

NEW YORK TENANTS' GUIDE TO SMOKE-FREE HOUSING



CENTER FOR PUBLIC HEALTH AND TOBACCO POLICY

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SmokeFreeHousingNY.org

New York Tenants’ Guide to Smoke-Free Housing

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The Center for Public Health & Tobacco Policy
at New England Law | Boston
154 Stuart St.
Boston, MA 02116
www.tobaccopolicycenter.org

Contact:
Phone: 617-368-1465
Fax: 617-368-1368
E-mail: tobacco@nesl.edu

Smoke Free Housing New York
www.smokefreehousingny.org

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This work provides educational materials only and does not constitute and cannot be relied upon as legal advice.

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Summary

It is very likely that you are able to identify the odor of secondhand tobacco smoke when you come across it. However, are you aware that the secondhand smoke drifting into your apartment may pose a threat to the health of you and your family? As a Class A carcinogen, secondhand smoke has been classified within the same category as asbestos, benzene and arsenic. Accordingly, you may want to protect yourself and your family by reducing or eliminating your exposure to secondhand smoke in your home.

First, learn the facts about secondhand smoke. For example:

- Secondhand smoke is the third leading preventable cause of death in the United States.
- Children exposed to secondhand smoke are more likely to develop asthma, bronchitis or sudden infant death syndrome (SIDS).
- Nonsmokers exposed to secondhand smoke for even a short period of time suffer immediate damage to their cardiovascular systems.

Next, look for solutions. The most effective means of eliminating secondhand smoke exposure in a multi-unit building is to establish a smoke-free policy. Landlords may legally adopt such policies to prevent smoking in common areas and individual units, just as they can prohibit other disruptive or dangerous behavior. Not only is such a policy likely to be attractive to New York tenants (as evidenced by recent surveys), but it may also reduce the landlord's costs for maintenance and insurance.

If smoking occurs in common areas of the building, contact the New York Department of Health to find out if the Clean Indoor Air Act requires those places to remain smoke-free. The New York State Clean Indoor Air Act prohibits smoking in any indoor place of employment. Therefore, if your landlord employs cleaning crews or other staff, any area in which they work must remain smoke-free. For more information or to file a complaint, call 1-866-NYS CLEAN (1 866-697-2532) or visit www.health.ny.gov.

If your landlord is unwilling to establish a smoke-free policy in your building, there are measures you can take to protect yourself and your family. First begin by speaking to neighbors who smoke in your building. Inform them that secondhand smoke is seeping into your apartment and work together to implement an amicable solution. Second, you can ask your landlord to seal holes or cracks that allow smoke to infiltrate your unit. Although such measures have not been shown to completely eliminate exposure to secondhand smoke, they may help reduce the amount of smoke that infiltrates into your unit. Finally, you should educate yourself about your legal right to a safe living environment. While litigation should be a last resort, it is important for you to know how the law may protect you. More about these solutions may be found in this guide.

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Secondhand smoke is more than a nuisance. It's a serious health hazard.

Many people are unaware that the secondhand smoke entering their apartments from other units is actually harmful to their health. Smoke from one unit travels to neighboring units and common areas under doors, through cracks in the walls and floors, around light fixtures, plumbing and electrical outlets and through heating and ventilation ducts. Once inside the unit, secondhand smoke lingers in the air for hours.¹

Secondhand smoke is more than a nuisance: Secondhand smoke is responsible for the deaths of approximately 46,000 adults from heart disease, and 3,400 adults from lung cancer annually in the United States.² It contains more than 7,000 chemicals, and more than 70 of them are carcinogenic.³ The United States Environmental Protection Agency considers secondhand smoke a Class A carcinogen,⁴ and the U.S. Surgeon General has stated that “there is no risk-free level of exposure to secondhand smoke.”⁵

Secondhand smoke has serious health consequences for nonsmokers:

- Even short-term exposure to secondhand smoke has immediate adverse effects on the cardiovascular system and increases the risk for heart attack.⁶
- Secondhand smoke increases nonsmokers' risk of developing heart disease and lung cancer by 20 to 30 percent.⁷
- In children, secondhand smoke can cause ear and respiratory infections, increase the frequency and severity of asthma attacks, and increase the risk for sudden infant death syndrome (SIDS).⁸

