

How Disability Laws Can Help Tenants Suffering from Drifting Tobacco Smoke

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If you have a medical condition made worse by secondhand smoke drifting into your apartment, federal and state disability laws might help you address the problem. Depending on the nature of your disability, your landlord may be required to make changes to reduce your exposure.

Disability Laws

California and federal disability laws are designed to ensure that people with disabilities have an equal opportunity to access and enjoy their homes.¹ If you rent, your landlord or property manager can be required to make reasonable changes to the rules to accommodate your disability.² A tenant with a hearing impairment, for example, may ask to be exempted from a landlord's no-pet policy if

a service dog alerts her to sounds such as a knock at the door or a telephone ringing.³ Or a tenant with asthma could ask her landlord to prohibit smoking in the common areas of the building, if the smoke is coming into her unit from those areas.

If you are not considered disabled under state or federal law, other legal remedies may apply to your situation. See TALC's fact sheet "Legal Options for Tenants Suffering from Drifting Tobacco Smoke" at www.talc.phi.org.

In order to qualify for protection under these laws, your medical condition must meet the legal definition of a disability. A disability is a mental or physical condition that "limits" (under California law⁴) or "substantially limits" (under federal law⁵) a major life activity such as breathing, walking, or performing manual tasks. Courts have generally recognized that individuals are disabled when they



Illustrations by Janet Cleland
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have severe asthma, allergies, chemical sensitivities, or other respiratory conditions that limit their ability to breathe.⁶ Whether you are legally considered disabled will depend on the particular facts of your situation.

What is a reasonable accommodation?

There are several options you could request that would be considered reasonable and necessary to accommodate your respiratory condition. For example:⁷

- You could ask your landlord to prohibit smoking in the common areas of the building, if the smoke is coming from those areas.⁸
- You could ask to move to a vacant unit in the complex, away from the drifting smoke. In this situation, it is not clear how much of the moving and preparation expenses the landlord must pay; however, the law clearly contemplates that the landlord bear some costs.⁹ (Your landlord would not be required to evict another tenant in order to create a vacancy.¹⁰)
- You could ask your landlord to prohibit smoking in the apartments and balconies surrounding your unit. This might not be an immediate solution: the landlord may be required to follow a legally prescribed set of steps to change the leases and

make these units nonsmoking, and it could be up to a year before smoking is prohibited. For more information on adopting smokefree policies, see “How Landlords Can Prohibit Smoking in Rental Housing,” another fact sheet available from TALC at www.talc.phi.org.

- You could ask to “break” your lease without incurring any financial penalties so that you can move to another apartment complex.¹¹

Although disability laws also can be used to request building alterations such as sealing gaps and cracks or installing fans or air purifiers, these approaches rarely solve the problem of drifting tobacco smoke. One study found that as much as 60 percent of the air in one unit can come from another unit, and that sealing leaks and openings only reduces air flow by about 3 percent.¹² Air cleaning technologies and ventilation systems also have been shown to be ineffective: according to a U.S. Surgeon General’s report, filters only remove large particles, not the minute particles and toxic gases in secondhand smoke.¹³

What is *not* a reasonable accommodation?

Your request for an accommodation must directly address the problem affecting your health condition. You could not request a reduction in rent, for instance, because this does nothing to alleviate the impact of drifting secondhand smoke.¹⁴

In addition, your accommodation request must not impose an undue burden on the landlord.¹⁵ For a tenant who begins to have difficulty climbing stairs, requesting that an elevator be installed would likely

put an undue financial burden on the landlord, and that request could be legally rejected. However, a request by that tenant to move to a vacant ground-floor unit would be considered reasonable.¹⁶ While the law does not require a housing provider to absorb excessive costs, such as the elevator, it does envision that the landlord bear *some* costs.¹⁷

Finally, it would not be a reasonable request to ask the landlord to evict the person who smokes from the building. However, you could ask the landlord to change the conditions of that person’s rental agreement to prohibit smoking.¹⁸

What accommodation is reasonable and who should pay for the changes depend on the facts of each case. You and your housing provider should discuss your needs and how to best accommodate these.

