Technical Assistance Legal Center (TALC)

- Expertise on a wide range of tobacco control policies
- Assist community organizations, public health departments, and gov’t attorneys
- Provide legal technical assistance on tobacco control issues
- Funded by the California tobacco tax
Legal Questions

- Is there a right to smoke?
- Do smoking restrictions invade a tenant’s right to privacy?
- Is a no-smoking policy discriminatory?
- What is a landlord’s potential liability without a smoking policy?
- Do disability laws apply?
- How does a landlord adopt a no-smoking policy?
Is there a right to smoke?

- There is NO constitutionally protected right to smoke

- Landlords CAN prohibit smoking in units and common areas
  - Similar to other lease restrictions
  - For example: no pets, no loud noise

- Legitimate business reason for no-smoking policy
  - For example: cleaning costs, fire risk
Violate a tenant’s right to privacy?

- The “right to privacy” does not include the right to smoke – even in one’s home
  - Constitutional right to privacy only protects decisions about reproduction and family relationships

- Courts have found that the fundamental right to privacy does NOT include smoking
Discriminate against smokers?

- Smoking restrictions in multi-unit housing do not violate anti-discrimination laws

- Illegal to discriminate against specially protected groups of people
  - Can’t discriminate based on a person’s race, religion, gender, ethnicity, etc.

- Smokers are NOT considered a specially protected group
Landlord’s potential liability?

- Landlord could be legally responsible for knowing about drifting smoke and failing to do anything about it

- Possible legal claims that might be brought against a landlord:
  - Violation of the implied covenant of quiet enjoyment
  - Constructive eviction
  - Negligence
  - Violation of the implied warranty of habitability
Do disability laws apply?

- Tenants with disabilities may have special rights:
  - **IF** tenant’s disability made worse by exposure to secondhand smoke...
  - **THEN** tenant may be entitled to a “reasonable accommodation” to limit exposure to SHS
    - Allow to move to a vacant unit away from smoke
    - Adopt a smokefree housing policy for common areas and/or surrounding units
    - Break lease without paying penalty
Adopting a no-smoking policy

- May prohibit smoking in:
  - Indoor common areas
  - Outdoor common areas
  - Individual units
  - Balconies and patios

- **Important:** may still rent to people who smoke
Smokefree common areas

- Smoking may already be prohibited in indoor common areas

To implement:

- Provide reasonable notice of the new policy (usually 30 days)
- Post No Smoking signs
- Designate an outdoor smoking area
- In most cases, does not require changing existing leases
Smokefree units

- Can make some or all units nonsmoking
  - **IF** designating certain units as nonsmoking
  - **THEN** group nonsmoking units together and separate from smoking units

- Can also restrict smoking on balconies and patios
Smokefree units (cont.)

- To implement:
  - New lease – include no-smoking term
  - Existing lease
    1. With consent of tenant — amend lease
    2. Without consent of tenant
      a. *Month-to-month agreement:* give at least 30-days written notice of new restriction
      b. *Fixed-term lease:* cannot change the lease until expires
Summary

- Landlords have the legal ability to make common areas and individual units nonsmoking.

- No-smoking policies define where people can smoke, not whether people smoke.

- Protects against potential liability.

- Implement like any other rule or lease change.
Resources from TALC

Fact sheets

- How Landlords Can Prohibit Smoking in Rental Housing
- There is No Constitutional Right to Smoke
- Legal Options for Tenants Suffering from Drifting Tobacco Smoke (fact sheet and glossary)

How Landlords Can Prohibit Smoking in Rental Housing

January 2006

Although Californians have extensive protections from exposure to secondhand tobacco smoke where they work, eat, and play, some are still exposed to secondhand smoke where they live. Landlords and property managers can protect tenants from exposure to secondhand smoke by prohibiting smoking in common areas and in individual rental units.

This fact sheet describes how a landlord can make common areas nonsmoking, and outlines the steps a landlord must follow to change a lease to make an individual unit smokefree. The information in this fact sheet does not apply to rental housing governed by a local rent control ordinance. In addition, it does not apply to a condominium complex that is seeking to adopt a no-smoking policy. It also notes that if rental housing is subsidized by a government agency, such as the U.S. Department of Housing and Urban Development (HUD), additional procedures might be required to adopt a no-smoking policy.

Q: Why would a landlord want to prohibit smoking?
A: In addition to the important health benefits of reducing exposure to secondhand smoke, restricting smoking can decrease the risk of accidental fires and may even reduce fire insurance premiums. Landlords may also see a significant reduction in maintenance and turnover costs. Cleaning and refurbishing a smoker’s unit can require additional time and effort to repaint and to replace carpets and drapes. By prohibiting smoking in a unit, landlords can minimize or eliminate these expenses altogether.

Q: Is it legal for a landlord to prohibit smoking?
A: Yes. A ban on smoking in common areas is similar to other rules tenants typically must follow regarding the use of common areas, such as the hours for using the laundry facility or the requirement that children be accompanied by an adult when using the pool.

It is also legal for a landlord to ban smoking in individual units. Landlords have the legal right to set limits on how a tenant may use rental property—for instance, by restricting guests, noise, and pets. A “no-smoking” term is similar to a “no pets” restriction in the lease—another way for a landlord to protect his or her property.

Important
A landlord is not unlawfully discriminating against smoking tenants or violating a smoker’s fundamental right to privacy when banning smoking in common areas or in individual units. Claims to the contrary have no legal basis.
Additional Resources

- **Smokefree Apartment House Registry (CA)**
  [www.smokefreeapartments.org](http://www.smokefreeapartments.org)
  Provides information about smokefree apartments and lists vacancies in smokefree housing providers.

- **California’s Clean Air Project (CA)**
  [www.ccap.etr.org](http://www.ccap.etr.org)
  Provides assistance, training, and educational materials on smokefree multifamily housing.

- **MI Smokefree Apartments (Michigan)**
  [www.mismokefreeapartment.org](http://www.mismokefreeapartment.org)
  Provides material for both landlords and tenants including information on reasons why smokefree apartments make sense for landlords.

- **Americans for Nonsmokers’ Rights (National)**
  [www.no-smoke.org](http://www.no-smoke.org)
  Provides material for both landlords and tenants in “Going Smokefree In Your Home” section.
Technical Assistance Legal Center

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