas and about secondhand smoke seeping into their units from the units of their smoking neighbors. In addition, lawsuits have been filed against property management companies, alleging failure to warn about environmental tobacco smoke and alleging that secondhand smoke is a nuisance. State legislation has been introduced that would clarify the ability of property owners to restrict smoking on the property and in individual units.

### **II**

#### **RISING DEMAND FOR SMOKE-FREE UNITS**

Eighty-four percent of Californians do not smoke. A recent statewide telephone survey of 602 California apartment residents, commissioned by the American Lung Association of California's Center for Tobacco Policy and Organizing, found:



- 69 percent favored regulations requiring all apartment buildings to offer non-smoking sections, where all the apartments, patios, and balconies in that section were non-smoking.
- 39 percent would prefer to live in a building where smoking is not allowed anywhere.
- 46 percent experience secondhand smoke drifting into their own apartment.
- 61 percent favor a law requiring landlords to inform new tenants if there is a smoker in the apartment next door to the unit they are about to rent.
- 70 percent of survey respondents believed a tenant should be evicted for repeated violations of smoking prohibitions in a lease (43 percent definitely should / 27 percent probably should). Interestingly, this also means 30 percent of respondents did *not* think a tenant should be evicted for repeated violations of the lease.

### III

## RESTRICTIONS ON SMOKING IN THE WORKPLACE

Although tenants view the apartment building and their individual units as their home, larger complexes are also the workplace of the building manager and maintenance personnel. California's Labor Code Section 6404.5 bars smoking in any enclosed work area. Although "private residences" are exempt from this law, according to California's Legislative Counsel, common areas of apartment or condominium buildings or complexes such as lobbies, hallways, laundry rooms, stairways, elevators, and recreation rooms remain subject to the Labor Code's smoking prohibition if the areas are enclosed and are places of employment. The smoking prohibition also applies to residences licensed as family daycare homes during the hours of operation as a family daycare home and in those areas where children are present. The Labor Code requires the posting of 'no smoking' signs and requires employers to ask smokers to stop smoking in any enclosed work area. The Labor Code is enforced by local health departments and other local law enforcement agencies. Penalties start at \$100 for a first violation and increase thereafter. Workplace exposure to tobacco smoke is also addressed by Proposition 65 (discussed below).

### IV

## ENVIRONMENTAL TOBACCO SMOKE AS A TOXIC AIR CONTAMINANT

On January 26, 2006, the California Air Resources Board (ARB) identified environmental tobacco smoke (ETS) as a "Toxic Air Contaminant," meaning that it is now formally identified as an airborne toxic substance that may cause and/or contribute to death or serious illness. The listing is based on studies of exposure levels and health effects. In May 2007, the ARB indicated that it is now beginning to evaluate the need for action to reduce exposure by conducting an analysis of measures already in place, available



options, and costs for reducing the health risk from exposure. CAA will monitor this process as it takes place and participate when appropriate.

For additional information see: <http://www.arb.ca.gov/toxics/ets/factsheetets.pdf>

On June 27, 2006, the Office of the Surgeon General of the United States issued a report that concludes there is no risk-free level of exposure to secondhand smoke, and that nonsmokers exposed to secondhand smoke at home or work increase their risk of developing heart disease by 25 to 30 percent and lung cancer by 20 to 30 percent.

For a copy of the report see:

<http://www.surgeongeneral.gov/library/secondhandsmoke/report/>

## V

### HOUSING DISCRIMINATION

Under the California Fair Employment and Housing Act (Government Code Section 12960 ("FEHA")), individuals with disabilities are entitled to reasonable accommodations to ensure equal access to, and enjoyment of, their housing. FEHA prohibits discrimination based on physical disability, mental disability, and medical condition. "Physical disabilities" include physiological and anatomical conditions that limit a person's ability to participate in major life activities. Courts have found that individuals such as asthmatics, who are hypersensitive to tobacco smoke, are disabled because the tobacco exposure interferes with the major life activity of breathing. Under the FEHA, reasonable accommodations must be provided to the qualified disabled person unless that accommodation causes an undue hardship. Depending on the circumstances, such accommodations could range from (1) designating common areas or certain other portions of a building as smoke-free, (2) allowing the tenant to relocate to a different unit, or (3) allowing the tenant to terminate the lease without a penalty so that the tenant can move to other housing in order to obtain a smoke-free environment.