How to make the request

It is your responsibility, as the person with the disability, to make the request for an accommodation to your housing provider. It is not your landlord’s obligation to seek out and make these alterations.¹⁹

Your reasonable accommodation request and all subsequent exchanges should be in writing, and you should keep copies of the letters. Although not required by law, putting your requests in writing facilitates clear communication and creates a “paper trail” in case the issues are not resolved and you later file a lawsuit. All letters should be sent by registered mail not only to the manager of the property but also to the property owner, property management company, and/or board of directors. Since each of these parties may ultimately be liable

Renting a condo?

Disability laws apply even if you are renting a condominium unit. Your landlord (the condo unit owner) is required to accommodate your disability. However, what may be considered reasonable in an apartment setting may not be the same in a condominium because of the covenants, conditions, and restrictions (CC&Rs) that regulate what condominium owners can do. For example, some of the suggested accommodation requests presented here could not be implemented solely by the owner of the condominium unit you are renting but instead may require the owner to work with the homeowners’ association and/or the board of directors.



in a lawsuit later, it is important that they all receive notice of the request.

When making a reasonable accommodation request, you will want to send a demand letter, a doctor's note, and a record of the drifting smoke.

Demand letter

A demand letter to your housing provider describes your physical condition that is aggravated by exposure to secondhand smoke, identifies the source and frequency of the drifting secondhand smoke, outlines the reasonable accommodation(s) you are requesting, and summarizes the landlord's legal responsibility to accept this request. (A sample letter accompanies this fact sheet.)

Nonprofit organizations in California called *fair housing councils* help residents with disabilities make their requests for accommodation. These services are typically provided free of charge. (A contact list of California fair housing councils accompanies this fact sheet.) Note that you do not need an attorney to prepare or submit an accommodation request.

Doctor's note

A doctor's note – which documents both the effect the drifting smoke has on your health and the need for the particular accommodation – is key to your request. Housing providers are not required to grant accommodations unless they know or should have known about the disability. In cases where the condition is not always obvious (such as asthma), the note serves as notice of the disability. Moreover, a doctor's note answers many, if not all, of the provider's legitimate medical questions in the least intrusive manner.²⁰ (A sample doctor's note accompanies this fact sheet.)

Record of drifting smoke

It is a good idea to keep a log of how the drifting secondhand smoke affects your health and the use of your home. You might list each instance when the smoke drifted into your apartment, including the time, date, and resulting health problems.

You should provide the log along with your demand letter, as it may help the landlord in deciding whether to grant the request for accommodation.

If the request is denied

In most drifting smoke situations, because the solutions cost little or nothing, a housing provider probably cannot reject the requested accommodation on the grounds that it is an undue burden. However, if your request is rejected, you have one year to file a complaint with the California Department of Fair Employment and Housing²¹ or the U.S. Department of Housing and Urban Development.²² You have two years to file a lawsuit after the accommodation request has been denied. A fair housing council may be able to refer you to a local attorney for assistance.

Conclusion

Depending on your situation, disability laws may provide the most effective way for you to get relief from drifting tobacco smoke. There are many reasonable adjustments a landlord can make to accommodate your respiratory disability and reduce your exposure to secondhand smoke. By using the protections of these laws, you may be able to enjoy a smokefree environment.

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¹ See Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.*; California Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12900 *et seq.* The Fair Housing Act provides protections for people with disabilities who live in rental housing (public or private). 42 U.S.C. § 3604(f). People with disabilities who live in federally-funded housing have further protections. See Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* and Title 2 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* The California Fair Employment and Housing Act provides protections for people with disabilities living in all types of housing accommodations except in a single family home where only one room is rented. Gov't Code § 12927(c)(2)(A). See also Unruh Civil Rights Act, Civil Code § 54.1(b)(1–2).

² *Hubbard v. Samson Management Corp.*, 994 F. Supp. 187, 191-192 (S.D.N.Y. 1998).

³ U.S. Dept. of Justice and U.S. Dept. of Housing and Urban Development. *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act 6-7*. 2004 (hereinafter "Joint Statement"). Available at: www.hud.gov/offices/fheo/library/hudjointstatement.pdf.

