Secondhand smoke exposure in multi-unit dwellings such as apartments and condominiums is unfortunately both a common problem and also dangerous for you and your family. Exposure to secondhand smoke can lead to serious health problems including lung cancer, heart disease and stroke, and can make asthma worse in adults and children. It is especially dangerous for children as it can result in permanent damage to growing lungs, and cause respiratory illnesses like bronchitis and pneumonia, ear infections and sudden infant death syndrome (SIDS).¹

Secondhand smoke can seep into multi-unit dwellings from many places, including vents and cracks in walls or floors.

You are not alone in being exposed to secondhand smoke in your multi-unit dwelling. Based on several studies, an estimated 44 percent to 53 percent of multi-unit housing residents that do not allow smoking in their home, have experienced secondhand smoke infiltration in their home from elsewhere in or around the building.² The steps below can help you if you find yourself facing this difficult situation.

**Steps to Take to Protect You and Your Family from Secondhand Smoke Exposure**

1. Check your lease for your apartment or rules for your condominium to see if smoking is addressed or even allowed

2. See if there are laws in your community that apply to secondhand smoke in multi-unit housing
   - In Maine and Oregon and some local jurisdictions in other states, owners/managers of apartments are required to disclose to renters where smoking is allowed or not before they rent an apartment to a tenant.
   - Some local communities in California prohibit smoking in all or a certain percentage of units of multi-unit housing.

3. Talk with your neighbors about your exposure to secondhand smoke.
   - If you know where the smoke is coming from and feel comfortable talking with your neighbor about it, see if an agreement can be reached about where and when they smoke. Try to be calm, polite and offer solutions.
   - Engage and connect with other neighbors about how secondhand smoke may be affecting them and their families, and work together.

4. Talk with your doctor if secondhand smoke is affecting your health and get a note from them that exposure to secondhand smoke is or may be contributing to your illness.

[www.lung.org/smokefreehousing](http://www.lung.org/smokefreehousing)
5. Talk with your landlord/property manager about the secondhand smoke problem in your apartment.
   - An in person meeting or written communication is better, keep a record of all communications in case it is needed later.
   - Be calm, polite, stick to the issue, and ask what solutions might be available.
   - Bring with you or include your doctor’s note about exposure to secondhand smoke if applicable.
   - Ask other neighbors who are being affected by secondhand smoke to attend the meeting with you or send letters too.
   - If your building does not have an indoor smokefree policy, including in living units, ask them about adopting one.
   - Ask them to conduct a tenant survey to gauge the views of residents about a policy prohibiting smoking in all indoor areas. Generally, the majority of residents will be supportive of a voluntary smokefree housing policy.

6. If and when the landlord/property manager gets back in contact with you, they may try to fix the problem by plugging underneath your door or sealing cracks in your walls. This may solve the problem temporarily, but most likely not permanently.
   - Eliminating secondhand smoke exposure indoors is the only permanent solution.

7. You have additional options if the landlord/property manager can’t or won’t fix the problem.
   - The Federal Fair Housing Act could be used if secondhand smoke is causing breathing difficulties, for more information go to, http://www.mdsmokefreeapartments.org/tenants/fair_housing_act.html.
   - There are also other legal options, although a lawsuit should be your last resort after other options have been tried. For more information: http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-condos-2009_0.pdf.
   - If possible, consider moving to another property. If it comes to that, you should ask your landlord/property manager to waive any penalties for breaking your lease.

Additional Resources

There are many additional resources that can provide more information on secondhand smoke in multi-unit housing, here are a few of them:

- The American Lung Association has several nationwide resources available, including its online course and an issue brief in English and Spanish, all available at www.lung.org/smokefreehousing.
- The U.S. Department of Housing and Urban Development (HUD) has created an online toolkit, http://portal.hud.gov/hudportal/documents/huddoc?id=pdfresidents.pdf that provides materials to residents of public housing authorities looking to adopt smokefree buildings.
- There are a number of state and local level websites focused on secondhand smoke in multi-unit housing that may be able to provide more individual assistance in your state or community.

Adopting a Building Wide Smokefree Policy is the Best Way to Protect All Residents from Exposure to Secondhand Smoke

It is perfectly legal for landlords/property owners to adopt policies prohibiting smoking in all indoor areas of their buildings, including in living units or even on their property. There is no legal or constitutional right to smoke.

You can learn more about how to help adopt a smokefree policy in your building through the American Lung Association’s free online course, Smokefree Policies in Multi-Unit Housing: Steps for Success. You can register to take the course at www.lung.org/smokefreehousing.

How Landlords Can Prohibit Smoking in Rental Housing

January 2006 (revised December 2012)

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 ordinance or to a condominium complex that is seeking to adopt a no-smoking policy. 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.

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. California law affirms that landlords have the authority to prohibit smoking anywhere on their property, including common areas and individual units. 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. Note that as of January 1, 2012, landlords who choose to adopt smokefree policies on their property have to inform all new tenants of the policy by including a provision in the lease describing the portions of the property that are smokefree.

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.
How would a landlord restrict smoking in the common areas?
A landlord may prohibit smoking in indoor and outdoor common areas and designate a specific outdoor smoking area by changing the rules for those areas. For existing month-to-month rental agreements, a landlord must provide reasonable notice of the new no-smoking policy, usually 30 days before it becomes effective. For existing fixed-term leases (leases that last for a set time period, for example, 12 months), the rules may be modified with reasonable notice if the lease agreement and/or the rules allow for such changes during the lease period. Otherwise, fixed-term leases should be amended in writing to include the no-smoking provision, either during the term of the lease with the tenant’s consent or when the lease renews or converts to month-to-month.

Note that state law may already prohibit smoking in indoor common areas if the facility has employees, such as property managers or others, who work on site.6

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.7 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;8 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 condition9 and by making the no-smoking restriction effective at least 30 days after giving notice to the tenant.10 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 on our website at www.changelabsolutions.org/tobacco-control, including a Sample California Ordinance Regulating Smoking in Multi-Unit Housing.

This material was made possible by funds received from the California Department of Public Health, under contract #04-35336. Changelab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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Sample Lease Provision
A sample lease addendum is available from the Smokefree Apartment House Registry.¹¹

www.smokefreeapartments.org/Registry_Pix/caa_smoking_addendum.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 our publication There Is No Constitutional Right to Smoke. Available at: http://changelabsolutions.org/publications/no-constitutional-right-smoke.
⁴ Cal. Civil Code § 1947.5
⁵ Id.
⁶ Cal. Labor Code § 6404.5.
⁷ 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.
⁸ 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.
⁹ 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.
¹⁰ Cal. Civil Code § 827(a).
¹¹ Changelab Solutions 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.
A New Lease on Life
Landlords’ Right to Make Properties Smokefree

What Does California Law Say?

California Civil Code section 1947.5 (sometimes known by its bill number, SB 332) affirms that landlords have the right to make their properties 100% smokefree, not just in common areas, but everywhere on the property, including all dwelling units, private balconies, patios, and other areas. In other words, the law makes clear that a landlord who wants to adopt a smokefree policy faces no legal barriers to doing so under state law.

The law does not expand or create new rights for landlords. For example, the law says that landlords still have to follow all applicable local laws, such as rent control laws or other laws that control how changes to a lease can be made.

However, the law does create some additional requirements regarding what landlords must do when they adopt and implement smokefree policies. Also, the law prohibits local governments from passing new ordinances that would directly prevent landlords from going smokefree.
What about Condos or Subsidized Housing?
Because SB 332 affirms the right of all landlords to go smokefree, condo owners who rent out their units and owners/managers of subsidized housing in California can point to SB 332 if their tenants challenge their authority to prohibit smoking. Although subsidized housing providers may, depending on the type of funding they receive, have to go through a slightly different process to become smokefree, it’s important to remember that federal law also allows them to go smokefree if they so choose. In fact, the U.S. Department of Housing and Urban Development, which manages federal funding for affordable housing, strongly encourages smokefree policies, and has developed a toolkit to help guide landlords and managers in going smokefree: http://portal.hud.gov/hudportal/HUD?src=/smokefreetoolkits1

Requirements for Landlords under Civil Code section 1947.5

What information must new lease agreements include regarding smokefree areas?
Under Civil Code section 1947.5, landlords who adopt smokefree policies have to specify, in all new leases, which parts of the property are going to be smokefree. This not only helps potential tenants who desire smokefree housing, but may also help people who smoke to comply with the policy. A housing applicant who is considering renting at a particular property can ask to review a landlord’s lease in order to find out whether smoking is prohibited and, if so, which areas are smokefree.

How must a landlord notify current tenants if she or he plans to adopt a smokefree policy?
State law has long required that landlords follow certain procedures before changing the terms of a lease or rental agreement. Civil Code section 1947.5 makes it clear that landlords must follow these procedures if they adopt a smokefree policy. The law specifically states that a new smokefree policy constitutes a change to the terms of an existing tenancy. Therefore, the law requires landlords to provide reasonable notice of such changes to their existing tenants. The amount of notice a landlord has to provide to a tenant is governed by California Civil Code section 827, and usually depends on the type of rental agreement involved.

The procedures for adding a smokefree provision to the terms of an existing tenancy are described below. Note that landlords may need to follow additional or different procedures if their property is located in a city with a rent control or eviction control ordinance, or if they are participating in a subsidized housing program.

Existing lease—with consent of the tenant
If a current tenant and landlord both agree to change an existing lease to include a smokefree provision, the landlord should either:

(a) Add the smokefree provision to the existing lease; or
(b) Create a new lease that includes the smokefree provision.

Existing lease—without the consent of the tenant
If a landlord wants to add a smokefree clause to an existing lease but the current tenant does not, the landlord may still change the lease. The process, however, 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, and by making the smokefree restriction effective at least 30 days after giving notice. A tenant who does
By including a smokefree policy in the lease, a landlord can help ensure that tenants are aware of smoking restrictions in common areas.

