

GOING SMOKE FREE

A GUIDE FOR LANDLORDS

This Guide was produced by the Massachusetts Smoke Free Housing Project, an initiative of the Public Health Advocacy Institute and funded by the Massachusetts Department of Public Health.

For more information or questions on how to implement a no smoking rule, contact the Massachusetts Smoke Free Housing Project at (617) 373-2026.

EXECUTIVE SUMMARY

Have you been thinking about implementing a no smoking rule? Have your tenants complained about secondhand smoke drifting into their apartments? You are not alone. More and more landlords are making their properties completely smoke free. Just like prohibiting pets, landlords can prohibit smoking. It is entirely legal. The following are just some of the benefits:

- Attract More Tenants
- Save Money by Reducing the Need for Repairs
- Reduce Potential Legal Liability
- Eliminate the Leading Cause of Residential Fires
- Potentially Reduce Your Insurance Premiums
- Reduce Conflicts among Tenants
- Eliminate Exposure to a “Class A” Carcinogen

Implementing a no smoking rule is simple. When your current tenants renew their leases, have them sign the model *No Smoking Lease Addendum*. The Addendum is attached at the end of this Guide and available at www.makesmokinghistory.com.

Enforcement also is easy. No smoking rules are largely self-enforcing. Once the rule is established, you are likely to attract tenants who support smoke free policies. Some additional tips for enforcement are:

- Post “No Smoking” Signs
- Clean up Cigarette Butts and Remove Ash Trays
- Tell Your Tenants Why You Have a No Smoking Rule
- Have Tenants Tell Their Guests about the No Smoking Rule
- Respond Quickly and Consistently to Potential Violations
- Tell Your Tenants that They Will Be Held Financially Responsible for Violating the Rule.

Free telephone support is available for all smokers and their families at 1-800-Try-To-Stop. More information about quitting smoking and secondhand smoke is available www.makesmokinghistory.org.

INTRODUCTION

Smoking in apartments is a concern because the secondhand smoke is not contained inside the apartments. Instead, it drifts into common areas and other apartments. It seeps under doors, through kitchen and bathroom ventilation ducts, and through electrical wall sockets and light fixtures. After seeping into neighboring apartments, secondhand smoke can stay in the air for hours.¹ As a result, nonsmoking tenants may be involuntarily exposed at unsafe levels for hours.

Secondhand smoke can best be described as a “toxic soup.”² It is comprised of side-stream smoke from the lit tobacco product and exhaled smoke from the smoker. Of the more than 4,000 chemical compounds found in secondhand smoke, no less than 60 of them are known or probable human carcinogens.³ The United States Environmental Protection Agency classifies secondhand smoke as a “Class A” carcinogen.⁴ Children are particularly vulnerable. Exposure to secondhand smoke causes bronchitis, pneumonia, asthma, and ear infections in children.⁵ Exposure to secondhand smoke also has been linked to Sudden Infant Death Syndrome.⁶

As the public’s awareness of these harmful effects has increased, more and more tenants have sought out apartment buildings where smoking is prohibited altogether. Surveys from across the country show a high demand for smoke free apartment buildings.⁷ The trend is not surprising given that smoking rates have dropped off over the past decade, particularly in Massachusetts. In fact, Massachusetts has a smoking rate of 17.8%, which is one of the lowest in country.⁸

Many landlords have responded by deciding to prohibit smoking altogether in their buildings. It is entirely legal. Landlords have current tenants sign a No Smoking Lease Addendum when they renew their lease. New tenants sign the Addendum along with their lease. Smokers are welcome as long as they refrain from smoking while on the property.

LEGAL QUESTIONS

✓ It Is Legal to Prohibit Smoking Entirely

A common question is whether implementing a property-wide no smoking rule is legal. There is no doubt as to the answer. It is entirely legal. It simply involves having tenants sign a No-Smoking Lease Addendum.

Smoking is Not a Protected Constitutional Right The question of whether smoking is constitutionally protected was answered once and for all in the 2005 case entitled *American Lithuanian Naturalization Club, Athol, Mass., Inc., v. Board of Health of Athol*.⁹ The case involved a legal challenge to a board of health regulation that prohibited smoking in private clubs. The Massachusetts Supreme Judicial Court went through a list of federal and state constitutional protections and found that none of them protected smoking.* Accordingly, smoking in apartment buildings is not a constitutional right.