In addition to the harms caused by secondhand smoke, nearly 1,000 people in the United States die each year in fires caused by cigarettes.⁹

Health and engineering experts agree that the *only* way to eliminate the health risks associated with indoor exposure to secondhand smoke is to prohibit all smoking activity.¹⁰ Both the Surgeon General and U.S. Department of Housing and Urban Development have issued publications encouraging the adoption of smoke-free policies in multi-unit housing.¹¹

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Taking Immediate Action

Although secondhand smoke cannot be completely eliminated from a multi-unit building without implementing a smoke-free policy, there are measures that tenants and landlords can take to reduce smoke infiltration.

Tenants can take the following steps to reduce exposure to secondhand smoke:

- Keep in mind that smokers may not realize that secondhand smoke is drifting into others' apartments or common areas. You can approach neighbors who smoke and make them aware of the issue. Ask for their help in reducing your exposure.
- If someone is smoking inside his apartment, ask him to consider smoking outside.
- If a neighbor is unwilling to smoke outside, speak with her and your landlord about making sure the neighbor's door is closed, and perhaps installing a door sweep to seal the space between the floor and door.
- If neighbors are smoking outside and smoke is drifting in through a window, either ask them to move away from the window or talk to your landlord about creating a designated smoking area away from doors and windows.
- Talk to your landlord about repairing cracks and holes in the walls, ceilings and floors where smoke is infiltrating your apartment. (To be most effective, these spaces should be sealed in both your apartment and the smoker's apartment.)
- Check the terms of your lease to determine if any "nuisance" clause or "quality of life" clause prohibits tenants from engaging in behaviors that interfere with other residents' enjoyment of the premises. If so, talk to your landlord and request that the provision be enforced to prohibit or restrict smoking in the building.

If your neighbor is unwilling to cooperate and if no other solution seems to work, request that your landlord relocate you to another apartment or building. Check the new apartment for secondhand smoke at different times during the day and week before moving in.

Keep in mind that these recommendations may not eliminate secondhand smoke from infiltrating your apartment. The only way to avoid such infiltration is to live in a smoke-free building.

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Legal Rights of New York State Tenants

Smoke-Free Laws

The New York State Clean Indoor Air Act prohibits smoking in any indoor areas within “places of employment.” Places of employment include any indoor area under the control of the employer in which employees perform services. Therefore, if your landlord employs cleaning crews, managers or other staff, the areas in which they work should be smoke-free. Individuals may register a complaint of violations with their local board of health, county board of health or their district health office. For more information, call 1 866-NYS CLEAN (1 866-697-2532) or visit www.health.ny.gov.

Some local jurisdictions also have their own smoke-free laws. For example, the New York City Smoke-Free Air Act of 2002 prohibits smoking in lobbies, stairwells, hallways, elevators, laundry rooms, and other common areas in residential buildings with ten or more units. Individuals can report violations by calling 311.

Sanitary Code

Your local or county board of health ensures that apartment buildings are in compliance with ventilation and other code requirements. Correcting code violations often helps address drifting secondhand smoke. Your health inspector may have experience with this issue and can speak with your landlord about changes that may help.

Disclosure Laws

Currently in New York, both the City of Buffalo and the County of Rockland have adopted disclosure laws which require landlords to give written notice of their smoking policy to current and prospective tenants. If you live in these jurisdictions, you have a right to know where smoking is or is not allowed in your multi-unit community.

Lawsuits

Tenants may have a right to take legal action against landlords or smoking tenants if smoke is drifting into their apartment. However, as litigation is expensive, time-consuming, and can strain relationships, it should be the last resort. For tenants who wish to explore legal action:

- Possible legal claims include claims for negligence, trespass, breach of the covenant of quiet enjoyment, nuisance, and violation of the warranty of habitability. If the exposure to secondhand smoke forced you to move out of your apartment, you may also have a claim for constructive eviction.
- Although the outcome of a legal claim depends on the particular facts of the case, several recent New York cases have found that exposure to secondhand smoke constitutes a nuisance or violates the warranty of habitability. The warranty of habitability recognizes tenants' rights to “livable, safe, and sanitary apartments.” The following are examples:
 - *Duntley v. Barr*, 20 Misc. 3d 206, New York City Civil Court (2005). Court found that a private nuisance cause of action could be brought by a tenant against landlord or other tenant for secondhand smoke conditions. Tenant smoker was

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found to be liable to the adjoining non-smoker tenant for interfering with his use and enjoyment of his own premises.