**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. Until the lease expires, its terms are set. However, when a fixed-term lease ends, it may convert to a month-to-month agreement. Then the landlord can add a smokefree requirement (providing the tenant with at least 30 days’ notice, as described above). Otherwise, at the end of the lease’s fixed term, the landlord and tenant may create a new multi-month lease, which can include the smokefree clause. If the tenant will not agree to a new lease, the landlord may evict them for refusing to sign it.

**What if a landlord has a smokefree policy, but doesn’t include it in the lease?**
Although the law does not specify any penalties for a landlord who adopts a smokefree policy but fails to put it in their leases, such a landlord may have difficulty getting tenants to comply with the policy. Even if a tenant repeatedly violates the policy, the landlord likely would not have legal grounds for evicting the tenant, absent an explicit clause in the lease. Including a smokefree policy in the lease helps to ensure that all tenants are aware of restrictions on smoking, and makes it more likely that they will observe the policy.

**Does this law have any impact on landlords who don’t have smokefree policies?**
Civil Code section 1947.5 does not require landlords to adopt smokefree policies. However, tenants who would like their landlords to adopt smokefree policies may want to inform them about the law, as many property owners may be unaware of it (and unaware of their rights that the law affirms). Additional resources that tenants can share with their landlords on creating smokefree housing are available on our website at changelabsolutions.org/landing-page/secondhand-smoke.

**The Effect of Civil Code section 1947.5 on Local Ordinances**

**My city already has a local smokefree housing ordinance. Does this law affect it?**
Civil Code section 1947.5 does not override local laws that restrict smoking in rental housing. Landlords and tenants still must follow local laws. If they haven’t already, landlords should include the requirements of any local smokefree housing ordinance in their leases. For example, if a local ordinance is passed that prohibits smoking in all multifamily housing units, including patios and balconies, landlords should update their leases to be consistent with the ordinance. However, even if a landlord does not update the lease, any local ordinance would still apply to the landlord and their tenants. For more information on how local smokefree housing ordinances may be enforced, see changelabsolutions.org/publications/making-new-smokefree-housing-law-work.

**My city is considering adopting a smokefree housing ordinance. Does Civil Code section 1947.5 make these ordinances unnecessary?**
While Civil Code section 1947.5 makes clear that landlords have the right to adopt smokefree policies, it neither requires them to do so nor guarantees that they will. To ensure that...
all residents, especially those most vulnerable to secondhand smoke, have access to smokefree housing, cities and counties may choose to pass local ordinances that restrict smoking in multifamily properties. Civil Code section 1947.5 does not limit local governments from adopting such ordinances.

Some localities have smokefree housing laws that “grandfather” existing tenants, meaning that tenants can continue smoking in units that they occupied before the laws became effective. Localities that are considering adopting smokefree housing laws should examine whether a grandfathering provision like this could conflict with a landlord’s right to adopt a smokefree policy under Civil Code section 1947.5. Civil Code section 1947.5 explicitly does not override any local laws passed before January 1, 2012, even if they actively require landlords to allow some tenants to continue to smoke. However, the law does override local ordinances passed after January 1, 2012 that deliberately prohibit owners from going 100% smokefree, because such ordinances would conflict directly with Civil Code section 1947.5. Examples of laws that could be preempted are ordinances that would require landlords to maintain designated smoking areas on their property, or that would require them to keep a certain percentage of “smoking units” available to future tenants.

Note that because Civil Code section 1947.5 requires landlords to abide by all local laws about changes in the terms of tenancy, it does not override local rent control or eviction control ordinances. For example, it would not preempt a local ordinance that grandfathering existing tenants by allowing them to maintain the terms of their existing tenancies until they move out. Even though this type of law could limit a landlord’s ability to go smokefree, it would not prohibit them from doing so, but rather would regulate how they must go about it, as discussed below.

How does this law affect cities with local rent control ordinances?

Civil Code section 1947.5 does not override the tenant protections provided by local rent control ordinances. In cities with rent control, local ordinances usually state when and how a landlord can change the terms of a tenancy. For example, a rent control ordinance may require that a tenant agree in writing before a new rule can become effective, or before the tenant can be evicted for violating the new rule. A new smokefree policy that applies to areas where smoking has previously been allowed is a change to the terms of a tenancy. Before they can prohibit smoking on their properties, landlords in cities with rent control have to follow local law governing how to change the terms of a lease. For information about procedures for changing the terms of a tenancy, landlords (and tenants) should consult their local rent control ordinances. For more information, please see our fact sheet, Smokefree Multi-Unit Housing in Jurisdictions with Rent Control, at changelabsolutions.org/publications/smokefree-rent-control.

Finally, many landlords use leases that reference “house rules.” House rules state, in greater detail than the lease, the landlord’s expectations regarding tenants’ use of common areas. House rules are usually listed in a separate document that is attached to the lease. In the past, some landlords have used house rules to prohibit smoking in common areas. Now, however, if a landlord adopts a policy regarding smokefree common areas, Civil Code section 1947.5 requires them to incorporate that policy into the lease itself. This is particularly relevant to jurisdictions with rent control or eviction control ordinances, because landlords in these jurisdictions typically can’t make changes to the terms of tenancy (i.e. the lease) without the tenant’s consent. This means that landlords in rent controlled jurisdictions may only apply a new smokefree common areas policy to existing tenants who agree to the change.

ChangeLab Solutions has developed tools to help California cities and counties better understand, plan, and implement policies to establish smokefree housing. For more information, please see our resources at www.changelabsolutions.org/landing-page/secondhand-smoke.
Landlords’ Right to Make Properties Smokefree

ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

This fact sheet was made possible by funds received from Grant Number 09-11182 with the California Department of Public Health, California Tobacco Control Program.

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3 A landlord must follow the notice requirements of Cal. Civ. Proc. Code § 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.
5 As of December 2013, California cities with local rent control ordinances included Berkeley, Beverly Hills, Campbell, East Palo Alto, Fremont, Hayward, Los Angeles, Los Gatos, Oakland, Palm Springs, San Francisco, San Jose, Santa Monica, Thousand Oaks, and West Hollywood.

changelabsolutions.org/tobacco-control
Although California laws protect people from secondhand smoke at work and in restaurants, shops, and other places, many residents still find themselves exposed to unwanted secondhand smoke in their homes—especially if they live in multi-unit buildings. In condos, where each unit is owned separately, addressing this problem can be especially challenging. This fact sheet answers common questions about how condo owners can make their entire complex, including individual units, smokefree.

Why make a condo complex smokefree?
In addition to the health-related harm drifting tobacco smoke can cause, it can increase condo maintenance costs (for sealing and repainting walls and cabinets, replacing carpets, and cleaning the ventilation system) and decrease a unit’s resale value. Trying to block smoke from drifting between units by using air filters, installing an exhaust fan, or sealing crevices is usually ineffective. Prohibiting smoking altogether is the only sure way to avoid unwanted exposure to this toxic substance.

Who can create a smokefree policy?
Most people assume that when they buy a home, they will be the ones making decisions about their property. If you live in a condo, however, much of the decision-making power lies with the homeowners’ association (HOA). The HOA, either through its elected board of directors (“the board”) or by a vote of the full membership, has the power to enforce or enact regulations controlling the use of property within the complex.

Owning a unit automatically means you are a member of the HOA, and any member of the HOA can begin the process of making a complex smokefree. Many board members are unaware that condos may legally prohibit smoking in part or all of the complex, so it is often up to the HOA members to educate the board. This fact sheet can help.

What areas can be designated smokefree?
Smoking can be restricted on the entire property or only in certain areas.

Indoor common areas: Lobbies, elevators, stairwells, laundry facilities, mailrooms, and other indoor common areas can be designated smokefree by the HOA. Smoking is already prohibited in such areas in many condo complexes, through HOA restrictions or state or local law.
Outdoor common areas:
Courtyards, pools, playgrounds, sandboxes, gardens, pathways, parking areas, and other common areas can also be designated smokefree.\(^8\) In addition to protecting residents from exposure to unwanted smoke, a smokefree outdoor policy can reduce litter from cigarette butts on condo property and keep children from putting discarded butts in their mouths. Designated smoking areas in the outdoor common space are recommended so that people who smoke can do so away from shared recreational areas.

Individual units: HOAs may even restrict smoking in individual units, which would prohibit all current and future owners, renters, and guests from smoking there. A smoking restriction could include the “exclusive-use” common areas such as balconies and patios.

How can a condo complex be made smokefree?
In addition to state laws that regulate all condominiums, each complex has its own governing documents. These include the Declaration of Covenants, Conditions, and Restrictions (CC&Rs)\(^9\) and the Rules.\(^10\)

CC&Rs describe restrictions on the use of property in the complex—for example, the number or ages of people permitted to live in a unit. Because the CC&Rs are legally binding restrictions that automatically apply to the buyer, they must be disclosed at the time of sale and officially recorded, like a deed.\(^11\) Members of the HOA must vote to approve any changes to the CC&Rs.

Rules contain additional restrictions on the use of property and typically expand upon areas not fully defined in the CC&Rs—for example, whether private barbecue grills are permitted on balconies or what types of vehicles may park in the parking lot. Changes to the Rules only require a vote by the board. Because Rules are easier to pass than CC&Rs, Rules may change relatively frequently.

There are three ways to address smoking in a condo complex using these governing documents:

1. Have the HOA members (the condo owners) vote to amend the CC&Rs to restrict smoking in common areas and/or units.

2. Have the HOA members vote to amend the CC&Rs’ nuisance provision to include drifting secondhand smoke. (A condo owner can already apply the nuisance provision to unwanted secondhand smoke, but unless the provision expressly states that secondhand smoke is a nuisance, it can be difficult to prove that the amount of drifting smoke is severe enough to be considered a violation of the nuisance provision.)