Anti-Discrimination Laws Do Not Protect Smoking Although the nicotine in tobacco products is highly addictive, anti-discrimination laws do not protect smoking. Anti-discrimination laws, such as the American with Disabilities Act (“ADA”), the Federal Fair Housing Act of 1988 and the Massachusetts state-law equivalents are designed to prevent discrimination based on race, disability and certain other characteristics. The only conceivable way that any of these laws would stop landlords from prohibiting smoking was if someone were to argue that smoking is a protected disability. However, it has already been established that smoking is not a protected disability. The ADA states that “nothing in this [law] shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking...”¹⁰ Additionally, smoking does not qualify as a protected disability because it is treatable through cessation counseling and pharmacological aids, such as the nicotine patch. Thus, anti-discrimination laws do not prohibit landlords from implementing no smoking rules.

Smoker Protection Laws Do Not Prohibit “No Smoking Rules” Massachusetts does not have a smoker protection law. Even if it did, smoker protection laws only

* It is also important to note that private landlords are not subject to claims that they violated a constitutional right. The United States and Massachusetts Constitutions are checks on government action, not actions by private citizens.

prevent employers from factoring in smoking when making employment decisions or requiring employees to quit smoking.¹¹ These laws, however, do not create a right to smoke anywhere, including in apartment buildings.

Housing Subsidies or Public Funding Do Not Prohibit “No Smoking Rules” Neither Massachusetts, nor the United States Department of Housing and Urban Development (“HUD”) prohibit landlords from implementing no smoking rules. In fact, landlords are encouraged to establish rules for the protection of the health of their tenants, which would include a no smoking rule.¹² Note that those landlords required to use the HUD model lease, should first contact their HUD supervisor before implementing a no smoking rule.

✓ Landlords Are Potentially Liable if They Allow Smoking

Smoking in apartment buildings exposes landlords and property managers to significant potential liability. Implementing a no smoking policy will eliminate this potential liability.

Landlords are financially liable under Massachusetts law for allowing smoking in indoor common areas, if the common areas qualify as workplaces. The 2004 Statewide Smoke Free Workplace Law prohibits smoking in virtually every workplace in Massachusetts.¹³ If an apartment building has one or more employees, then smoking is prohibited in the enclosed areas where employees work, including hallways, stairways, elevators, lounges, lobbies, and other such common areas. Outdoor common areas are not included.

Landlords and property managers are responsible for prohibiting smoking in the common areas covered by the Smoke Free Workplace Law. Local boards of health and municipal governments may issue fines of up to \$300 for failing to act. Each day smoking is allowed constitutes a separate violation, which means the financial liability can increase quickly. Smokers may receive fines of \$100.

In addition to the potential liability under the Statewide Smoke Free Law, tenants may bring legal action directly against landlords under the following legal claims:

- Negligence
- Breach of the Covenant of Quiet Enjoyment
- Nuisance

- Violation of the Warranty of Habitability

As awareness of the danger of secondhand smoke increases, the potential liability from these types of lawsuits also will increase. The following two Massachusetts cases are instructive:

Harwood Capital Corp. v. Carey, No. 05-SP00187, Boston Housing Court (2006). The owner of a condominium unit, who was leasing the unit, was forced to evict his tenants for smoking. The Condominium Trust had levied numerous fines against the unit owner after other residents in the building complained about the drifting secondhand smoke. In the eviction proceedings, the Boston Housing Court found that the secondhand smoke that was drifting out of the rented condominium unit and into neighboring units constituted a **nuisance** under the terms of the lease. The precedent established by this case would support claims by tenants that drifting secondhand smoke is a nuisance, for which landlords are liable.

50-58 Gainsborough St. Realty Trust v. Haile, No. 98-02279, Boston Housing Court (1998). A judge in the Boston Housing Court awarded tenants **rent abatement** because of secondhand smoke seeping into their apartment. The judge found that “the evidence does demonstrate to the Court the tenants’ right to **quiet enjoyment** was interfered with because of the second-hand smoke that was emanating from the nightclub below.”

A third area of potential liability arises from the Federal Fair Housing Act of 1988 and the Massachusetts state law equivalent. Fair housing laws prohibit discrimination in housing, including discrimination against tenants who are disabled. If a tenant with a disability proves that exposure to secondhand smoke substantially impairs his ability to reside in the apartment, then the landlord must make “reasonable accommodations” for the tenant.