⁴ Cal. Gov't Code § 12926(k).

⁵ 42 U.S.C. § 3602(h).

⁶ See *County of Fresno v. Fair Employment & Hous. Comm'n*, 226 Cal. App. 3d 1541, 1551 (1991) ("To most people tobacco smoke is merely irritating, distasteful or discomfoting. Someone who suffers from a respiratory disorder and whose ability to breathe is severely limited by tobacco smoke is, nevertheless, physically handicapped within the meaning of the [Fair Employment and Housing] Act."). See also *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash., 1982) where the court found the employee to be a "handicapped person" because the employee was unusually sensitive to tobacco smoke and this limited one of his major life activities—working in an environment that was not completely smokefree. Note: the legal definition of "handicapped" is equivalent to the legal definition of "disabled." See *Bragdon v. Abbot*, 524 U.S. 624, 631 (1998). Holdings in employment discrimination cases may be used as guidance in housing cases. *Pfaff v. U.S. Dep't of Hous. and Urban Dev.*, 88 F.3d 739, 745 n.1. (9th Cir. 1996).

⁷ These examples assume that you do not live in rental housing governed by a local rent control ordinance. A rent control ordinance might affect the ability of your landlord to implement various reasonable accommodation requests. Contact your local rent control board for specific information regarding this issue.

⁸ A California court determined that both the federal Fair Housing Act and FEHA do apply to common areas of residential complexes. *Garza v. Raft*, WL 33882969, at *3 (N.D. Cal. 1999).

⁹ *Giebeler v. M&B Assoc.*, 343 F.3d 1143, 1152 (9th Cir. 2003) ("accommodations need not be free of all possible cost to the landlord").

¹⁰ 42 U.S.C. § 3613.

¹¹ See *Samuelson v. Mid-Atlantic Realty*, 947 F. Supp. 756, 761 (D. Del. 1996) (finding waiver of a landlord's required lease termination fee a necessary reasonable accommodation under the FHA).

¹² Center for Energy and Environment. *Reduction of Environmental Tobacco Smoke Transfer in Minnesota Multifamily Buildings Using Air Sealing and Ventilation Treatments*. (2004). Available at: www.mncee.org/pdf/research/summary.pdf.

¹³ US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2006, p. 31–32. Available at: www.surgeongeneral.gov/library/secondhandsmoke/report/chapter2.pdf.

¹⁴ That request, however, may be valid to protect your rights under other legal claims such as alleging the landlord breached the warranty of habitability. See TALC's fact sheet "Legal Options for Tenants Suffering from Drifting Tobacco Smoke." Available at: http://talc.phlaw.org/pdf_files/0081.pdf.

¹⁵ *Giebeler v. M&B Assoc.*, *supra* note 9, at 1154 (an undue burden can include an excessive financial outlay or a fundamental change in operations).

¹⁶ *Roseborough by Roseborough v. Cottonwood Apts.*, WL 490717 (N.D. Ill. 1996).

¹⁷ *Giebeler v. M&B Assoc.*, *supra* note 9, at 1152.

¹⁸ For more information on adopting smokefree polices, see TALC's fact sheet "How Landlords Can Prohibit Smoking in Rental Housing." Available at: http://talc.phlaw.org/pdf_files/0076.pdf.

¹⁹ For more information about making a reasonable accommodation request: See Joint Statement, *supra* note 3, at 10-14.

²⁰ Once a request for accommodation is made, the housing provider can ask for verification of the disability and for further information relating to the need for the requested accommodation. This does not entitle the provider to the resident's medical records or to the precise nature (or even the name) of the disability. *Id.* at 13-14.

²¹ To file a complaint call (800) 233-3212 (available in both English and Spanish). For more information about the California housing complaint process, go to www.dfeh.ca.gov/complaintHousing.asp.

²² To file a complaint call (800) 669-9777. For more information about the federal housing complaint process, go to www.hud.gov/offices/fheo/promotingfh/atyourservice.cfm.