3. Have the board of the HOA adopt a new Rule restricting smoking in common areas and/or units.
### Comparing Three Ways to Make a Condo Complex Smokefree

<table>
<thead>
<tr>
<th></th>
<th>Amend CC&amp;Rs to prohibit smoking in units or common areas</th>
<th>Amend nuisance provision of CC&amp;Rs to state that secondhand smoke is a nuisance</th>
<th>Adopt a Rule prohibiting smoking in units or common areas</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Voting</strong></td>
<td>Requires vote of condo owners, using formal voting procedures.</td>
<td>Requires vote of condo owners, using formal voting procedures.</td>
<td>Voted on only by the board, not all HOA members.</td>
</tr>
<tr>
<td><strong>Drafting</strong></td>
<td>The new provision should be written by a lawyer.</td>
<td>The new provision should be written by a lawyer but isn’t overly complicated.</td>
<td>Doesn’t need to be written by a lawyer.</td>
</tr>
<tr>
<td><strong>Expense</strong></td>
<td>Can be expensive due to lawyer fees for drafting and cost to HOA for printing and distributing ballots.</td>
<td>Can be expensive, due to cost of printing and distributing ballots, though lawyer fees should be less than amending the CC&amp;Rs to prohibit smoking because drafting is less complicated.</td>
<td>Very inexpensive because it doesn’t incur lawyer fees or ballot costs.</td>
</tr>
<tr>
<td><strong>Enforcement</strong></td>
<td>The board has a duty to enforce CC&amp;Rs by fining, restricting the rights of, or suing the noncompliant owner. Individual owners can also enforce CC&amp;Rs by suing the noncompliant owner (and possibly by suing the board if it failed to act to enforce the provision).</td>
<td>The board has a duty to enforce CC&amp;Rs by fining, restricting the rights of, or suing the noncompliant owner. Individual owners can also enforce CC&amp;Rs by suing the noncompliant owner (and possibly by suing the board if it failed to act to enforce the provision).</td>
<td>Only the board can enforce a Rule, usually by fining the noncompliant owner.</td>
</tr>
<tr>
<td><strong>Important considerations</strong></td>
<td>Requires votes from enough owners to get passed. Because the owners vote to change the CC&amp;Rs, their participation in the decision may make them more likely to comply with the new no-smoking policy. If there is a violation, CC&amp;Rs may be enforced in more ways than a Rule.</td>
<td>Adding smoking to the nuisance provision would not eliminate smoking in the condo—it would just allow homeowners to more easily use the nuisance provision if secondhand smoke were entering their units. This approach may be useful if a ban on smoking in units isn’t feasible.</td>
<td>Because a Rule is only voted on by the board, this approach may work best for making the common areas nonsmoking—a less controversial restriction than smokefree units (although there is nothing preventing a Rule from prohibiting smoking in all parts of the complex). Adopting a smokefree Rule may work better for complexes where the board actively enforces Rules.</td>
</tr>
</tbody>
</table>
How do these three approaches differ?

Amending the CC&Rs is stronger and more enforceable than adopting a new Rule, but it’s also potentially more expensive and time consuming. What follows are three areas to consider when weighing the options.

**Voting Procedures:** With any change to the CC&Rs, HOA members will have to vote using a fairly complicated balloting procedure that must be followed precisely to ensure that the vote is valid.\(^{12}\) A new Rule, on the other hand, only needs to be voted on by the board rather than all of the HOA members, so it can be done relatively quickly—but it can also be overturned just as quickly by the same or a subsequent board.

**Expense:** Because the CC&Rs are a legally binding document, a new amendment should be drafted by a lawyer. This can be expensive, but it is important to ensure that the amendment is legally appropriate and enforceable.\(^ {13}\) (Drafting attorneys may find it helpful to review a sample at [www.smokefreeapartments.org/condos.html](http://www.smokefreeapartments.org/condos.html).) Amending the CC&Rs means the HOA must buy and print the ballots and envelopes required for the voting procedure; making a Rule change doesn’t involve these costs. You also don’t need to hire a lawyer to draft a new Rule, though it is encouraged. If you draft the Rule without a lawyer, make sure it clearly states what activity is prohibited, which portions of the condo complex are affected, and the penalty for failing to comply with the Rule.

**Enforcement:** Either the board or an individual owner can act to enforce the CC&Rs, whether it’s a new policy prohibiting smoking or an amendment to the nuisance clause.\(^ {14}\) Ordinarily, the board enforces the CC&Rs because it has a legal duty to do so,\(^ {15}\) either by assessing a fine or suspending the unit owner’s right to use recreational facilities in the condo. If the board fails or refuses to enforce the CC&Rs, an owner may sue the owner violating the CC&R and, in some cases, sue the HOA, if it did not act to enforce the CC&R.\(^ {16}\) (Before bringing suit, the owner may need to first participate in a process to resolve the dispute without going to court.\(^ {17}\))

When it comes to enforcing Rules, however, only the board of the HOA can take action—an owner cannot sue another owner for failing to comply.\(^ {18}\) The board could fine the person who is not following the Rule. Even though individual condo owners cannot enforce the Rules against each other, if the board fails to enforce the Rules, owners can work to recall the board and elect new directors who will enforce them.

How should I decide which approach to take?

A first step could be to find out how the other condo owners in your complex feel about a no-smoking policy. You may want to distribute a survey, especially if you live in a large complex.\(^ {19}\) Then you can assess whether and where owners are willing to restrict smoking.

If you want to restrict smoking inside units, a CC&R amendment is probably better suited than a new Rule, because there are more ways to enforce CC&Rs. Board members also may be reluctant to adopt a Rule that restricts smoking in units because they don’t want to upset residents who smoke, so they may be more comfortable putting the decision in the hands of the HOA membership by calling for a vote on whether to amend the CC&Rs instead.

Limiting smoking in common areas will probably be much less controversial than restricting smoking in units, so using the more informal and less costly approach of creating a new Rule might be a more appropriate route.

Another factor that will help you decide between a new Rule and a CC&R change is whether the board
tends to enforce the Rules your complex already has. Because owners cannot enforce Rules, passing a new one is not likely to solve a drifting smoke problem if your board is lax about enforcing Rules to begin with. Also, consider that if the new restriction is ever challenged in court, CC&Rs are more likely than Rules to be upheld by a judge.\textsuperscript{20}

If you are concerned that the condo owners or the board won’t vote for a change prohibiting smoking in units because they are hesitant to “tell others what to do,” it may be easier to add secondhand smoke to the nuisance provision of the CC&Rs.\textsuperscript{21} However, amending the nuisance clause will not create much (if any) immediate change unless the board or an owner takes action to enforce it, so it should be pursued only if the HOA members seem unwilling to vote for the stronger measure of prohibiting smoking in units.

Changing your condo’s policies can be a slow and political process. Getting the votes you need to support a change takes diplomacy and patience: it often can take months from the time you first raise your concerns until the day the votes are counted. For ideas about how to gather support for a new smoking policy, see www.center4tobaccopolicy.org/organizing-introduction.

**When should the smokefree provision go into effect?**

While restrictions can generally be put into effect immediately,\textsuperscript{22} delaying implementation—especially for new restrictions on smoking inside units—will give residents time to adjust.\textsuperscript{23} A reasonable delay could be anywhere from 60 to 180 days from when the change is approved.

You can also include a “grandfather clause” exempting current residents from a new restriction: this exemption would apply only to current owners (or tenants, if a unit is rented), not to future owners or tenants. In general, grandfather clauses are not recommended. Residents who are already suffering from drifting secondhand smoke will not experience any relief, nor will they see other benefits of a smokefree complex such as a reduced fire hazard. Beyond that, new owners—who are not grandfathered in—can complain that they are subject to restrictions that others aren’t; if they sue over the smoking ban, a court may agree that enforcing the provision only against certain owners is unfair and decide that the restriction is not legal.\textsuperscript{24} Still, a grandfather clause may provide a compromise if there is significant opposition and allow a smokefree policy to get enough votes to pass.

If grandfathering seems necessary, it is a good idea to simultaneously alter the CC&Rs’ nuisance provision to include secondhand smoke. This way, residents who suffer from secondhand smoke drifting from grandfathered units may be able to more easily enforce the nuisance provision.

**What if my complex won’t adopt a new Rule or change the CC&Rs?**

You may be able to enforce the existing nuisance provision in your condo’s CC&Rs, even if it doesn’t specifically list smoking as a nuisance. If you have a disability that is made worse by secondhand smoke, you may be able to pursue a disability discrimination claim. You may also be able to bring a lawsuit against a neighbor whose smoke is causing you harm. For more information about each of these options, see “Legal Options for Condo Owners Suffering from Drifting Secondhand Smoke,” a fact sheet coming soon from TALC.

You can also encourage your elected officials to pass a local law against smoking in multi-unit housing. This way, apartments and condos throughout your city or county—not just your own building—could be made smokefree.\textsuperscript{25}
1 Although the term condominium or condo will be used in this document, the information in this fact sheet may also apply to co-ops, subdivisions, common interest developments (CID), planned unit developments (PUD), or other housing that is subject to a declaration of covenants and restrictions and managed by a homeowners’ association.


3 Lingering tobacco residue can make a home difficult to sell and drive down the selling price. Clean-up costs can range from $1,500 to $10,000 and do not guarantee that the smell or the harmful chemicals left behind from the smoke will be fully removed. Martin A. "On Tobacco Road, It’s a Tougher Sell." New York Times, February 8, 2004.


5 The California Air Resource Control Board declared secondhand smoke a “toxic air contaminant” and concluded that there is no safe level of exposure. Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf.