In the 2003 Massachusetts case entitled *Donnelley v. Cohasset Housing Authority*, a tenant alleged that his exposure to secondhand smoke was a violation of fair housing laws.¹⁴ The court found that secondhand smoke could potentially constitute a violation, but did not in this case, because the tenant’s discomfort and other mild reactions did not qualify as a substantial impairment. A disability that could potentially qualify is asthma, which is one of the most common respiratory illnesses in Massachusetts.¹⁵ Secondhand smoke is known trigger for asthma attacks.¹⁶

REASONS FOR GOING SMOKE FREE

Going totally smoke free has numerous benefits. The following are just a few examples:

√ Attract More Tenants

There is a high demand for smoke free apartment buildings.¹⁷ Smoking rates have dropped off over the past decade, particularly in Massachusetts. In fact, Massachusetts has some of the lowest smoking rates in the country at 17.8%.¹⁸ The increase in demand for smoke free apartment buildings appears to be the result of an increase in the awareness of secondhand smoke-related diseases.

√ Save Money on Repairs

Prohibiting smoking can help landlords save money. Apartments in which tenants are allowed to smoke often require more time and money to re-rent. Some of the repairs include:

- Replacing carpets with cigarette burns,
- Patching burns in linoleum countertops and flooring,
- Abating the odor of stale tobacco smoke, and
- Repainting yellow stained walls and ceilings.

√ Reduce Potential Legal Liability

Under Massachusetts law, landlords are required to provide their residential tenants with a safe and habitable dwelling. Secondhand smoke that seeps into an apartment creates a harmful environment, for which the landlord may be liable. Residents have brought successful legal actions based on drifting secondhand smoke. Landlords can avoid the potential legal liability simply by eliminating smoking.

✓ Reduce Conflict among Tenants

Although the landlord is legally responsible for providing residential tenants with a safe and habitable dwelling, secondhand smoke can be a common source of conflict among tenants. Tenants will often choose to move out rather than expose themselves and family members to secondhand smoke.

✓ Eliminate the Leading Cause of Residential Fires

More people die in fires caused by smoking than by any other type of fire.¹⁹ Property damage from cigarette-caused fires exceeds \$400 million annually.²⁰

✓ Potentially Reduce Your Insurance Premiums

Some insurance companies offer landlords discounts on general liability insurance premiums if they implement a no smoking rule. No smoking rules reduce the risk of fire-related property damage, injury and death. Ask your broker.

✓ Ventilation Does Not Work

Some may recommend improving ventilation as a solution to secondhand smoke seepage. That is a very expensive solution that, in the end, probably will not work. HVAC standards are established by the American Society for Heating, Refrigerating and Air Conditioning Engineers (“ASHRAE”), which has studied drifting secondhand smoke for years. In a nut shell, ASHRAE will not recommend a ventilation standard for removing secondhand smoke because they know that no standard ventilation system or air purifier can handle the job.²¹

✓ Exposure to Secondhand Smoke is a Health Hazard

Secondhand smoke is not just a mere nuisance. It is dangerous. Here are some facts about secondhand smoke:

- The United States Environmental Protection Agency classifies secondhand smoke as a “Class A” carcinogen,

which puts it in the same category as asbestos and other highly carcinogen substances.

- Secondhand smoke contains Benzene, Formaldehyde, Arsenic Ammonia, Vinyl Chloride, Hydrogen Cyanide and other highly toxic substances.
- Secondhand smoke is the third leading cause of preventable death in the United States. It causes approximately 3,400 lung cancer deaths and 22,700 to 69,600 heart disease deaths in adult nonsmokers in the United States each year.
- Children exposed to secondhand smoke are more likely to develop bronchitis, pneumonia, asthma, and ear infections.
- Secondhand smoke has been linked to Sudden Infant Death Syndrome.²²
- Once present in a room or home, secondhand smoke can linger in the air for hours.

STARTING THE PROCESS

Implementing a no smoking policy is easy. You may find the following steps helpful.

STEP ONE: *Educate Your Tenants*



Take the time to educate tenants. This step is important. Getting as many tenants as possible to understand why you are implementing a no smoking rule will help with compliance.