Sample Demand Letter

[Tenant's Name]

[Address]

[Phone Number]

[Date]

An editable version of this sample demand letter (in Microsoft Word format) is available from TALC's website at www.talc.phil.org.

Dear [Landlord or Property Manager]:

I am writing to request that you make a reasonable accommodation for my disability. Both federal and state fair housing laws require that housing providers grant reasonable accommodation requests for tenants with disabilities. 42 U.S.C. § 3604(f)(3)(b) and Cal. Gov't Code § 12927(c)(1). *See also Giebel v. M&B Associates*, 343 F.3d 1143, 1147, 1156-8 (9th Cir. 2003).

I have a disability that significantly impairs my ability to breathe, and this condition is made worse by exposure to tobacco smoke. Tobacco smoke has been entering my unit and is coming from [identify where smoke is coming from (e.g., neighboring unit) and how it is entering your unit (e.g., seems to be coming in through the heater vent)]. The smoke enters my apartment [describe the frequency (e.g., every day)]. A log is attached listing the dates of my exposure. This continuous exposure to secondhand tobacco smoke has aggravated my disability by [describe your symptoms]. A doctor's letter is attached, documenting my condition and symptoms.

The U.S. Surgeon General has concluded that there is no safe level of exposure to secondhand smoke. *See* U.S. Dept. of Health and Human Services. *News Release, New Surgeon General's Report Focuses on the Effects of Secondhand Smoke*. June 27, 2006. Available at: www.hhs.gov/news/press/2006pres/20060627.html. In addition, the California Air Resources Board declared secondhand smoke a "toxic air contaminant," which means that it may cause and/or contribute to death or serious illness. *See* Air Resources Board, Cal. Dept. of Environmental Protection Agency. *News Release, Environmental Tobacco Smoke: A Toxic Air Contaminant*. Oct. 18, 2006. Available at: www.arb.ca.gov/newsrel/nr012606.htm.

California courts and the U.S. Department of Housing and Urban Development (HUD) have required that reasonable accommodations be made for persons whose disabilities are aggravated by drifting tobacco smoke. *See County of Fresno v. Dept. of Fair Employment and Hous. Comm'n*, 226 Cal. App. 3d 1541 (employer liable for failure to accommodate two employees whose disabilities were aggravated by co-workers' smoking); *in re U.S. Dep't of Hous. and Urban Dev. and Park Tower Apartments*, HUD Case Nos. 05-97-0010-8 and 05-97-11-0005-370 (1998) (in response to complaint by disabled tenant with respiratory illness, landlord was required to include no-smoking term in all new tenants' leases).

I am requesting [describe your accommodation request (e.g., ban smoking in the common areas, allow to move to a vacant unit away from the drifting smoke, make the surrounding units nonsmoking, release from

rental agreement so can move, etc.)]. This change will eliminate my exposure to drifting tobacco smoke and alleviate the symptoms of my disability.

The only reason a housing provider may reject an accommodation request is if granting the accommodation would cause an **undue** financial or administrative burden. See *Giebler*, 343 F.3d, at 1157. However, a housing provider is required to bear some financial and/or administrative burden. See *U.S. v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416-17 (9th Cir. 1994).

My request to [describe your accommodation request (e.g., move to a vacant unit away from the drifting smoke, make the surrounding units nonsmoking, release from rental agreement so can move, etc.)] is reasonable because there will be little, if any, burden on you if you grant the accommodation.

Please respond in writing to this letter by [date] confirming whether or not you will grant my accommodation request. I would like to resolve this issue amicably and informally, if possible. If that cannot be done, please be aware that failure to grant a reasonable accommodation can subject a housing provider to a discrimination claim in which compensatory and punitive damages are awarded, along with prevailing party's attorneys' fees. 42 U.S.C. § 3613(c).

Thank you for your consideration and prompt attention in this matter.

[Signature]

cc: [Property Management Firm, Homeowners' Association Board, etc.]