6 This fact sheet uses the term HOA to refer to all homeowners’ associations, even though some complexes may use a different name.

7 If the indoor common area is a place where people such as security guards or maintenance staff work, the California smokefree workplace law prohibits smoking there. See Cal. Lab. Code § 6404.5 (West 2008). Some local governments have passed additional laws banning smoking in indoor common areas, eliminating the need for the condominium association to regulate these areas. Many condo complexes also have restrictions against smoking in indoor common spaces already in their governing documents.

8 As with indoor common areas, many condos already have restrictions on smoking in outdoor common areas either in their governing documents or under local law.

9 Some condominium associations may use a different term for this document, such as declaration or restrictive covenants; but this fact sheet will use the term CC&R to mean any of these documents.

10 Many condos also have Bylaws, a Condominium Plan, or Articles of Incorporation, but because those cannot be used to restrict smoking, they will not be discussed here.


12 Although the precise voting procedures vary, all HOAs must distribute secret ballots and two envelopes to each member 30 days before the deadline for voting. The ballot must be put into one envelope, which is put inside a second envelope. The voter is identified on the outside envelope only. These ballots and envelopes must be prepared by the HOA.

13 The chances are fairly small that another owner will sue to overturn your HOA’s new smoking prohibition. If that happens, it’s helpful to know that there has been at least one case in another state where a court upheld a new CC&R banning smoking in units. An owner who wished to continue smoking in the unit challenged the legality of a new CC&R restricting smoking inside the condos, but the court held that the new CC&R was valid. See Christiansen, et al. v. Heritage Hills #1 Condo. Ass’n, W. 4585750 (Colo. Dist. Ct. Nov. 7, 2006). Available at: http://davis-stirling.com/ds/pdf/smoking.pdf.


18 The method of enforcement used by the board will be different for each HOA and will be described in the governing documents.

19 A sample survey can be found at www.smokefreeapartments.org/CondominiumSurvey.doc.

20 CC&Rs are presumed valid by courts, "unless the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction’s benefits to the development’s residents, or violates a fundamental public policy.” Nahrstedt v. Lakeside Village Condo. Ass’n, 8 Cal. 4th 361, 386 (1994) (italics in original).

21 Some CC&Rs’ nuisance provisions list specific examples of what would be considered a nuisance, such as loud noise at certain hours and foul odors, while others merely make a general statement that any activity or thing affecting residents’ health or welfare will not be permitted. If secondhand smoke is expressly defined as a nuisance in the CC&Rs, individuals affected by the smoke no longer have to prove that the impact of the drifting smoke constitutes a “substantial and unreasonable interference” with the use of the unit. This makes it much easier to enforce the nuisance provision.

22 Your HOA’s governing documents may require a brief notice period before changes go into effect.

23 A short delay in implementation of a new smoking restriction may also make the provision seem more reasonable to a judge, if the provision is ever challenged in court by residents who disagree with the policy. As mentioned above, this scenario is unlikely but possible.

24 See Liebler v. Point Loma Tennis Club, 40 Cal. App. 4th 1600, 1610-11 (4th Dist. 1995) (holding that enforcement of CC&R restrictions must be “uniformly applied” and not place a burden on the individual owner that is “disproportionate to the benefit to the whole”).

If tobacco smoke drifts into your apartment from a neighboring unit, causing you illness or discomfort, you may wonder whether you can take legal action. Suing your neighbor or landlord is an option, but it should be your last resort. Lawsuits are time consuming, expensive, and contentious, and the outcome is always uncertain. In a lawsuit regarding drifting tobacco smoke in an apartment building, the result is especially unpredictable because very few cases, and no state laws, are directly relevant.

Before suing, you should try to reach an agreement with your neighbor to limit where and when s/he smokes. You also could ask your landlord or property manager to make certain areas of the building smokefree. In addition, you could work to pass a law in your community to address the problem of drifting smoke in multi-unit residences. If these approaches fail, you may even want to consider moving.

If you reach the point where a lawsuit seems to be your only option, this fact sheet outlines several things to consider.

Evaluating Your Case
To help you evaluate your potential lawsuit, ask yourself three questions: What harm have I suffered? Who is responsible? And what do I want to get out of a lawsuit?

What harm have I suffered?
As a general rule, it is unwise to file a lawsuit unless you have suffered significant harm. Your chance of convincing a court that you have a justifiable legal claim is far better if you can show that you have been harmed badly by repeated, unwanted exposure to secondhand smoke in your apartment—for instance, if you have visited a doctor with frequent respiratory complaints, missed work due to illness caused by the smoke, stayed away from home when you know your neighbor tends to smoke, or kept your windows closed in hot weather or your heater off in cold weather to prevent smoke from entering your unit.

Who is responsible?
Depending on your situation, it may be your neighbor and your landlord. Your neighbor could be responsible for harming you directly by smoking, and your landlord could be responsible for knowing about the drifting smoke and failing to do anything to protect you from it. So you may be able to sue both your landlord and your neighbor, or you may be able to sue only one or the other.

Legal Options for Tenants Suffering from Drifting Tobacco Smoke
April 2007 (revised December 2012)

If you are considered to be disabled under state or federal law and secondhand smoke makes your condition worse, you might be eligible for special legal protections that are not addressed in this fact sheet. We have developed a separate fact sheet that applies specifically to people with disabilities, available at www.changelabsolutions.org/publications/disability-laws-tobacco-smoke.
What do I want to get out of a lawsuit?
The goal of any lawsuit is to obtain a “remedy” that either stops or compensates for the harm. In a case involving secondhand smoke exposure in an apartment building, you would probably seek money from the person you sued (“money damages”) and/or an order from the court requiring the person you sued to do or stop doing something (an “injunction”). Money damages might help you cover moving costs, medical bills, or lost pay. An injunction might force your landlord to designate certain units smokefree or provide you with a different unit, or it might order your neighbor to smoke only at certain times or places. Before filing a lawsuit, consider what you are hoping for and whether it is worth a legal fight.

Possible Legal Claims
Depending on your circumstances, there are a variety of legal claims that might serve as the basis of your argument in court. Later in this fact sheet you will see why, if you take your case to small claims court, you do not need to learn the names or details of these legal claims. If you hire a lawyer to bring your case in trial court, your lawyer will evaluate which claims are best suited to your situation.

In California, very few cases apply directly to the problem of drifting tobacco smoke in an apartment building. Moreover, state law currently does not restrict smoking in apartments. Unless you live in one of the several cities in California that has specifically prohibited smoking in multi-unit housing or declared secondhand smoke to be a nuisance, your lawsuit would rest on broad legal claims that are not specifically designed to solve your situation.

Legal claims that might be brought against a neighbor include battery, harassment, intentional infliction of emotional distress, negligence, nuisance, and trespass.

At least two courts in California have been open to claims brought against a neighbor for harms caused by drifting tobacco smoke. In 1996, a Los Angeles couple sued their neighbor for harassment because he smoked on a regular basis in the garage under their unit, forcing them to leave their home for hours at a time. The trial court issued a restraining order instructing the neighbor to stay away from his garage while smoking. In 2004, a trial court in Riverside County ruled against a smoking neighbor. The court held that it is possible to win negligence and nuisance claims for exposure to drifting tobacco smoke if it is sufficiently extreme, constant, and noxious. Although these two cases suggest that courts in California might be sympathetic to apartment residents who suffer from a neighbor’s secondhand smoke, neither case is a “published” decision, which means that they cannot be used to support future lawsuits.

Legal claims that might be brought against a landlord include nuisance, constructive eviction, violation of the implied covenant of quiet enjoyment, negligence, and violation of the implied warranty of habitability.

In 2009 a California court held that a landlord who allowed smoking in outdoor common areas could be held liable for creating a public nuisance, after the family of a young girl with asthma sued the landlord based on nuisance and other claims. A California Court of Appeal ruled that secondhand smoke in the outdoor common areas of an apartment complex could in fact constitute a nuisance. The Court of Appeal sent the case back to the lower court for trial to determine whether the secondhand smoke in the outdoor areas of this particular complex is enough to constitute a legal nuisance.

Courts in other states have also held landlords liable for drifting smoke. In an Oregon case, a jury found that a landlord breached the warranty of habitability by moving a known smoker into an apartment below a nonsmoking tenant who was sensitive to secondhand smoke. The jury awarded the tenant a 50 percent rent reduction and damages to cover her medical bills. The housing court in Boston held that drifting cigarette smoke from a downstairs bar was a serious enough intrusion into a tenant’s apartment to violate both the warranty of habitability and the covenant of quiet enjoyment. The court awarded money damages to the tenant and ordered the landlord to fix the problem. In New York, a trial court ruled that secondhand smoke

We have developed a glossary which provides more detail about the legal claims that might apply to your situation. The glossary can be found at the end of this fact sheet.
from a neighboring unit or common area can give rise to a breach of the warranty of habitability and a constructive eviction when the landlord fails to take any action to remedy the situation.\textsuperscript{11}

In addition to the case in California holding that drifting secondhand smoke in an apartment complex may constitute a nuisance, there are scientific findings that should help boost your case against your neighbor and/or landlord. The California Air Resources Board has added secondhand smoke to its list of toxic air contaminants,\textsuperscript{12} and the U.S. Surgeon General has declared there is no risk-free level of exposure to secondhand smoke.\textsuperscript{13} These findings, along with a vast amount of other evidence documenting the negative health effects of secondhand smoke, could help convince a court that you have suffered serious harm from repeated, unwanted exposure to drifting smoke in your apartment.

**Trial Court or Small Claims Court?**

If you decide that you want to file a lawsuit, there are two types of courts available to hear your case: regular trial court and small claims court. (Every trial court in the state must have a small claims court division that is designed to resolve minor civil disputes.) These two types of courts differ in at least three important ways.