Let tenants know that you are concerned about smoking in the building. Share with them the many benefits of going smoke free. It will create a healthier and safer home for them by eliminating exposure to secondhand smoke and reducing the risk of fire. You may need to convince some tenants, but a little work up front pays dividends down the road. Attached to this Guide is a [sample letter](#).

The tough part is talking with the tenant who smokes. Here is one way to approach that tenant. Share your concerns with him. Make sure the tenant knows he is welcome to stay as long as he does not smoke at the apartment complex or only in a designated smoking area, if one is designated. Then, invite the tenant to help you set a date for going smoke free. A landlord has an absolute legal right to establish a smoke free policy when the tenant renews his or her lease. But, the tenant may volunteer to go smoke free sooner. If the tenant is interested in quitting, you can refer them to the free services offered by the Massachusetts Department of Public Health available at 1-800-Try-To-Stop. More information is available at www.makesmokinghistory.org.

STEP TWO: *Implement the No Smoking Policy for All Common Areas*



Start right away by making sure your building is in compliance with the Statewide Smoke-Free Workplace Law. Many common areas such as hallways, stairwells and laundry rooms should be smoke free already. The Workplace Law

mandates that any enclosed area with one or more employees be smoke free, including the common areas of residential rental properties. Property managers, superintendents, cleaning crews and other workers, even if they are independent contractors, qualify as an “employee” under the Workplace Law. If your property has employees, you are required to prohibit smoking in the enclosed common areas.

If your property is exempt from the Workplace Law, establishing a smoke free policy in common areas is a good place to start. Individual leases do not need to be changed for the common areas. Simply give tenants notice before the rule change goes into effect. The notice should describe where smoking will be prohibited and that the rule change will become effective immediately. Attached is a [model notice](#).

If, like many buildings, the common areas in your building are smoke free already, your next step is to implement a rule change for those common areas that are not enclosed, such as fire escapes, decks, patios, exterior landings, front steps and the surrounding grounds. Secondhand smoke often drifts from these locations back inside the building through doors and apartment windows. So, it is important to prohibit smoking in these areas. If a smoking area is designated, it should be far from any entrance or other area where the smoke might drift back into the building.

STEP THREE:

Implement the No Smoking Policy for the Entire Property



To prohibit smoking inside apartments, when current tenants renew their lease, have them sign the model [No Smoking Lease Addendum](#), which is attached at the end of this Guide. Have new tenants sign the Addendum along with the lease.

Although tenants might find it disruptive, you may have the legal right to implement the rule change sooner than the lease renewal dates. Many residential leases allow for changes to the rules and regulations for inside apartments if they “are reasonably related to the safety, care, cleanliness, or orderly conduct of the leased premises and the building ... and for the benefit, safety, comfort and convenience of all the occupants of said building.” Check your leases.

STEP FOUR:
Enforce the No Smoking Rule



No smoking rules are largely self-enforcing. Once the rule is established, you are likely to attract tenants who support smoke free policies.

Here are some tips on what to do:

- ✓ Post “No Smoking” signs at the entrance, hallways and other conspicuous areas. If you find someone smoking somewhere, post a “No Smoking” sign there, too.
- ✓ Provide smokers who interested in quitting with information about the free telephone services provided by the Massachusetts Department of Public Health, 1-800-Try-To-Stop. More information is available at www.makesmokinghistory.org.
- ✓ Remove ash trays and clean up any cigarette butts. These items make people feel like they are in a smoking area.
- ✓ Repair the smoking-caused damages inside apartments, for one last time. If an apartment has cigarette burns and smells like cigarette smoke, then the tenants may be inclined to ignore the no smoking rule. Replace or patch carpet, floors, and countertops with cigarette burns; paint smoke-stained walls and ceilings; and take other steps to reduce the odor of stale tobacco smoke.
- ✓ Document potential violations. If you smell secondhand smoke in the building, record when and where you smelled the smoke and where you think it originated.
- ✓ If a tenant complains about smoking, respond quickly. Acknowledge the complaint and resolve the issue in a timely fashion.
- ✓ Be consistent. Taking the same steps in the same period of time sends a clear message to everyone that smoking is not allowed.

- ✓ Make your tenants aware that they will be held financially responsible for violating the policy. The cost of repairing any damage caused to the apartment by smoking can be deducted from the security deposit.
- ✓ Tell the offending tenant why you have a smoke free policy? Give him or her information on the effects of exposure to secondhand smoke.
- ✓ Smoking violations are just like any other. How would you respond to loud noises or inappropriate disposal of garbage? Deal with it the same way as all of the rules in the building.

