

Smoke-Free Multiunit Housing: Legal Issues and Implications

Regional Tobacco Meeting: Howard County

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Maryland Smoke Free Apartments



www.mdsmokefreeapartments.org

WHY ENACT A SMOKE-FREE HOUSING LAW?

- **Health Impact**

- A 2010 Harvard School of Public Health study detected nicotine in 89% of non-smoking low-income multifamily residences
- According to the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), “the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking.”

- **Economic Impact**

- Reduce property owners/managers maintenance and turnover costs
- Reduce health care and loss of life costs
- Reduce insurance premiums
- Limit liability for owners/managers
- Increasing demand for smoke-free housing

- **Safety Impact**

- Reduce risk of residential fire
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COST OF REHABBING A UNIT

	No Smoking	Light Smoking	Heavy Smoking
General Cleaning	\$240	\$500	\$720
Paint	\$170	\$225	\$480
Flooring	\$50	\$950	\$1,425
Appliances	\$60	\$75	\$490
Bathroom	\$40	\$60	\$400
TOTAL	\$560	\$1,810	\$3,515

ARE SMOKE-FREE LAWS AND POLICIES LEGAL?

NO CONSTITUTIONAL RIGHT TO SMOKE

- Proponents of smokers' rights often argue that smoke-free laws or policies:
 - Violate an individual's constitutional right to privacy; or
 - Discriminate against smokers in violation of the Equal Protection Clause
- All courts, including the U.S. Supreme Court, considering the issue have found:
 - **Smoking is not a protected liberty, and**
 - **Smokers are not a protected class of people**
- **Important Note:** The Maryland state constitution provides broader protections than the federal constitution; however, no state court has found smoking to be a constitutionally protected right.

WHO HAS THE AUTHORITY TO ENACT SMOKE-FREE LAWS?



NO FEDERAL LAW PROHIBITS SMOKE-FREE LAWS

- All 50 states (and the District of Columbia), including Maryland, have the authority to enact smoke-free housing laws
- No federal or state law prohibits an owner, property manager or housing authority from making their apartment building smoke-free

WHO HAS THE AUTHORITY TO ENACT SMOKE-FREE LAWS?

STATE GOVERNMENT

- ▶ The Maryland General Assembly has the authority to enact smoke-free multiunit housing and smoke-free outdoor area laws
 - “Supremacy Clause” establishes that the U.S. Constitution and federal laws are the “supreme law of the land.” This means any state law that conflicts with federal law is preempted.
 - No federal law prevents MD from enacting smoke-free laws
- ▶ The Family Smoking Prevention and Tobacco Control Act (2009) expressly preempts or prevents state legislatures from enacting any law **“which is different from, or in addition to”** federal laws relating to:
 - Cigarette or smokeless tobacco labeling or the content of advertising
 - Tobacco product standards
 - Tobacco manufacturing standards
 - Misbranding, adulteration or modified risk tobacco products

WHO HAS THE AUTHORITY TO ENACT SMOKE-FREE LAWS?

- Sec. 916. Preservation of State and Local Authority.
 - “Nothing...shall be construed to limit the authority of **a...State or political subdivision of a State...**to enact, adopt, promulgate, and enforce any law, rule, regulation or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this chapter, including a law, rule, regulation or other measure relating to or **prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products** by individuals of any age...”

WHO HAS THE AUTHORITY TO ENACT SMOKE-FREE LAWS?

COUNTY GOVERNMENTS

- Howard County has charter rule, which means the county government can legislate on local matters **unless it contradicts or is inconsistent with state law**
- No state law prevents county authorities from enacting and enforcing more stringent measures to protect Maryland residents from involuntary exposure to secondhand smoke.
- The only state law regulating smoking is the Maryland Clean Indoor Air Act of 2007 (CIA). The CIA **prohibits smoking in indoor areas open to the public, but does not regulate smoking in outdoor public areas**. In addition, the law expressly permits county and municipal governments to adopt additional measures “to reduce involuntary exposure to environmental tobacco smoke.” MD. CODE ANN. HEALTH-GEN. § 24-502; 24-510.

