

The Smoker Next Door ... Handling Unwanted Tobacco Smoke in Apartments and Condominiums

Secondhand smoke seeping into apartments or condominiums from neighboring units poses both a health risk and a significant nuisance. The only fail-proof solution to this problem is for buildings to go entirely smokefree, either by a policy voluntarily adopted by building management or by local ordinance. Since personal dwellings are not considered public spaces, they are generally not covered under existing legislation regulating smoking in public places, but many states and municipalities prohibit smoking in common areas of multi-family housing. Additionally, some communities are now adopting ordinances to require no smoking in all or a certain percentage of the private units of multi-family housing.

While it is possible to file a lawsuit, the record of resolving drifting secondhand smoke conflicts in the courts is somewhat mixed. Nonsmokers have filed lawsuits against landlords or fellow tenants on the basis of nuisance, breach of statutory duty to keep the premises habitable, breach of the common law covenant of peaceful enjoyment, negligence, harassment, battery, and intentional infliction of emotional distress; courts have ruled for and against nonsmokers in individual cases.

Despite not always having a specific law to turn to, there are still a number of steps that you can take to protect yourself from secondhand smoke in your home. When weighing your options, keep in mind that air filtration and other ventilation systems **do not** eliminate the health hazards caused by secondhand smoke. Ventilation is not an effective alternative to creating safer and healthier smokefree living environments.

If you're sharing a building, you're sharing the air.

Visit www.no-smoke.org/homes.html to find additional resources about your options for protecting yourself and your family from drifting secondhand smoke.

Clarify your goals.

- Your main goal is clear—you want to breathe smokefree air. It will be helpful if you have some specific ideas about how you want the problem resolved. Do you want an expense-paid voluntary relocation? Do you want out of your lease? Do you want the building designated as completely nonsmoking? Do you want at least one building of a multi-building complex designated as completely nonsmoking? Do you want outdoor private and common areas, such as patios, balconies and pool areas, to also be smokefree? The more you can clarify what it is you want from the neighbor or the management, owner, or condo association, the better your position. More and more, the choice is being made to designate all indoor areas of the buildings as smokefree and to create an outdoor smoking area away from the buildings, windows, doorways, and outdoor common areas.

- If you live in an apartment, you can encourage the management to create a smokefree environment by adding no-smoking language to the leases of tenants. If you live in a condominium, a solution that you can pursue is changing the conditions, covenants and restrictions (CC&Rs) through the established rule-making procedure so that the condo is declared smokefree. Sample policy language for a smokefree apartment lease or condo CC &R is available at www.no-smoke.org/homes.html.

Do your homework.

- Learn about the health impacts of secondhand smoke exposure and the benefits of a smokefree apartment. There are several documents available at www.no-smoke.org/homes.html to familiarize yourself with the dangers of secondhand smoke, your options to improve the situation, and why smokefree air is a benefit for tenants, landlords, and building owners alike.
- Read your lease or condominium agreement. Most leases contain language about the enjoyment of quiet and safe premises, implied warranty of habitability, nuisance, and rules about noise and other potential nuisances. These clauses prohibit tenants from engaging in activities that interfere with another tenant's peace and well-being, such as loud music, noxious odors, noisy late-night parties, etc. Even if your agreement does not specifically address smoking, you can make a case that another tenants' smoke drifting into your unit violates these other protections in your agreement that address quality of life and safety issues. Secondhand smoke is not only a nuisance but a serious health hazard.
- Check to see if there are any applicable local laws that regulate or prohibit smoking in multi-unit housing. Your city or county health department or local smokefree coalition can assist you. Even if there isn't currently a law in your area, there may be efforts underway to track complaints about drifting smoke in housing, encourage landlords to make their buildings smokefree, and other local resources that you can utilize.
- Learn about applicable housing, tenants' rights, and disability laws. Contact tenant and housing rights' organizations and local bar associations to learn if any local or state laws apply to your situation, especially if you have a health condition that is impacted by the secondhand smoke exposure. Information about federal disability laws is available at www.no-smoke.org/homes.html.

Try to resolve the situation amicably.

- Approach the situation positively. Roughly 80% of smokers report that they want to quit, and only 20% are successful. Most smokers want to do the right thing but may not realize the negative impact they are having on their neighbors. So, begin with the assumption that your neighbor and manager are interested in your health and well-being. Take a friendly, educational approach. Let the neighbor know that you are experiencing difficulty from their secondhand smoke, and that you are concerned about your health. Let them know that you are flexible and interested in working out a mutually satisfying solution.
- Don't assume that your neighbors or your landlord know much about the health effects of secondhand smoke. Try posting information about secondhand smoke on apartment bulletin boards, in laundry rooms, or in condominium newsletters.