STEP FIVE:

Promote Your Status as a Smoke Free Building



Take advantage of the high demand for smoke free apartment buildings and promote your status. Remember that smoking rates have dropped off over the past decade and that Massachusetts has one of the lowest smoking rates in the country at 17.8%. Potential tenants will appreciate your attention to this important issue.

STEP SIX:

If You Have Questions, Call for Free Advice



For more information or questions on how to implement a no smoking rule, call the Massachusetts Smoke Free Housing Project at (617) 373-2026.

More information about secondhand smoke is available at www.makesmokinghistory.org.

THIS GUIDE IS PROVIDED FOR EDUCATIONAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS LEGAL OPINION OR AS A SUBSTITUTE FOR OBTAINING LEGAL ADVICE FROM AN ATTORNEY. READERS WITH QUESTIONS ABOUT THE APPLICATION OF THE LAW TO SPECIFIC FACTS ARE ENCOURAGED TO CONSULT LEGAL COUNSEL.

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- ¹ CA Env'tl. Prot. Agency, Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant (2005).
- ² U.S. Dep't of Health and Human Servs., The Health Consequences of Involuntary Smoking: A Report of the U.S. Surgeon General (1986) (hereinafter Surgeon General Report).
- ³ *See id.*
- ⁴ *See Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. Env'tl. Prot. Agency*, 313 F.3d 852 (2002).
- ⁵ J. DiFranza et al., *Prenatal and Postnatal Environmental Tobacco Smoke Exposure and Children's Health*, *Pediatrics* 113 (4 Supp.) 1007-15 (April 2004).
- ⁶ H. S. Klonoff-Cohen et al., *The Effects of Passive Smoking and Tobacco Exposure Through Breast Milk on Sudden Infant Death Syndrome*, 273(10) *JAMA* 818 (March 1995)
- ⁷ *See e.g.* http://www.smokefreeoregon.com/housing/pdf/CDRI_SummaryReport.pdf (last visited on March 31, 2008)
- ⁸ Centers for Disease Control and Prevention, State-Specific Prevalence of Cigarette Smoking Among Adults and Quitting Among Persons Aged 18 -- 35 Years -- United States, 2006, 56(38) *Morbidity & Mortality Wkly. Rep.* 993 (Sept. 2007); *see also* Executive Office of Health and Human Serv., Mass Dep't of Public Health, Annual Report of the Mass. Tobacco Control Program, Fiscal Year 2007 (2008) *available at* http://www.mass.gov/Eeohhs2/docs/dph/tobacco_control/annual_report_2007.pdf.
- ⁹ 446 Mass 310 (2006).
- ¹⁰ 42 U.S.C.A. § 12201 (2007).
- ¹¹ Samantha Graff, Tobacco Control Legal Consortium, *There is No Constitutional Right to Smoke: 2008* (2008), *available at* <http://www.tclconline.org/documents/constitutional-right.pdf>.
- ¹² No Smoking Policies at HUD Assisted Housing Developments. Smoke-free Environments Law Project, <http://mismokefreeapartment.org/hudletter.pdf>
- ¹³ Mass. Gen. Laws. c. 270, §22 (2008).
- ¹⁴ 2003 WL 21246199 (Sup. Ct. Mass) (2003).
- ¹⁵ *Asthma & Allergies*, Asthma and Allergy Foundation of America, *republished at* <www.aafa.org>, (visited on Nov. 1, 2002).
- ¹⁶ *See id.*
- ¹⁷ *See supra* note 7.
- ¹⁸ *See supra* note 8.
- ¹⁹ The Hartford Fin. Serv. Group Inc., Fire Sense, Causes and Prevention, http://www.thehartford.com/firesense/causes_prev/smoking.htm (last visited on March 31, 2008)
- ²⁰ John R. Hall, Jr., National Fire Protection Association, The Smoking-Material Fire Problem 10 (2006).
- ²¹ American Society of Heating, Refrigerating and Air-Conditioning Engineers, Engineers Should Follow Local Codes in Regard to Smoking, <http://www.ashrae.org/pressroom/detail/13537> (last visited March 31, 2008)
- ²² *See supra* note 1.