**Role of attorneys**

In trial court, both sides generally hire lawyers to represent them. In small claims court, the parties must represent themselves. Note that California law requires small claims courts to provide advisory services to help the parties navigate the process from start to finish. In addition, helpful guides to using small claims court are available on the Internet.\textsuperscript{14}

**Formality of proceedings**

A trial court case is governed by elaborate rules about filing the case, presenting evidence, and so on. Small claims court actions are informal; they use a simple approach to conflict resolution enabling the judge to decide a case quickly, focusing on basic principles of fairness instead of legal technicalities. In order to file a small claims court case, an individual must be able to tell his or her side of the story but does not have to name the legal claims that apply to the case.

**Available remedies**

A trial court judge has the ability to award a wide range of remedies, including money damages and an injunction ordering the person being sued to do or stop doing something. A small claims court, however, may only hear cases involving $7,500 or less and cannot generally issue an outright injunction. A small claims court may instead issue a “conditional judgment,” which allows the person being sued to choose between taking a certain action or paying a fine. For example, a conditional judgment might instruct a tenant to either stop smoking on her patio or pay $5,000 to her neighbor.

Given these three essential differences between trial court and small claims court, one or the other may seem better suited to your case. Trial court would be a good choice if you can find a lawyer willing to represent you who can make solid legal arguments about how some of the claims mentioned above apply to your case. If you win in trial court, you would not only benefit yourself, but you could also contribute to advancing the law by clarifying how certain general legal theories apply to drifting smoke in multi-unit housing.

You might choose to sue in small claims court if you cannot find a lawyer to represent you or if you want your case resolved quickly and efficiently. A small claims court judge will be less worried about the exact legal basis of your claim than about finding a fair solution to your problem. Given that there is are few laws in California addressing secondhand smoke in apartments, the focus on fairness over legal precision may end up working in your favor.
Several local jurisdictions in California have passed laws to address the problem of drifting secondhand smoke in multi-unit housing—and so are the courts. California has joined an increasing number of states across the country where courts have found in favor of tenants who sued their neighbors or landlords over drifting secondhand smoke. Your case might contribute to this trend in California.

Conclusion

If a lawsuit seems to be your only option, do not give up hope. Our society is gradually beginning to recognize the problem of drifting tobacco smoke in multi-unit housing—and so are the courts. California has joined an increasing number of states across the country where courts have found in favor of tenants who sued their neighbors or landlords over drifting secondhand smoke. Your case might contribute to this trend in California.

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1 For a comprehensive discussion of how many of these legal claims might apply in a lawsuit regarding a neighbor’s drifting tobacco smoke: see Ezra DB. “Get Your Ashes Out of My Living Room!” Controlling Tobacco Smoke in Multi-Unit Residential Housing.” Rutgers Law Review, 54(135): 163-65, 2001; For a useful summary of cases addressing real property and nuisance claims relating to secondhand smoke: see Sweeda EL. “Summary of Legal Cases Regarding Smoking in the Workplace and Other Places.” Tobacco Products Liability Reporter: 41-46, 2005.

2 Several local jurisdictions in California have passed laws to address the problem of drifting secondhand smoke in multi-unit housing. Some examples of cities that have adopted laws to prohibit smoking inside almost all units of multifamily housing are: Alameda, Baldwin Park, Belmont, Calabasas, Compton, Dublin, Fairfax, Huntington Park, Larkspur, Loma Linda, Novato, Pasadena, Pineole, Pleasant Hill, Richmond, Rohner Park, Sebastopol, South Pasadena, Tiburon, and Union City. Many of these cities have explicitly declared secondhand smoke to be a nuisance. To learn whether your community has a smokefree multi-unit housing law, contact us at www.changelabsolutions.org/tobacco-control/tobaccoquestions


6 Id.

7 Id.

8 See, e.g., Dwarkin v. Paley, 638 N.E.2d 636 (Ohio Ct. App. 1994); see also Donnelly v. Cohasset Housing Authority, 815 N.E.2d 1103 (Mass. App. Ct. 2004); see Paul, PA, PC v. 370 Lex., LLC, No. 50258(U), slip op. (N.Y. 2005). (All allowing cases to go forward in which a tenant sued a landlord for a failure to ameliorate the problem of another tenant’s secondhand smoke.)


Additional Resources

Americans for Nonsmokers’ Rights (ANR)
www.no-smoke.org

ANR provides advocacy information on such topics as clean indoor air ordinances, smokefree apartments, and tobacco industry activity. The “Going Smokefree” section of ANR’s website contains resources on smokefree housing.

California Courts Self-Help Center
www.courtinfo.ca.gov/selfhelp/smallclaims

The California Courts Self-Help Center offers information and assistance for individuals who are suing or being sued in small claims court. The website includes general background on small claims and mediation, as well as county-specific court information.

California Department of Consumer Affairs
www.dca.ca.gov/publications/small_claims

The Department of Consumer Affairs has produced a thorough handbook that includes answers to frequently asked questions and provides a step-by-step guide to small claims court procedures. See The Small Claims Court: A Guide to Its Practical Use at www.dca.ca.gov/publications/small_claims/small_claims.pdf.

The Center for Tobacco Policy & Organizing
www.center4tobaccopolicy.org

The Center, a project of the American Lung Association in California, provides assistance with community organizing strategies and serves as a tobacco policy resource. Its website contains a variety of resources on smokefree housing.

Smokefree Apartment House Registry
www.smokefreeapartments.org

The Registry provides guidance on how to implement smokefree housing policies and maintains a database of vacant units in apartment complexes where at least half of all adjacent units are nonsmoking.

Conclusion

If a lawsuit seems to be your only option, do not give up hope. Our society is gradually beginning to recognize the problem of drifting tobacco smoke in multi-unit housing—and so are the courts. California has joined an increasing number of states across the country where courts have found in favor of tenants who sued their neighbors or landlords over drifting secondhand smoke. Your case might contribute to this trend in California.

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6 Id.

7 Id.

8 See, e.g., Dwarkin v. Paley, 638 N.E.2d 636 (Ohio Ct. App. 1994); see also Donnelly v. Cohasset Housing Authority, 815 N.E.2d 1103 (Mass. App. Ct. 2004); see Paul, PA, PC v. 370 Lex., LLC, No. 50258(U), slip op. (N.Y. 2005). (All allowing cases to go forward in which a tenant sued a landlord for a failure to ameliorate the problem of another tenant’s secondhand smoke.)


Battery
Intentional contact with another person that results in harm or offense.\(^1\) A battery can involve intentionally causing another person to come into contact with a foreign substance.\(^2\)

**Example:** A Georgia court held that it is possible for a smoker to inflict a battery on another person with his tobacco smoke.\(^3\) The court reasoned, “We are not prepared to accept [the] argument that pipe smoke is a substance so immaterial that it is incapable of being used to batter indirectly. Pipe smoke is visible; it is detectable through the senses and may be ingested or inhaled. It is capable of ‘touching’ or making contact with one’s person in a number of ways.”\(^4\)

Harassment
Willful conduct directed at a specific person that seriously alarms or annoys the person, and that serves no legitimate purpose.\(^5\)

**Example:** A California court ruled in favor of a couple who sued their neighbor for harassment because he smoked on a regular basis in the garage under their unit, forcing them to leave their home for hours at a time.\(^6\)

Intentional infliction of emotional distress
Extreme and outrageous conduct that intentionally or recklessly causes severe emotional suffering.\(^7\)

**Example:** A Georgia court held that a smoker can be liable for intentional infliction of emotional distress if his smoking is “deliberately or recklessly and wantonly” directed at another person and results in emotional harm to that person.\(^8\)

Negligence
Failure to exercise the amount of care that a reasonable person would use in a similar circumstance.\(^9\)

**Example:** A California court ruled that, although negligence claims associated with secondhand smoke may be novel, the law leaves room for a neighbor to be found negligent for generating secondhand smoke that harms a neighbor. The court noted that “the dangers of ‘secondhand smoke’ are not imaginary, and the risks to health of excessive exposure are being increasingly recognized in court.”\(^10\)

Nuisance
Anything harmful to health, or indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life or property.\(^11\) Courts require that, in order for something to be considered a nuisance, the interference must be both “substantial” and “unreasonable.”\(^12\)

**Example:** A California court held that a neighbor’s secondhand smoke can constitute a nuisance if it is a “substantial and unreasonable” invasion “comparable to the reeking manure piles” left unattended by a dairy (the subject of another case).\(^13\)

Trespass
Unauthorized invasion of another’s property.\(^14\) It can include the “deposit of particulate matter”\(^15\) or the “casting of substances”\(^16\) upon someone’s property.

**Example:** A Florida court found that a condominium owner who subjected a neighbor to “excessive secondhand smoke” was liable for trespass because he “discharge[ed] a foreign polluting matter [e.g., drifting tobacco smoke]” from his condominium, which invaded the neighbor’s condominium.\(^17\)
Possible Claims Against a Landlord

Constructive eviction
When a landlord, by acting or failing to act, makes an apartment unfit for occupancy or deprives a tenant of the use of the unit, and the tenant moves out. In such a situation, the landlord has not dispossessed the tenant but has done something which makes the unit uninhabitable.

Example: A New York court ruled that “it is axiomatic that secondhand smoke can be grounds for a constructive eviction” from an apartment if the smoke is sufficiently pervasive.

Covenant of quiet enjoyment
Requires that a landlord must not interfere with the tenant’s ability to possess and use an apartment for the purposes outlined in the rental agreement (e.g., residential living). In order to violate the covenant, a landlord must substantially interfere with a tenant’s right to possess and use the unit.

Example: A Massachusetts court held that drifting cigarette smoke from a downstairs bar was a substantial enough intrusion into a tenant’s apartment to violate the covenant of quiet enjoyment.