## VI

### IS IT LEGAL TO PROHIBIT SMOKING IN RESIDENTIAL RENTAL PROPERTY?

When it comes to tobacco smoke, both governmental restrictions and private restrictions in a lease are legal. There is no law that prohibits an owner from imposing restrictions. This type of policy is no different than restrictions on noise, quiet hours, pool use, pets, and guests – these are all house rules that protect residents and the owner's property. There is no constitutional "right to smoke." As long as it is a property owner's policy to prohibit smoking, rather than to refuse to rent to smokers, there should be no claim of unlawful arbitrary discrimination. According to a 1999 Legislative Counsel Opinion, "Discrimination against smokers by landlords serves legitimate business interests by potentially reducing the risk of fire damage and, in turn, reducing insurance and maintenance costs." In addition, civil rights suits in the employment context suggest that smoking is not a disability, and smokers are not a protected class. By contrast, a resident with an unusual sensitivity to tobacco smoke (*i.e.*, asthma, hypothyroid,



allergies, etc.) would be considered disabled under both California and federal law. Such a resident would be entitled to a reasonable accommodation, which could include limitations on smoking in common areas and nearby units from which smoke may drift, allowing the tenant to relocate to another unit or letting them out of the lease. The key liability risk in offering smoke-free housing is that residents will argue that you have made a promise of higher air quality. This concern can be minimized by language in the rental agreement.

## VII

### LIABILITY FOR FAILURE TO WARN REGARDING EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE: PROPOSITION 65

Proposition 65, the "Safe Drinking Water and Toxic Enforcement Act of 1986," (Health & Safety Code Sections 25249.5, *et seq.*) requires businesses with ten or more employees to provide notification to individuals about exposures to carcinogens and reproductive toxins. Tobacco smoke is listed as both a carcinogen and a reproductive toxin under Proposition 65. In addition, it contains over forty other listed chemicals, including arsenic, carbon monoxide, nicotine, lead, benzene and formaldehyde. Proposition 65 requires warnings for consumer products, environmental, and workplace exposures. Unlike the Labor Code's prohibition against smoking in the workplace, Proposition 65's "environmental" warning requirement is not limited to enclosed areas and applies to any area where smoking occurs. CAA and its special counsel, Jeffer, Mangels, Butler & Marmaro have developed Proposition 65 compliance guidelines, warning signs and warning brochures for use by members of the rental housing industry. CAA's recommended compliance methodology consists of two parts: warning signs to be posted on the property and a brochure to be provided to new and existing tenants. The brochure contains information regarding specific exposure sources that may be present on the property. Specific warning requirements vary depending on the size and layout of the property. The compliance guidelines and additional information about Proposition 65 is available on CAA's website at:

[http://www.caanet.org/AM/Template.cfm?Section=Prop\\_651&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=13&ContentID=5124](http://www.caanet.org/AM/Template.cfm?Section=Prop_651&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=13&ContentID=5124).

## VIII

### LOCAL REGULATION OF SMOKING IN PUBLIC PLACES

Local ordinances that restrict smoking in public places have been passed in many California communities. Some of these ordinances can be interpreted to prohibit smoking in certain interior common areas, entryways, or playgrounds of apartment complexes. The cities of Arcata, Oakland, Davis, Sacramento, Palo Alto, and Monterey, as well as San Mateo and Marin Counties have, to varying degrees, restricted indoor and outdoor smoking in public areas. Certain local ordinances apply to the interiors of buildings that are open to the public, including areas that may not be workplaces covered by the Labor Code. Other ordinances extend to outdoor public areas such as sidewalks, plazas, doorways, and entryways. The Cities of Davis and Arcata have the most restrictive ordinances. Arcata bans smoking in its entire downtown "Plaza" area. Davis bans smoking in most outdoor locations where people are likely to congregate,



including ATM lines, bus stops, and outdoor bar and restaurant seating areas, and it also forbids smoking within 20 feet of any building in which smoking is prohibited, except when passing through to another destination. Calabasas prohibits smoking outdoors within 20 feet of any person who is not smoking.

Modesto, San Ramon, Berkeley, San Diego, and the County of Stanislaus have all passed, or are about to pass, ordinances making outdoor children's recreational facilities, such as playgrounds, zoos, wading pools, and skate parks, smoke-free. These ordinances could cover playgrounds that are part of an apartment complex if the playgrounds are accessible to the public.