- *Poyck v. Bryant*, 13 Misc. 3d 699, New York City Civil Court (2006). The court held that the landlord's failure to address secondhand smoke traveling from one unit to a neighboring unit constituted a violation of New York's Real Property Law (RPL) §235-b (which codifies the landlord's warranty of habitability).
- *Upper East Lease Associates, LLC v. Danielle Cannon*, 30 Misc. 3d 1213(A), New York District Court (2011). The Court held that a landlord violated the warranty of habitability when secondhand smoke from one tenant's apartment was allowed to infiltrate another's. Thus, the nonsmoking tenant was entitled to a reduction in rent.
- Disabled persons may be able to bring an action under the Federal Fair Housing Act (FHA) or complementary state law. Persons suffering from Chemical Sensitivity Disorder (MCS) or other ailments that are severely aggravated by exposure to secondhand smoke (such as COPD or asthma) may qualify as disabled for purposes of the FHA. The FHA requires that landlords make "reasonable accommodations in rules, policies, practices, or services...when such may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas."¹²
- Documentation is essential for legal action. If you think that secondhand smoke is contributing to an illness, speak with your doctor, who may be able to provide you with documentation that you can use when speaking with your landlord or to support legal action. In addition, document all interactions with your landlord or neighbors that may be relevant to a legal case, as well as all costs that you incur in your effort to reduce exposure to secondhand smoke.

For more information about legal options, consult an attorney in your jurisdiction. The New York State Bar Association (NYSBA) can assist you in locating an attorney in your area. The NYSBA can be contacted at 1-800-342-3661 or <http://www.nysba.org/>. If you cannot afford an attorney, assistance may be available from a legal aid association. You can visit <http://www.lawhelp.org/ny/> for more information.

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Seeking Permanent Solutions

As stated previously in this guide, there is no safe level of exposure to secondhand smoke. The most effective way to eliminate secondhand smoke exposure in a multi-unit building is for the landlord or property manager to implement a smoke-free policy throughout the entire building.

To make a persuasive argument in favor of a smoke-free policy, tenants should be sure to make the issue relevant to their landlord. Property owners and managers are generally interested in keeping costs down and relieving conflicts among tenants. The following steps may help you in your discussions with your landlord:

- Document the problem and determine the source of the smoke and the method of infiltration to your unit or common areas.
- Survey neighbors' experiences with secondhand smoke in their units and common areas of the building. Ask their opinions about going smoke-free or establishing rules that protect nonsmokers from secondhand smoke exposure. This information may be helpful in persuading the landlord to seriously consider smoke-free policies.
- When proposing smoke-free policies, inform your landlord that going smoke-free:
 - Increases the number of potential tenants. Surveys indicate that the demand for smoke-free housing among New Yorkers is increasing.¹³
 - Reduces the amount of money necessary to clean and repair smoking units (e.g., cleaning and repainting, replacing burned countertops, carpeting or flooring, and eliminating odors).
 - Reduces the threat of fires and may reduce insurance costs. A leading cause of residential fires is the use of cigarettes and other combustible tobacco products,¹⁴ which cause over \$400 million in property damage nationwide each year.¹⁵ As a result, some insurance companies offer discounts on properties that prohibit smoking.¹⁶
 - May reduce conflicts between neighbors. In the absence of a smoke-free policy, landlords may be repeatedly called upon to settle disputes relating to secondhand smoke that drifts between units.
 - May reduce the landlord's legal liability.¹⁷ Tenants have filed claims against landlords and other tenants for the harm caused by exposure to secondhand smoke. A smoke-free policy could reduce the possible causes of action arising in response to exposure to secondhand smoke.
- Assure your landlord that going smoke-free is legal, enforceable, straightforward and inexpensive. There is no constitutional right to smoke, and although smoking is a legal activity for adults, people do not have the right to smoke in any manner they choose.