Negligence
A landlord owes a general duty of care to a tenant to provide and maintain safe conditions on the rental property. A landlord can be found legally negligent for causing an injury to a tenant by failing to fulfill this duty of care.

Example: In a case analogous to a situation involving drifting smoke in an apartment building, a California court held that a landlord can be liable for negligence for failing to protect a tenant from a physical assault by another tenant when that landlord should have foreseen—based on knowledge of the violent tenant’s ongoing assaults—that this tenant eventually would injure the victim.

Nuisance
Anything harmful to health, or indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life or property. Courts require that, in order for something to be considered a nuisance, the interference must be both “substantial” and “unreasonable.”

Example: A California Court of Appeals ruled that a tenant may sue the landlord for creating a nuisance in outdoor common areas of an apartment building where the landlord permits smoking.

Warranty of habitability
Requires the landlord to guarantee that the rental property is and will remain habitable. Habitability is usually determined by the landlord’s compliance with certain code requirements, such as the obligation to meet specified heating and ventilation standards. However, the California Supreme Court has recognized that there are other factors besides code compliance that may affect whether a residence is considered uninhabitable.

Example: An Oregon jury found that a landlord breached the warranty of habitability by moving a known smoker into an apartment below a nonsmoking tenant who was sensitive to secondhand smoke.

1 Restatement (Second) of Torts § 18(1) (1965); Cal. Penal Code § 242 (West 2007) (defining a battery as “any willful and unlawful use of force or violence upon the person of another”).
2 Restatement (Second) of Torts § 18 cmt. c (1965); Inter-Insurance Exchange of Auto. Club of Southern Cal. v. Lopez, 238 Cal. App. 2d 441, 445 (1966) (explaining that the common law concept of battery includes “any forcible contact brought about by a... substance ... set in motion by a defendant”).
4 Id.
5 Cal. Civ. Proc. Code § 527.6(b) (West 2007); see also, Cal. Civ. Proc. Code § 527.6(a) (West 2007) (A person who has suffered harassment may ask a court to issue a temporary restraining order and an injunction prohibiting the conduct.)
7 Restatement (Second) of Torts § 46 (1965); State Rubbish Collectors Ass’n v. Siltzoff, 38 Cal. 2d 330, 336 (1952) (first recognizing intentional infliction of emotional distress as an independent tort in California).
8 Richardson v. Henny, supra note 3, at 776.
9 Restatement (Second) of Torts § 283 (1965).
12 San Diego Gas & Electric Co. v. Superior Court, 13 Cal. 4th 893, 938 (1996). Examples of nuisances that California courts have found to cause “substantial” interference are: noxious odors from a municipal sewage plant that gave the plaintiffs teary eyes and nausea; and “great volumes of offensive smelling, thick, black smoke” emitted from a smokestack and blown into the plaintiff’s home; Varjabedian v. City of Madera, 20 Cal. 3d 285, 294 (1977) (sewage plant); Dauberman v. Grant, 198 Cal. 586, 589-90 (1926) (smoke). An activity found to constitute an “unreasonable” interference was dust created by the scratching of a neighbor’s chickens, which blew on the neighbor’s vines and trees. See McIntosh v. Brimmer, 68 Cal. App. 770 (1924). By contrast, the noise caused by a bouncing ball and the chatter of players from a neighbor’s basketball court, occurring for thirty minutes, five times a week, was found to be neither substantial nor unreasonable. See Schild v. Rubin, 232 Cal. App. 3d 755 (1991).
13 Babbitt v. Superior Court, supra note 10, at 3.
16 Elton v. Anheuser-Busch Beverage Group Inc., 50 Cal. App. 4th 1301, 1306 (1996); see also Restatement (Second) of Torts § 159(1) (noting that “a trespass may be committed... above the surface of the earth”).
17 Merrill v. Bosser, No. 05-4239 (Fla. Broward County Ct. June 29, 2005) (emphasis in original).
29 Knight v. Hallithammar, 29 Cal. 3d 46, 59 n.10 (1981) (“violation of a housing code or sanitary regulation is not the exclusive determinant of whether there has been a breach”).
Smokefree Housing Ordinance
A Model California Ordinance Regulating Smoking in Multi-Unit Residences
(with Annotations)

Revised June 2015
(Originally issued April 2005)

Developed by ChangeLab Solutions

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INTRODUCTION

ChangeLab Solutions developed this Model Ordinance to help California cities and counties limit exposure to secondhand smoke in multi-unit residences such as apartment buildings, condominium complexes, senior housing, and single resident occupancy hotels. By creating nonsmoking living environments in multi-unit residences, communities can provide an opportunity for everyone to live smokefree – even people who can’t afford to live in a single-family home.

Smokefree multi-unit housing is an important policy initiative to address health inequities among communities of color and low-income populations. Nearly two-thirds of residents of multi-unit housing are people of color, and close to half are low-income or below the poverty level. By adopting laws eliminating exposure to secondhand smoke in people’s homes, communities can ensure that smokefree living is not a luxury but instead made available to all residents, regardless of their economic means, race, or ethnicity.

This Model Ordinance is very broad and can be used to limit smoking in all types of multi-unit dwelling places, from hotels to long-term health care facilities to apartments and condominiums. The Model Ordinance’s comprehensive design limits exposure to secondhand smoke by

- Restricting smoking in the indoor and outdoor common areas of all types of multi-unit residences, with the option to create designated outdoor smoking areas that meet specific criteria;
- Prohibiting smoking inside all units of multi-unit residences, including apartments and condominiums; and
- Providing robust enforcement mechanisms, including no-smoking lease terms and options for private individuals and organizations to enforce the smokefree housing provisions.

To create this updated version of the Model Ordinance, ChangeLab Solutions conducted key informant interviews with a dozen tobacco control professionals and advocates across California. Based on their detailed feedback and experience with the rapidly evolving policy landscape – in which acceptance and appreciation of smokefree housing is constantly growing – ChangeLab Solutions made the following changes to the Model Ordinance:

- All units of multi-unit residences, rather than most units, are nonsmoking. This approach is more protective of health; when smoking is permissible in even a few units, smoke can travel between smoking and nonsmoking units, exposing residents to secondhand smoke. Several studies have confirmed that smokefree housing policies are the most effective way to fully reduce secondhand smoke exposure in...
multi-unit housing. In addition, public health professionals and advocates agree that a 100 percent smokefree policy makes implementation, education, and enforcement of the law clearer and easier, since there are no exceptions to the policy.

- The prohibition of smoking in multi-unit housing includes not only traditional tobacco products, such as cigarettes and cigars, but also marijuana, used either medicinally or recreationally, and newly popular electronic smoking devices, such as e-cigarettes. Research has found that the secondhand smoke from marijuana and the aerosol emitted from electronic smoking devices contain chemicals known to the State of California to cause cancer. The gases from electronic smoking devices also have chemicals known to cause birth defects or other reproductive harm. Users of tobacco products and marijuana have smokeless options available to ingest the active ingredients. By using these alternatives, users can reduce the health risks associated with secondhand emissions, minimize exposure to those toxins, and protect people who live with and adjacent to them.

For communities that wish to allow smoking in some units or create an exemption for the use of electronic smoking devices or medical marijuana, please contact ChangeLab Solutions for assistance.

Please note: while this Ordinance is not written specifically for communities with rent control laws, there are no legal restrictions that would prevent those cities from adopting a smokefree housing law. However, it is highly recommended that in such jurisdictions the city attorney and rent control board be included in selecting and adopting the specific provisions for a smokefree housing law.

The Model Ordinance offers a variety of options. In some instances, blanks (e.g., [ ____ ] ) prompt you to customize the language to fit your community’s needs. In other cases, the ordinance offers you a choice of options (e.g., [ choice one / choice two ] ). Some of the ordinance options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary in order to make sure the ordinance is consistent with a community’s existing laws. Your city attorney or county counsel will likely be the best person to check this for you.

ChangeLab Solutions also has developed a separate ordinance to create smokefree outdoor areas, such as parks, dining patios, and public events. The Comprehensive Smokefree Places Ordinance also would make all indoor workplaces smokefree by eliminating the exceptions contained in California’s Labor Code section 6404.5, which prohibits smoking in most – but not all – places of employment. If you would like to adopt a more customized approach, some aspects of that ordinance can be combined with the smokefree housing ordinance.
If you have questions about how to adapt ChangeLab Solutions’ ordinances for your community, please contact ChangeLab Solutions through our website at www.changelabsolutions.org/tobaccoquestions. The model ordinances, plug-ins, and other tobacco control resources can be found on our website at www.changelabsolutions.org/tobacco-control.
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AN ORDINANCE OF THE [CITY / COUNTY OF ____ ]
PROHIBITING SMOKING IN AND AROUND
MULTI-UNIT RESIDENCES
AND AMENDING THE [ ____ ] MUNICIPAL CODE

The [ City Council / County Board of Supervisors ] of the [ City / County of ____ ] does
demand as follows:

SECTION I. FINDINGS.