## IX

### LOCAL REGULATION OF SMOKING IN MULTI-UNIT HOUSING

After legislation at the statewide level to restrict smoking in apartment buildings failed in 2003 (AB 210 (Nation)), efforts to pass local laws to address the issue have increased. The Technical Assistance Legal Center (TALC), funded by the California Department of Health Services, provides California communities with free technical assistance on tobacco control policy issues. TALC's website<sup>1</sup> contains a host of information about local laws that address smoking, the legality of smoking prohibitions, and background regarding litigation over drifting secondhand smoke. In addition to serving as an information resource, TALC has developed a sample local ordinance that addresses smoking in multifamily housing. The sample ordinance contains a wide variety of provisions – allowing localities to pick and choose among various approaches - ranging from provisions for clear authority for owners to limit or prohibit smoking and notification requirements about non-smoking areas, to mandates that prohibit smoking in certain areas, in a certain percent of units, etc. Other provisions include a “grandfather” clause for existing smokers when owners convert a complex over time, a declaration that secondhand smoke is a nuisance, and options for private enforcement both by tenants and the public.

In the last two years many localities have passed ordinances specifically addressing smoking in multi-unit rental housing. The most stringent ordinances-those in Belmont and Calabasas-have received nationwide news coverage.

Belmont, Calabasas, El Cajon, and Temecula all prohibit smoking in indoor and outdoor common areas. Each of these four cities also over time extends the smoking prohibition to individual units. Belmont, Calabasas, and El Cajon additionally require a 20 foot non-smoking buffer around any smoke-free area. At the end of 2008, a prohibition goes into effect in Belmont on smoking in any residential rental unit that shares a floor or ceiling with another unit. By 2012, 80 percent of units in every apartment building in Calabasas must be smoke-free. Similarly, in Temecula 25 percent of units in new buildings with 10 or more units must be designated as non-smoking units. Existing buildings have five years to come into compliance.

The City and County of Sacramento have taken a different voluntary approach to the issue. Each has passed resolutions encouraging owners of multi-unit rental properties to



designate a certain percentage of units as non-smoking (City 25 percent, County 50 percent). Owners in the City who comply are eligible for “public recognition.”

## X

### SMOKING IN INDIVIDUAL UNITS

According to the American Lung Association, secondhand smoke that seeps in from neighboring units can pose both a health threat to sensitive individuals and a significant nuisance. Since the interiors of private dwellings are not covered by the laws and ordinances that address public areas, there are no clear guidelines for resolving these conflicts. Non-smokers have filed lawsuits against property owners and against their fellow tenants for causing or failing to stop exposures to environmental tobacco smoke. They use legal theories such as nuisance, battery, breach of the covenant of quiet enjoyment, and the warranty of habitability, negligence, harassment, and intentional infliction of emotional distress.

A tenant could argue that the owner has violated the implied covenant of quiet enjoyment by failing to stop other tenants from smoking and thereby substantially affecting the tenant’s enjoyment of a material part of the premises. Although no California court has ruled on this issue, courts in several other states have allowed lawsuits to continue where a neighbor’s smoking is extreme enough, and the courts have required owners to give the tenant a reduction in rent or other relief.

In the absence of a specific law or ordinance, it may be difficult for a tenant to establish that a neighbor’s smoking is a nuisance, because the behavior must be both substantial and unreasonable. However, in San Diego, a condominium owner was successful in obtaining a restraining order to prevent his neighbor from smoking in his garage, which was located underneath the plaintiff’s home.

In 2006, a lawsuit was filed in Van Nuys, California that sought to require an apartment building owner to protect a tenant from secondhand smoke. The father, on behalf of his five year old daughter who suffers from asthma, asked the court to stop the property owner from permitting smoking in the common areas of the apartment complex. The plaintiff argued that the tobacco smoke had caused special injury to his daughter and to other residents and guests of the property. In 2007, the court granted the landlord’s motion to dismiss. The case has been appealed.