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There are no federal, state, or local laws that prevent apartment owners and managers from adopting smoke-free policies. Such policies do not discriminate against smokers; they simply require people to smoke outdoors, where their secondhand smoke will not drift into neighboring units.¹⁸ The experience of landlords across the country suggests that smoke-free policies are not difficult to implement and are largely self-enforcing. Tools available at www.smokefreehousingny.org provide landlords with guides and templates necessary for implementing smoke-free policies.

CITATIONS

¹ CA ENVTL. PROT. AGENCY, *Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant* (2005).

² CENTERS FOR DISEASE CONTROL, *Secondhand Smoke (SHS) Facts*, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm (last visited July 6, 2011).

³ *Id.*

⁴ Press Release, U.S. EPA, EPA Designates Passive Smoking a “Class A” or Known Human Carcinogen (January 7, 1993) available at <http://www.epa.gov/history/topics/smoke/01.html>.

⁵ U.S. SURGEON GENERAL, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf> [hereinafter Surgeon General’s Report].

⁶ WORLD HEALTH ORGANIZATION, *10 Facts on Secondhand Smoke*, <http://www.who.int/features/factfiles/tobacco/en/index.html> (last visited Sept. 22, 2011); Surgeon General’s Report, *supra* note 5.

⁷ WORLD HEALTH ORGANIZATION, *supra* note 7; Surgeon General’s Reprt, *supra* note 5.

⁸ CENTERS FOR DISEASE CONTROL, *supra* note 2.

⁹ U.S. FIRE ADMIN., *Smoking and Fire Safety*, http://www.usfa.dhs.gov/citizens/home_fire_prev/smoking.shtm (last visited Sept. 22, 2011)..

¹⁰ Surgeon General’s Report, *supra* note 5; AMERICAN SOCIETY OF HEATING, REFRIGERATION, AND AIR-CONDITIONING ENGINEERS, INC., *Position Document on Environmental Tobacco Smoke*, available at http://www.ashrae.org/File%20Library/docLib/Public/20090120_pos_ets.pdf.

¹¹ U.S. DEP’T OF HOUSING & URBAN DEVEL., *Leading our Nation to Healthier Homes: The Healthy Homes Strategic Plan*, 7 (2009), available at http://www.hud.gov/offices/lead/library/hhi/hh_strategic_plan.pdf; U.S. SURGEON GENERAL, *The Surgeon General’s Call to Action to Promote Healthy Homes* (2009), available at <http://www.surgeongeneral.gov/topics/healthyhomes/actions.pdf>.

¹² U.S. DEP’T OF HOUSING AND URBAN DEVEL., *Reasonable Accommodations Under the Fair Housing Act*, 1 (2004), available at <http://www.hud.gov/offices/fheo/library/huddojstatement.pdf>.

¹³ DANIELLE R. LANGE & MICHELLE H. WILDGRUBE, *A Legal Memorandum for Adoption of Smoke-Free Policies in Multi-Unit Housing*, 2 (2011), available at http://www.breathefreely.org/pdf/SFHNY_Legal_Memo.pdf (a recent survey of renters in NYC indicated 66% of renters prefer smoke-free communities and 58% would pay more to live in a smoke-free building.)

¹⁴ JOHN R. HALL, JR. NAT’L FIRE PROT. ASS’N, *The Smoking-Material Fire Problem*, 1 (2007), available at <http://www.nfpa.org/assets/files/PDF/OS.SmokingMaterials.pdf>.

¹⁵ *Id.* at 10.

¹⁶ See TOBACCO CONTROL LEGAL CONSORTIUM, *Regulating Smoking in Multi-Unit Housing – Tips and Tools* (2011), available at <http://publichealthlawcenter.org/resources/regulating-smoking-multi-unit-housing-tips-and-tools-2011>.

¹⁷ *Id.*

¹⁸ Because renters’ rights are governed by contractual lease agreements, smoke-free policies may have to be implemented gradually as each unit’s lease comes up for renewal. Since most residential leases are for one-year terms, must buildings are able to implement a smoke-free policy within one year.