Share information with Property Management and neighbors, including many resources available at www.no-smoke.org/homes.html.

- The biggest hurdle to resolving disputes about drifting secondhand smoke is misinformation. Your landlord, management company, or owner's association may be unaware that it is **perfectly legal** to require that an apartment building or condominium be smokefree. This can include private units, as well as outdoor areas such as patios and balconies. People often mistakenly believe that there is a legally protected "right to smoke" or that a smokefree building policy would discriminate against smokers. However, there is no such legal right to smoke, and people who smoke are not a protected class. The courts have held that protection of nonsmokers against the hazards of secondhand smoke takes precedence over smokers' desire to light up wherever they choose.

A smokefree building is the best interest of both management and residents.

It protects the health of residents at the same time as protecting management's investment by saving money and reducing the risk of fire.

- Recognize that your landlord or property management may not care about your health, but they probably do care very much about the safety of the building and their economic investment. You may want to remind management of the significant economic costs associated with smoking. Property management companies and building owners usually choose to make their buildings smokefree to reduce the risk of fire, reduce maintenance costs, limit the cost of repairs and replacements (carpets, drapes, painting) when turning over a smoker's unit, and reduce vacancy since there is increasing public demand for smokefree apartments.
- A no-smoking policy is an easy change to carry out: a no-smoking clause can simply be added to all rental agreements, in most cases including existing leases. Then, inform all residents of the change prior to its implementation, and post clear signage. Violations are handled just like any other lease violation.
- Property managers also may not be aware of the various legal protections afforded nonsmokers and the legal remedies that can be pursued by someone who is being impacted by secondhand smoke, especially by people who have breathing disabilities.

Find allies.

- You may not be the only one affected by secondhand smoke in your apartment or condominium complex. Other tenants may be willing and interested in joining with you to find a solution. Find out if any of the other tenants have health problems that make them particularly susceptible to the hazards of secondhand smoke. When discussing the problem of seeping secondhand smoke with the landlord, owner, or management association, you are likely to have greater success with many voices instead of one. As if fellow residents are willing to sign a petition, co-sign a letter, or even help host a meeting for all residents and management in support of making the building smokefree.
- Other good allies may include voluntary health groups such as the American Cancer Society, the American Lung Association, and the American Heart Association, local tobacco control coalitions, and your local health department.

Get a note from your doctor and keep documentation.

- A letter from your physician lends credibility to your complaint that you are being negatively impacted by drifting secondhand smoke. If your first informal complaint to management is not addressed to your satisfaction, send a formal complaint, together with your physician's letter, both to the property owner and the offending neighbor. Again, indicate that you wish to resolve the situation amicably.
- Document your situation. Keep a dated record in a notebook of when smoke infiltrates into your apartment, as well as all interactions and communication with your landlord, neighbors and others about the issue. Keep copies of any written or emailed correspondence. It's always smart to send paperwork Certified Mail, Return Receipt Requested. A paper trail is important to demonstrate the seriousness of the issue and what you've done to try to resolve it, especially if you eventually pursue a legal remedy.

There are always last resorts.

- Consult an attorney before seeking a legal remedy. If nothing else has worked, don't be afraid to resort to the threat of a lawsuit. No one wants to be sued. Advise management of its potential liability in this matter. Tenants have sued on the basis of nuisance, breach of statutory duty to keep the premises habitable, breach of the common law covenant of peaceful enjoyment, negligence, harassment, battery, and intentional infliction of emotional distress. A body of case law is building that holds management responsible for exposing tenants to secondhand smoke. However, you are dealing in a "gray area" of the law, and cases about drifting smoke in housing have had mixed results over the years.

Help protect both yourself and others: Pass a local ordinance.

- You are not alone. More and more people are complaining of secondhand smoke in multi-unit dwellings. Working together, you can make a difference. The best protection comes from enacting a local law that protects people, such as your self, from the hazards of secondhand smoke. A local ordinance can:
 - Require all multi-family buildings, including private units, be smokefree.
 - Require a certain percentage of units in all multi-family buildings be smokefree.
 - Require multi-family building complexes with two or more buildings to designate at least one building as smokefree.
 - Require the declaration of secondhand smoke as a legally actionable nuisance.
 - Require the disclosure to potential new tenants of a) whether smoking is allowed in the building and if so, b) whether smoking occurred in the specific unit in question, c) in which units smoking currently takes place, and d) how drifting smoke disputes are addressed.

This information is not intended to serve as legal advice by the ANR Foundation; the law varies from jurisdiction to jurisdiction. If you intend to file a lawsuit, please consult an attorney who is familiar with the laws in your community.