

How Landlords Can Prohibit Smoking in Rental Housing

January 2006 (revised June 2008)

Although Californians have extensive protections from exposure to secondhand tobacco smoke where they work, eat, and play, some are still exposed to secondhand smoke where they live. Landlords and property managers can protect tenants from exposure to secondhand smoke by prohibiting smoking in common areas and in individual rental units.

This fact sheet describes how a landlord can make common areas nonsmoking and outlines the steps a landlord must follow to change a lease to make an individual unit smokefree. This information does not apply to rental housing governed by a local rent control ordinance¹ or to a condominium complex that is seeking to adopt a no-smoking policy.² Also note that if rental housing is subsidized by a government agency, such as the U.S. Department of Housing and Urban Development (HUD), additional procedures might be required to adopt a no-smoking policy.



Illustrations by Janet Cleland
© California Department of Public Health

Why would a landlord want to prohibit smoking?

In addition to the important health benefits of reducing exposure to secondhand smoke, restricting smoking can decrease the risk of accidental fires and may even reduce fire insurance premiums. Landlords also may see a significant reduction in maintenance and turnover costs. Cleaning and refurbishing a smoker's unit can require additional time and effort to repaint and to replace carpets and drapes. By prohibiting smoking in a unit, landlords can minimize or eliminate these expenses altogether.

Is it legal for a landlord to prohibit smoking?

Yes. A ban on smoking in common areas is similar to other rules tenants typically must follow regarding the use of common areas, such as the hours for using the laundry facility or the requirement that children be accompanied by an adult when using the pool.

It is also legal for a landlord to ban smoking in individual units. Landlords have the legal right to set limits on how a tenant may use rental property—for instance, by restricting guests, noise, and pets. A “no-smoking” term is similar to a “no pets” restriction in the lease—another way for a landlord to protect his or her property.

Important

A landlord is not unlawfully discriminating against smoking tenants or violating a smoker's fundamental right to privacy when banning smoking in common areas or individual units. Claims to the contrary have no legal basis.³

How would a landlord restrict smoking in the common areas?

A landlord may prohibit smoking in common areas, such as lobbies, hallways, parking lots, laundry rooms, and swimming pools, by changing the rules for those areas. Such a change does not require changing an individual tenant's lease. Instead, a landlord should provide reasonable notice to tenants of the new no-smoking policy, usually 30 days prior to it becoming effective; describe what areas are to be non-smoking; and post signs in those areas. The landlord also may designate a specific area where smoking would be allowed.

Note that state law may already prohibit smoking in indoor common areas such as lobbies, hallways, laundry rooms, and stairwells, if the facility has employees, such as maintenance workers, property managers, or others who work on site.⁴

How would a landlord prohibit smoking in an individual unit?

A landlord would amend the lease with the tenant to add a no-smoking provision.⁵ The process the landlord uses depends on the type of lease involved.

New lease

The easiest time for a landlord to establish a no-smoking policy is when a new lease is created, either when a new tenant moves in or when an expired lease is replaced. Once the landlord and the tenant sign the new agreement, the smoking restriction becomes a requirement like any other provision in the lease. Note that such a provision does not prevent a smoker from renting the unit; instead, it prohibits smoking by anyone in the unit—whether tenants or guests.

Existing lease—with consent of the tenant

If a current tenant and landlord both agree to change an existing lease to include a no-smoking provision, the landlord should either:

- (a) add an amendment to the existing lease specifying the no-smoking provision,⁶ or
- (b) create a new lease that includes the no-smoking provision.

Existing lease—without the consent of the tenant

If a landlord wants to include a no-smoking clause in an existing lease but the current tenant does not, the landlord may still change the lease to prohibit smoking in the unit. The process depends on the type of rental agreement:

Month-to-month rental agreement

A landlord may add a smoking prohibition to a month-to-month rental agreement by giving written notice to the tenant of the new condition⁷ and by making the no-smoking restriction effective at least 30 days after giving notice to the tenant.⁸ A tenant who does not accept this new lease term is, in effect, ending the tenancy by refusing to renew the month-to-month rental agreement.

Fixed-term lease

When a lease is for a fixed term (typically a six- or 12-month period), the landlord cannot change the lease during that time period without the tenant's consent. This type of lease fixes all the conditions in the lease, and the landlord cannot make any changes to the lease during that time. However, when a fixed-term lease ends, it may convert to a month-to-month agreement. If so, the landlord may then add a no-smoking provision to this new month-to-month agreement by following the same steps outlined for the month-to-month rental agreement, above. Otherwise, at the end of the fixed term, the landlord and tenant may need to create a new lease, which can include the no-smoking clause.

Can a landlord prohibit smoking on the balcony or patio?

Yes, a landlord may use the lease to restrict smoking both inside and outside the unit. A no-smoking provision in the rental agreement should clearly state whether smoking is prohibited only inside the unit or on any outdoor space that only the tenant can use, such as the balcony or patio of that unit.

What effect does a no-smoking lease term have?

The smoking prohibition becomes part of the lease. This new term will be like any other condition of the lease: if the tenant or the tenant's guests fail to comply with the provision, the tenant is in breach of the agreement, which could be grounds to end the tenancy.

Additional materials for creating smokefree housing are available from TALC's website at www.talc.phil.org, including a Sample California Ordinance Regulating Smoking in Multi-Unit Housing.

TALC is a project of Public Health Law & Policy and the Public Health Institute. This material was made possible by funds received from the California Department of Public Health, under contract #04-35336. It was created for a California audience to provide general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues, and attorneys should perform an independent evaluation of the issues raised in this fact sheet.



Sample Lease Provision

A sample lease addendum is available from California's Clean Air Project (CCAP):⁹

<http://ccap.etr.org/base/documents/CaliforniaApartmentAssociationRental-LeaseAgreement.pdf>

¹ Such ordinances generally prohibit landlords from changing lease agreements without the tenant's consent. Contact your local rent control board for specific information regarding your rent control ordinance.

² The scope of smoking restrictions and the process to adopt such a policy for a condominium complex is very different from that in the rental housing context, because of condominiums' ownership structure and covenants, conditions, and restrictions (CC&Rs). Note, however, that this fact sheet applies if a condominium owner is renting the unit to a tenant.

³ For a more detailed discussion of this topic see TALC's publication *There Is No Constitutional Right to Smoke*. Available at: http://talc.philaw.org/pdf_files/0051.pdf.

⁴ Cal. Labor Code § 6404.5.

⁵ The terms lease and rental agreement are legally interchangeable and are used in this manner throughout this fact sheet. In practice, a lease provides for a fixed term tenancy (usually six or 12 months), and a rental agreement is used for a month-to-month tenancy.

⁶ A lease amendment must refer to the agreement that is changed and must be signed by the same two people who signed the original agreement.

⁷ A landlord must follow the notice requirements set forth in Cal. Code of Civil Procedure § 1162, which authorizes a landlord to serve notice of a changed lease term in three ways: the landlord must attempt to give written notice to the tenant personally; if that fails, she may leave a copy with someone of suitable age and discretion at either the tenant's residence or place of business; and if that fails, the landlord may fasten a copy in a conspicuous place on the property, and mail a copy to the tenant.

⁸ Cal. Civil Code § 827(a).

⁹ TALC does not endorse any of the cited provisions and is providing the information for illustrative purposes only. Landlords should seek the advice of their own legal counsel before adding language to their rental agreements.