WHO HAS THE AUTHORITY TO ADOPT SMOKE-FREE POLICIES?

PROPERTY OWNERS/MANAGERS

- Property owners and managers, condominium associations and public housing authorities can prohibit smoking in individual units as well as indoor and outdoor common areas

PHAs/SECTION 8/SUBSIDIZED HOUSING

- Section 8 properties, public housing, or other government subsidized affordable housing units can prohibit smoking by changing the “house rules” or amending leases
- “The right to smoke or not to smoke is not a right that is protected under the Civil Rights Act of 1964 because smokers are not a protected class under federal law.” – *U.S. Department of Housing and Urban Development*

SMOKE-FREE MULTIUNIT HOUSING: POLICY OPTIONS

Total or Partial Ban

- State/local governments have the authority to prohibit smoking in market-rate, subsidized and public housing,
- Legislative bans can prohibit smoking in one or more of the following areas:
 - **Residential Units**
 - 100% comprehensive;
 - Percentage of units (e.g. 75%)
 - Floors or wings
 - **Balconies/Patios**
 - **Outdoor Common Areas**

SMOKE-FREE MULTIUNIT HOUSING: POLICY OPTIONS

Nuisance Statute

- ▶ Creates private right of action in limited circumstances for residents repeatedly exposed to tobacco smoke drift in the home.
- ▶ HB 1224 (2012) would have added secondhand smoke to the list of nuisances included in the Maryland Code, but the bill failed to make it out of committee.
- ▶ **Utah Code 78B-6-1101.**
 - A nuisance under this part includes tobacco smoke that drifts into any residential unit a person rents, leases, or owns, from another residential or commercial unit and the smoke:
 - (a) Drifts in **more than once in each of two or more consecutive seven-day periods**; and
 - (b) is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property
- ▶ The law provides no cause of action for drifting smoke if the rental agreement or restrictive covenant states that smoking is allowed in other units and that smoke from those units may drift into the unit.

SMOKE-FREE MULTIUNIT HOUSING: POLICY OPTIONS

Express Grant for Owners/Managers to Adopt Smoke-Free Policies

- ▶ Authorizes the owner or manager of a residential dwelling unit to prohibit the smoking of tobacco products on the property, in a dwelling unit, in another interior or exterior area, or on the premises on which the dwelling unit is located
- ▶ Smoke-free policies are already legal, but owners/managers often choose not to adopt them out of fear of lawsuits
- ▶ Owners/managers adopting smoke-free policies must abide by state landlord-tenant law (e.g. tenant notice or amend terms at end of lease)

Montgomery County Code § 24-9

- ▶ **Optional smoking restrictions. The owner or person in control of any property...may prohibit or restrict smoking as provided in this Section by notifying, in writing, the department designated to enforce this Section and by posting appropriate signs. The department must enforce the prohibition or restriction wherever signs are posted...**

SMOKE-FREE MULTIUNIT HOUSING: POLICY OPTIONS

Disclosure Law

- ▶ Mandatory landlord disclosure laws require property owners and managers to notify prospective tenants, in writing, whether smoking is allowed on the premises. Also, smoking policy must be part of the lease.
- ▶ Owners/managers must inform prospective residents whether:
 - Smoking is prohibited on the entire property
 - Smoking is permitted on the entire property; or
 - Smoking is permitted in designated or limited areas of the property (e.g. residential units, outdoor common areas, patios/balconies)
- ▶ Owners/managers not required to restrict smoking or protect residents from secondhand smoke
- ▶ Jurisdictions with disclosure laws: Maine, Oregon, Utah

SMOKE-FREE MULTIUNIT HOUSING: POLICY OPTIONS

Promote Voluntary Adoption of Smoke-Free Policies

- ▶ Smoke-Free multiunit housing policies are legal, effective and good for business
- ▶ **How to Promote Smoke-Free Housing:**
 - Provide local property owners and management agencies with informational materials on legality and benefits of SF MUH
 - LRC available to assist with drafting, implementation and enforcement of SF policies
 - Incentivize smoke-free policies through:
 - Health Department award or acknowledgment
 - Publicizing smoke-free properties
 - Tax credits for properties with comprehensive smoke-free policies

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