

SMOKE-FREE POLICIES ARE LEGAL Q&A

What does the law say concerning smoking in apartment buildings?

No state or federal law prohibits making your property smoke-free. Just like you may adopt a no pets policy, you can adopt a no smoking policy. There is no legally recognized “right to smoke” in a multi-unit dwelling, whether it is privately owned or public housing.

Wisconsin

Wisconsin law prohibits smoking in the “common areas of multiple-unit residential properties.” Wis. Stat. § 101.123(2)(a)(8d). Smoking is not allowed in enclosed places of employment and public places, including, but not limited to, management offices, maintenance rooms, stairways, basements, lobbies, community rooms, laundry rooms, fitness rooms, or swimming pool rooms. Signs should be posted in common areas.

Federal

Federal government publications have strongly encouraged making multi-unit housing smoke-free, including:

- The Surgeon General’s Call to Action To Promote Healthy Homes (2009)
- US Department of Housing and Urban Development’s Leading Our Nation to Healthier Homes: The Healthy Homes Strategic Plan (2009)

What areas of my property can be covered?

Individual units

You can make all units in your building smoke-free. Covering all units ensures that smoke doesn’t drift from one unit to another unit in the building.

Outdoor areas

You can also prohibit smoking in all outdoor areas. If you choose to designate an outdoor smoking area it should be a considerable distance (at least 25 feet is recommended) away from entrances, windows, patios, balconies, and ventilation intakes. This prevents smoke from drifting into the building.

Is it discriminatory to designate an entire building or complex smoke-free?

No, it is not discriminatory to prohibit smoking. Smoking is not a protected activity or right, a person’s status as a smoker is not a protected category of person, and addiction to nicotine is not considered a disability. To help protect against any charges of discrimination or targeting smokers, we recommend that the policy focus on the activity of smoking and not on smokers.

Graff, Samantha K. “There is No Constitutional Right to Smoke.” Tobacco Control Legal Consortium. 2008.



If I have a resident with a disability, do I have to allow them to smoke inside?

Accommodations have to directly relate to a person's disability. Smoking in violation of a smoke-free policy does not help to alleviate the limitations resulting from someone's disability; therefore accommodations should not have to be made to facilitate the act of smoking in indoor spaces.

What if I have a HUD or publicly-funded building?

Owners of federally subsidized housing can prohibit smoking. In fact, in 2012 and 2010 the US Department of Housing and Urban Development (HUD) issued notices encouraging all public housing authorities and project-based Section 8 housing to adopt smoke-free policies:

- HUD Notice PIH-2012-25: Non-Smoking Policies in Public Housing
- HUD Notice H-2010-21: Optional Smoke-Free Housing Policy Implementation

The requirements for implementing a smoke-free policy in subsidized housing vary depending on the type of subsidy or assistance the property receives. For example, some policies can include the smoke-free language in the lease; others should implement the policy using house rules. Enforcement of a smoke-free policy can also vary by type of property.

Are there legal liabilities if my building is not smoke-free?

A smoke-free policy can protect you from liability.

Residents with disabilities made worse by being exposed to their neighbors' secondhand smoke may seek legal action under federal disability statutes (the Americans with Disabilities Act or the Federal Fair Housing Act) or state law (Wis. Stat. § 106.50) requiring reasonable accommodations in their housing.

In addition, residents have "successfully brought claims for secondhand smoke seepage using various common law remedies, including breach of warranty of habitability, breach of the covenant of quiet enjoyment, trespass, constructive eviction, nuisance, negligence, and harassment." In these cases, courts have allowed residents to break their lease early, have required landlords to reduce or pay back rent, or have awarded monetary damages for ruined furniture and clothing.

**Schoenmarklin, Susan. "Infiltration of Secondhand Smoke into Condominiums, Apartments and Other Multi-Unit Dwellings: 2009." Tobacco Control Legal Consortium. 2009.*

What are the legal liabilities of a smoke-free policy?

There have been no lawsuits challenging the legality of adopting smoke-free policies. To help protect property owners from additional legal liability, disclaimer language can be included in the policy. An example of disclaimer language includes a provision stating that the property owner is not guaranteeing a smoke-free environment, but is only making a best effort to provide a healthier, smoke-free environment.



Could I exempt some residents from the smoke-free policy?

Indefinitely “grandfathering” current residents from the smoke-free policy while requiring new residents to sign a smoke-free lease is not recommended. This approach indefinitely delays the economic, health, and safety benefits of a smoke-free property and can create enforcement issues. With smokers mixed in with non-smokers, managers may find it difficult to identify the source of the policy violation. A property manager may need to temporarily “grandfather” a resident with a long-term lease, but that is only necessary if both parties do not agree to the change, and will only last until the end of that lease.

For more information on smoke-free housing visit
www.wismokefreehousing.com

No part of this document should be considered legal advice or considered a replacement of a property manager’s responsibility to be familiar with federal, state, and local law governing a particular jurisdiction. If you need legal advice, seek the services of a competent attorney. Also, laws change. Information that is accurate at the time of creation may be rendered obsolete by the passage of new laws or revised judicial interpretations of existing law.

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