WHEREAS, tobacco use causes death and disease and continues to be an urgent public
health threat, as evidenced by the following:

- 480,000 people die prematurely in the United States from smoking-related diseases
every year, making tobacco use the nation’s leading cause of preventable death;¹
- Tobacco use can cause disease in nearly all organ systems and is responsible for 87
percent of lung cancer deaths, 79 percent of all chronic obstructive pulmonary disease
deaths, and 32 percent of coronary heart disease deaths;² and

WHEREAS, secondhand smoke has repeatedly been identified as a health hazard, as
evidenced by the following:

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to
secondhand smoke;³
- The California Air Resources Board placed secondhand smoke in the same category as
the most toxic automotive and industrial air pollutants by categorizing it as a toxic air
contaminant for which there is no safe level of exposure;⁴,⁵
- The California Environmental Protection Agency (EPA) included secondhand smoke
on the Proposition 65 list of chemicals known to the state of California to cause
cancer, birth defects, and other reproductive harm;⁶
- The American Society of Heating, Refrigerating, and Air Conditioning Engineers
(ASHRAE) recommends that multi-unit housing be free from environmental tobacco
smoke, marijuana smoke, and electronic smoking devices’ aerosol;⁷ and

WHEREAS, exposure to secondhand smoke causes death and disease, as evidenced by the
following:

- Since 1964, approximately 2.5 million nonsmokers have died from health problems
caused by exposure to secondhand smoke;⁸
- Secondhand smoke is responsible for an estimated 41,300 heart disease-related and
lungs cancer-related deaths among adult nonsmokers each year in the United States;8

- Exposure to secondhand smoke increases the risk of coronary heart disease by about 25 percent to 30 percent9 and increases the risk of stroke by 20 percent to 30 percent;10
- Secondhand smoke kills more than 400 infants every year;11 and

WHEREAS, secondhand aerosol emitted from electronic smoking devices has been identified as a health hazard, as evidenced by the following:

- Research has found at least ten chemicals known to the State of California to cause cancer, birth defects, or other reproductive harm,6, 12, 13, 14 such as formaldehyde, acetaldehyde, lead, nickel, and toluene;15,16,17
- More than one study has concluded that exposure to vapor from electronic smoking devices may cause passive or secondhand vaping;15,17,18
- The State of California’s Tobacco Education and Research Oversight Committee (TEROC) “opposes the use of e-cigarettes in all areas where other tobacco products are banned;”19 and

WHEREAS, secondhand marijuana smoke has been identified as a health hazard, as evidenced by the following:

- The California EPA included marijuana smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer;6,20
- Marijuana smoke contains at least 33 known carcinogens;20
- Research on the health effects of marijuana smoke has found statistically significant associations with cancers of the lung, head and neck, bladder, brain, and testes;20 and

WHEREAS, nonsmokers who live in multi-unit dwellings can be exposed to neighbors’ secondhand smoke, as evidenced by the following:

- Several peer-reviewed studies on drifting secondhand smoke in multi-unit housing have confirmed that secondhand smoke can and does transfer between units,21,22 creeping under doorways and through wall cracks;11
- More than one study has found that residents of multi-unit housing have high levels of cotinine (a biomarker for nicotine) in their blood and saliva;21,22
- 13 peer-reviewed journal articles have found that between 26 percent and 64 percent of residents of multi-unit housing report secondhand smoke drifting into their home;21 and

WHEREAS, harmful residues from tobacco smoke can be absorbed by and cling to virtually all indoor surfaces long after smoking has stopped and then be emitted back into the air, making this “thirdhand smoke” a potential health hazard, as evidenced by the following:
Thirdhand smoke contains carcinogenic materials that accumulate over time, presenting a health hazard long after the initial smoke is gone;\textsuperscript{23} A study found that thirdhand smoke remains months after nonsmokers have moved into units where smokers previously lived;\textsuperscript{24} Human exposure to these thirdhand smoke carcinogens can be through inhalation, ingestion, or skin absorption through contact with carpeting, furnishings, or clothing;\textsuperscript{25} Thirdhand smoke potentially poses the greatest danger to infants and toddlers, who crawl on rugs and furnishings and suck on items in the home;\textsuperscript{25} Non-smoking people who are exposed to thirdhand smoke have significantly higher nicotine and cotinine levels than those who have not been exposed to thirdhand smoke;\textsuperscript{24} Research has shown that thirdhand smoke damages human cellular DNA;\textsuperscript{26} and

WHEREAS, smoking is the number one cause of fire deaths, is a leading cause of fire-related injury;\textsuperscript{27} and contributes to fire-related health inequities, as evidenced by the following:

- In 2011, U.S. fire departments responded to an estimated 90,000 smoking-related fires, which resulted in an estimated 1,640 injuries, 540 deaths, and $621 million in direct property damage;\textsuperscript{28} One in four fatalities is NOT the smoker whose cigarette started the fire, and 25 percent of those who die are neighbors or friends of the smoker;\textsuperscript{28} African-American males and American-Indian males have the highest fire death rates;\textsuperscript{27} The elderly (people 85 and older) have the highest fire death rate (49.2%);\textsuperscript{29} and the risk of dying from smoking-related fires increases with age;\textsuperscript{28} The U.S. Fire Administration recommends that people smoke outdoors;\textsuperscript{30} and

WHEREAS, the Surgeon General has concluded that eliminating smoking in indoor spaces is the only way to fully protect nonsmokers from secondhand smoke exposure and that separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot completely prevent secondhand smoke exposure;\textsuperscript{3} and

WHEREAS, several studies have confirmed that smokefree multi-unit housing policies are the most effective method to fully reduce secondhand smoke exposure in multi-unit housing;\textsuperscript{21} and

WHEREAS, 32 percent of Californians (or 11.8 million people) live in multi-unit housing,\textsuperscript{31} which accounts for one-seventh of the total multi-unit housing population in the country;\textsuperscript{32} and
WHEREAS, between 44 percent to 46.2 percent of Californians living in multi-unit housing with personal smokefree home policies are exposed to secondhand smoke in their home;\(^{31}\) and

WHEREAS, surveys have found that between 65 percent and 90 percent of multi-unit housing residents who experience secondhand smoke in their home are bothered by the secondhand smoke incursion;\(^{21}\) and

WHEREAS, secondhand smoke exposure in multi-unit housing contributes to tobacco-related health inequities. For example, when compared with adults who live in single family homes, adults who live in multi-unit housing are more likely to

- Be from communities of color (62.9\% of residents of multi-unit homes versus 49.6\% of residents of single family homes);\(^ {32}\)
- Be low-income or below the poverty line (46.8\% versus 27\%);\(^ {32}\)
- Have less than a high school diploma (21.4\% versus 14.8\%);\(^ {32}\)
- Be current smokers (17.5\% versus 13.2\%);\(^ {32}\) as well as
- Be uninsured (23.4\% versus 14.2\%);\(^ {32}\) and

WHEREAS, secondhand smoke in multi-unit housing is a significant threat to the health and safety of California children, as evidenced by the following:

- About a quarter of those who live in multi-unit housing (25.2\%) are under the age of 18;\(^ {31}\)
- The home is the primary source of secondhand smoke for children;\(^ {11}\)
- 56.4 percent of youth living in apartment units in which no one smokes have elevated blood cotinine levels above .05 ng/mL, indicating they have been exposed to potentially dangerous levels of secondhand smoke;\(^ {21,33}\)
- Children who live in apartments have mean cotinine levels that are 45 percent higher than cotinine levels in children who live in detached homes;\(^ {21,33}\) and

WHEREAS, there are significant savings from adopting a smokefree multi-unit housing policy, as evidenced by the following research:

- Multi-unit housing property owners in California would save $18.1 million in renovation expenses each year;\(^ {21,34}\)
- If all subsidized housing were to go smokefree in California, there would be approximately $72.4 million saved per year, including $61.1 million in secondhand smoke-related healthcare expenditures, $5.9 million in renovation expenses, and $5.4 million in smoking-attributable fire losses;\(^ {35}\) and
WHEREAS, a majority of multi-unit housing residents, including a large portion of smokers, support smokefree policies in multi-unit residences, as evidenced by the following:

- 74 percent of Californians surveyed approve of apartment complexes requiring that at least half of rental units be nonsmoking;
- 69 percent of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings;
- 78 percent support laws that create nonsmoking units;

WHEREAS, a local ordinance that authorizes residential rental agreements to include a prohibition on smoking of tobacco products within rental units is not prohibited by California law; and

WHEREAS, there is no Constitutional right to smoke; and

WHEREAS, California law declares that anything which is injurious to health or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance; and

WHEREAS, local governments have broad latitude to declare nuisances and are not constrained by prior definitions of nuisance; and

WHEREAS, at least 55 California cities and counties have adopted smokefree multi-unit housing ordinances, and at least 25 of these jurisdictions have restricted smoking in 100 percent of units; and

NOW THEREFORE, it is the intent of the [City Council / County Board of Supervisors] in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking around nontobacco users; by protecting children from exposure to smoking where they live and play; and by protecting the public from nonconsensual exposure to secondhand smoke in and around their homes.

SECTION II. [Article / Section] of the [City / County of ____] Municipal Code is hereby amended to read as follows:

Sec. [____ (*1)]. DEFINITIONS. For the purposes of this [article / chapter] the following definitions shall govern unless the context clearly requires otherwise:

(a) “Adjacent Unenclosed Property” means any Unenclosed Area of property, publicly or privately owned, that abuts a Multi-Unit Residence, but does not include property containing detached single-family homes.
**COMMENT:** This definition is used to describe the reach of nonsmoking “buffer zones” around Multi-Unit Residences. It defines where Smoking is prohibited when buffer zones reach beyond the property lines of the Multi-Unit Residence and extend onto neighboring property (see Section 4 “Nonsmoking Buffer Zones”).

To exclude property containing detached single-family homes (so that residents and guests at such homes may smoke notwithstanding their proximity to multi-family housing), add the bracketed language. Without the bracketed language, a smokefree buffer zone might encompass a portion of the backyard of a single-family residence as well as adjacent outdoor areas of businesses and parking lots.

(b) “Common Area” means every Enclosed Area and every Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit are entitled to enter or use, including, without limitation, halls, pathways, lobbies, courtyards, elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools, parking garages, parking lots, grassy or landscaped areas, restrooms, laundry rooms, cooking areas, and eating areas.

**COMMENT:** Note that California Labor Code section 6404.5 (the state smokefree workplace law) may already prohibit Smoking in indoor Common Areas if the Multi-Unit Residence has employees, such as maintenance workers, property managers, or others who work on-site.