## XI

### BENEFITS OF PROVIDING SMOKE-FREE HOUSING

In addition to the obvious health and safety benefits of reducing exposure to secondhand smoke and decreasing fire danger, smoke-free housing can be a good business decision. The statistics quoted above indicate that smoke-free units are a desired amenity that can make it easier to market a unit. In addition, maintenance and turnover costs are significantly lower for non-smoking units. Refurbishing the apartment of a heavy smoker for the next resident requires more time and effort in repainting (particularly surface preparation). In many instances, carpeting, draperies, and



upholstered furniture must be replaced rather than cleaned. Many owners have also found fire insurance to be less expensive due to the lower risk present on non-smoking properties. According to the State Fire Marshall, in one year, cigarettes were found to have caused over 1400 fires in California homes, apartment, and mobile homes, with an estimated \$18 million loss in property and contents. According to the National Fire Protection Association, smoking materials (*i.e.*, cigarettes and cigars, etc.) are twice as likely to be the cause of fires in apartment buildings compared with one and two family homes and mobile homes. Lastly, voluntarily providing an amenity desired by many residents may diminish the perceived need for government regulation in this area.

## XII

### HOW TO IMPLEMENT A SMOKE-FREE OR PARTIALLY SMOKE-FREE APARTMENT COMMUNITY

Before implementing a smoke-free environment, many owners survey residents to determine whether they are interested in living in a smoke-free apartment building or smoke-free section of the building. This also provides owners an opportunity to communicate to residents about the health and safety and business reasons for a non-smoking policy – secondhand smoke, fire dangers, maintenance, cleaning and redecorating costs, insurance costs, and consumer demand for smoke-free units. The easiest time to set a new policy is when a unit or building is vacant.

For most owners, the next step for occupied units is to set a time frame for making changes; some owners “grandfather” in existing tenants – making their units non-smoking after residents move out, rather than changing the terms of tenancy. As with any other change in terms of tenancy, residents must be provided proper notice – thirty days if the tenancy is month to month or at the time of renewal if the tenant is on a lease. An owner who prohibits smoking in common areas, where it was previously permitted – for example at poolside - also requires proper notice. In addition to adding the smoking prohibition to rental agreements, non-smoking signs should be posted on the property, and the no-smoking policy advertised as part of the owner’s marketing strategy.

In response to member inquiries and to enable the industry to address this resident demand voluntarily, the California Apartment Association has made available an Addendum for Tobacco Smoke-Free Areas.<sup>2</sup>

## XIII

### SMOKE-FREE APARTMENT REGISTRY

The Smoke-free Apartment Registry is one way to market your property to residents who are looking for smoke-free housing. The registry provides free listings of apartment buildings that are completely or partially smoke-free. Funded by the Tobacco Tax Health Protection Act of 1988 (Proposition 99), the Registry began in 1995 in response to tenant complaints about drifting smoke. The Registry’s goal is to accommodate both smokers and non-smokers in multi-family housing so that all residents are able to use and enjoy their homes. The Registry website<sup>3</sup> also includes information about the legality of smoke-free multi-unit housing. Most owners listed in the Registry have



adopted smoke-free policies for their buildings; some owners include outdoor common areas. Buildings of 12 or more units that offer one half of the units adjacent to each other as non-smoking (including patios or balconies) can be included in the Registry. The Registry also accepts listings of single family homes. According to the Smoke-Free Apartment Registry, more than 200 building owners in Los Angeles have successfully adopted smoke-free policies.

## **OTHER REFERENCE MATERIALS FROM THE CALIFORNIA APARTMENT ASSOCIATION**

CAA's Policy Statement #12 – Smoke-Free Housing Choice

<http://www.caanet.org/Content/ContentFolders/PolicyStatements/PolicyStatement12.pdf>

CAA's Compass – Local Regulation of Tobacco Smoke in Multi-Unit Housing

[http://www.caanet.org/AM/Template.cfm?Section=CAA\\_Compass&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=16546](http://www.caanet.org/AM/Template.cfm?Section=CAA_Compass&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=16546)

CAA's Lease Addendum (Form 34.0) – Tobacco Smoke-Free Areas Addendum

[http://www.caanet.org/AM/Template.cfm?Section=Forms\\_by\\_Form\\_Number&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=16558](http://www.caanet.org/AM/Template.cfm?Section=Forms_by_Form_Number&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=16558)

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<sup>1</sup> <http://www.phi.org/talc/>

<sup>2</sup> [http://www.caanet.org/AM/Template.cfm?Section=Forms\\_by\\_Form\\_Number&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=16558](http://www.caanet.org/AM/Template.cfm?Section=Forms_by_Form_Number&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=16558)

<sup>3</sup> [www.smokefreeapartments.org](http://www.smokefreeapartments.org)