Enclosures:

Letter from Dr. [doctor's name]

Log of exposure to drifting smoke

Additional resources:

- How Landlords Can Prohibit Smoking in Rental Housing
http://talc.phpnet.org/pdf_files/0076.pdf
- There Is No Constitutional Right to Smoke
http://talc.phpnet.org/pdf_files/0051.pdf
- Secondhand Smoke: The Science
(fact sheet from Americans for Nonsmokers' Rights)
<http://no-smoke.org/pdf/SHS.pdf>
- There Is No Risk-Free Level of Exposure to Secondhand Smoke
(fact sheet based on the 2006 U.S. Surgeon General's Report)
www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet7.html

Sample Doctor's Note

(should be on doctor's stationery)

An editable version of this sample doctor's note (in Microsoft Word format) is available from TALC's website at www.talc.pho.org.

[Date]

To Whom It May Concern:

[Patient] has been under my care for [describe period of time (e.g., months, years)]. [Patient] has [name of condition] which significantly interferes with [her/his] ability to [describe limitations, especially related to respiratory impairment]. As a result [patient] qualifies as disabled under the federal Fair Housing Act and the California Fair Employment and Housing Act.

[Patient] has reported to me that tobacco smoke is drifting into [her/his] unit from [identify where smoke is coming from (e.g., neighboring unit) and how it is entering the unit, if known (e.g., through the heater vent)]. [Patient] says that the smoke enters [her/his] apartment [describe the frequency (e.g., every day)].

Due to [patient]'s condition, exposure to tobacco smoke is detrimental to [her/his] health and increases the risk of [patient] suffering an adverse event, such as [describe negative health impact].

I urge you to grant [patient]'s accommodation request to [describe the accommodation request (e.g., ban smoking in the common areas, allow to move to a vacant unit away from the drifting smoke, make the surrounding units nonsmoking, release from rental agreement so can move, etc.)]. This accommodation is necessary to ameliorate the conditions of [patient]'s disability.

Sincerely,

[Signature]

Dr. [doctor's name]

Fair Housing Councils

Nonprofit organizations called *fair housing councils* work to eliminate housing discrimination and can help residents with disabilities make their requests for accommodation. These services are typically provided free of charge.

Eden Council for Hope & Opportunities

Offices in: Berkeley, Hayward, Livermore, Oakland, and Palo Alto

www.echofairhousing.org/home.html

(510) 581-9380

Fair Housing Council of Central California

Office in: Fresno

Email: fhccc@cvip.net

(888) 498-3247 or (559) 244-2950

Fair Housing Council of Orange County

Office in: Santa Ana

www.fairhousingoc.org

(800) 698-FAIR or (714) 569-0823

Fair Housing Council of Riverside County

Offices in: Coachella, Corona, Moreno Valley, Norco, Palm Springs, and Riverside

www.fairhousing.net/index.html

(800) 655-1812 or (951) 682-6581

The Fair Housing Council of San Diego

Office in: San Diego

www.fhcsd.com

(619) 699-5888

Fair Housing Council of the San Fernando Valley

Office in: Panorama City

www.fairhousingcouncil.org

(818) 373-1185

Fair Housing Foundation

Offices in: Long Beach and Los Angeles

www.fhfla.com

(800) 446-3247 or (323) 295-3302

Fair Housing of Marin

Office in: San Rafael

www.fairhousingmarin.com

(415) 457-5025

Housing Rights, Inc.

Office in: Berkeley

www.housingrights.org

(510) 548-8776

Housing Rights Center

Offices in: Los Angeles, Pasadena, and West Los Angeles and walk-in clinics throughout Los Angeles County

www.hrc-la.org

(800) 477-5977 or (213) 387-8400

Inland Fair Housing and Mediation Board

Offices in: Barstow, San Bernardino, Upland, and Victorville

www.inmedbd.com

(800) 321-0911 or (909) 888-3763

Project Sentinel

Offices in: Fremont, Gilroy, Modesto, Palo Alto, San Jose, and Sunnyvale

www.housing.org

(888) 324-7468

Sentinel Fair Housing

Office in: Oakland

www.sentinelairhousing.org

(510) 836-2687

National Fair Housing Alliance

Office in: Washington, D.C.

www.nationalfairhousing.org

(202) 898-1661