The definition of Common Areas does not include balconies, patios, or decks associated with individual Units because these are not shared areas. Balconies, patios, and decks are included in the definition of Unit.

(c) “Electronic Smoking Device” means an electronic device that can be used to deliver an inhaled dose of nicotine, or other substances, including any component, part, or accessory of such a device, whether or not sold separately. “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

**COMMENT:** This definition is broad enough to cover all Electronic Smoking Devices that are used to deliver nicotine or other substances. Regulating the use of all varieties of Electronic Smoking Devices, regardless of their nicotine content, protects bystanders from exposure to the hazardous substances found in Electronic Smoking Device vapor, reduces the risk that people may view the use of Electronic Smoking Devices in smokefree areas as acceptable, and facilitates uniform enforcement.
(d) “Enclosed Area” means an area in which outside air cannot circulate freely to all parts of the area, and includes an area that has

(1) any type of overhead cover, whether or not that cover includes vents or other openings and at least three (3) walls or other physical boundaries of any height, whether or not those boundaries include vents or other openings; or

(2) four (4) walls or other vertical boundaries that exceed six (6) feet in height, whether or not those boundaries include vents or other openings.

**COMMENT:** For the purposes of this ordinance, the distinction between “enclosed” and “unenclosed” is primarily relevant to establishing designated Smoking areas (see Section *3) and nonsmoking buffer zones (see Section *4).

An area that is partially covered by anything would be analyzed under subparagraph (1), whereas only areas that are totally uncovered would be analyzed under subparagraph (2). For the purposes of this ordinance, any physical boundary, regardless of composition, constitutes an “other physical boundary” for application of this definition.

**NOTE:** If the Municipal Code already has Smoking restrictions, it may contain a definition of “enclosed.” Review the Code and make any necessary modification to existing definitions and/or operative provisions to ensure consistency with the new definition.

(e) “Landlord” means any Person or agent of a Person who owns, manages, or is otherwise legally responsible for a Unit in a Multi-Unit Residence that is leased to a residential tenant, except that “Landlord” does not include a tenant who sublets a Unit (e.g., a sublessor).

**COMMENT:** The Municipal Code may already contain a definition of “Landlord.” If so, the definition provided here can be omitted, although sublessors should specifically be excluded.

(f) “Multi-Unit Residence” means property containing two (2) or more Units, including, but not limited to, apartment buildings, condominium complexes, senior and assisted living facilities, and long-term health care facilities. [ Multi-Unit Residences do not include the following:

(1) a hotel or motel that meets the requirements of California Civil Code section 1940, subdivision (b)(2);
(2) a mobile home park;

(3) a campground;

(4) a marina or port;

(5) a single-family home, except if used as a child care or health care facility subject to licensing requirements; and

(6) a single-family home with a detached or attached in-law or second unit permitted pursuant to California Government Code sections 65852.1, 65852.150, 65852.2 or an ordinance of the [City/County] adopted pursuant to those sections, except if the single-family home or in-law/second unit is used as a child care or health care facility subject to licensing requirements.

**COMMENT:** This definition is intended to be used in conjunction with the definition of Unit in this Model Ordinance, which makes clear that this term is limited to dwelling spaces.

Because the definition of Unit in this ordinance is very broad and includes all types of dwelling places – from rooms in a hotel to tents at a campground – a community may want to limit the types of dwelling places covered by the smokefree housing ordinance. The optional language provides examples of the types of exceptions communities are likely to consider. Hotels and motels are included in the list of optional exemptions because many communities regulate Smoking in these facilities using a smokefree workplace ordinance, but there is no legal reason why hotels and motels could not be made completely smokefree using this Model Ordinance. Single-family residences are suggested as an exemption, because the definition of Unit in this ordinance includes individual bedrooms in a single-family home. Thus, a twobedroom free-standing house would be a Multi-Unit Residence per the definitions in this ordinance, unless the exemption is included.

Note that the definition of Multi-Unit Residence without any exemptions includes the following types of dwelling places: apartments, condominium projects, townhomes, stock cooperatives, and co-housing; affordable housing (for seniors, disabled tenants, Section 8, etc.); long-term health care facilities, assisted living facilities, hospitals, and family support facilities; hotels, motels, single room occupancy (“SRO”) facilities, dormitories, and homeless shelters; mobile home parks, campgrounds, marinas, and ports; as well as single-family homes and single-family homes with an in-law unit.

Should your community wish to allow Smoking inside a certain percentage of Units in apartments or condominiums and exclude those Units from the prohibitions in this Model Ordinance, please contact ChangeLab Solutions for assistance.
(g) “New Unit” means a Unit that is issued a [ certificate of occupancy / final inspection ] after [ insert effective date of ordinance ] [ and also means a Unit that is let for residential use for the first time after [ insert effective date of ordinance ] ].

COMMENT: This definition is used to differentiate between Units that are already built and occupied when the ordinance is adopted and Units constructed afterward. The distinction is important because, under this ordinance, all Units built after the ordinance is adopted are required to be nonsmoking as soon as they are deemed ready for occupancy. However, Smoking may be allowed in existing Units for a period of time after the effective date of the ordinance (the implementation period) to allow landlords and tenants time to become aware of and comply with the new ordinance.

The certificate of occupancy or final inspection is probably the most administrable way to distinguish between existing and New Units. Alternatively, a community could distinguish between Units for which land use entitlements have or have not been issued or Units that have or have not been occupied by a tenant for the first time.

To include existing housing that may become available to the rental market after the ordinance is adopted, such as an in-law cottage that has not been rented previously, add the optional clause at the end of the definition.

Note that the term “New Unit” is a subset of “Unit,” so whenever the term Unit is used in the ordinance, it includes all New Units.

(h) “Nonsmoking Area” means any Enclosed Area or Unenclosed Area in which Smoking is prohibited by

(1) this [ chapter / article ] or other law;

(2) binding agreement relating to the ownership, occupancy, or use of real property; or

(3) designation of a Person with legal control over the area.

(i) “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity, including government agencies.

COMMENT: The Municipal Code may contain a definition of “person.” Review any existing definition of “person” in the Municipal Code to determine whether to include this definition in your ordinance.
This definition includes most businesses. In addition, it includes governmental entities, such as a city or county.

(j) “Smoke” means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition, or vaporization when the apparent or usual purpose of the combustion, electrical ignition, or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term “Smoke” includes, but is not limited to, tobacco smoke, Electronic Smoking Device vapors, marijuana smoke, and crack cocaine smoke.

**COMMENT:** This is a special definition that differs from the common understanding of what “smoke” is. For example, smoke from a fireplace or a barbeque grill is not “Smoke” for the purposes of this ordinance because the smoke generated by those activities is not produced for the purpose of inhalation. The limitation placed on “Smoke” by this definition is important to prevent unintended consequences, such as inadvertently prohibiting the burning of incense or use of barbeque grills.

At the same time, this definition is designed to be broad enough to cover any emissions released into the air as a result of combustion or heating, so long as the purpose of the combustion or heating is to inhale the byproduct, as discussed above. By clarifying that the term “Smoke” applies not just to solid particles but also to vapor and gas, this definition covers the vapor emitted by Electronic Smoking Devices, such as electronic cigarettes, electronic hookahs, etc. This definition also includes marijuana smoke. Users of tobacco products and marijuana have smokeless options available to ingest the active ingredients. By using these alternatives, users can reduce the health risks associated with secondhand emissions, minimize exposure to those toxins, and protect people who live with and adjacent to them.

Should your community wish to allow the use of marijuana or Electronic Smoking Devices inside of Units and exclude these from the prohibitions in this Model Ordinance, please contact ChangeLab Solutions for assistance.

(k) “Smoking” means inhaling, exhaling, burning, or carrying any lighted, heated, or ignited cigar, cigarette, cigarillo, pipe, hookah, Electronic Smoking Device, or any plant product intended for human inhalation.

**COMMENT:** This definition includes Smoking marijuana and the use of Electronic Smoking Devices. Should your community wish to allow the use of marijuana or Electronic Smoking Devices inside of Units and exclude these from the prohibitions in this Model Ordinance, please contact ChangeLab Solutions for assistance.
(l) “Unenclosed Area” means any area that is not an Enclosed Area.

(m) “Unit” means a personal dwelling space, even where lacking cooking facilities or private plumbing facilities, and includes any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio. “Unit” includes, without limitation, an apartment; a condominium; a townhouse; a room in a senior facility; a room in a long-term health care facility, assisted living facility, or hospital; a room in a hotel or motel; a dormitory room; a room in a single room occupancy (“SRO”) facility; a room in a homeless shelter; a mobile home; a camper vehicle or tent; a single-family home; and an in-law or second unit. Unit includes, without limitation, a New Unit.

**COMMENT:** This definition is intentionally extremely broad. It is designed to capture all conceivable “dwelling spaces,” as the examples illustrate. However, due to the design of this Model Ordinance, any limitations on the types of housing covered by the ordinance should be added to the defined term “Multi-Unit Residence,” not to the definition of “Unit.” For example, some “mobile homes” in mobile home parks may be included in this definition and even cited in the examples, but “mobile homes” can be specifically excluded from the ordinance under the definition of “Multi-Unit Residence.”

Sec. [ ____ (*2) ]. SMOKING RESTRICTIONS IN NEW AND EXISTING UNITS OF MULTI-UNIT RESIDENCES.

(a) Smoking is prohibited in all New Units of a Multi-Unit Residence, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio. Smoking in a New Unit of a Multi-Unit Residence, on or after [insert effective date of ordinance], is a violation of this [article / chapter].

(b) Smoking is prohibited in all Units of a Multi-Unit Residence that are not New Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio. Smoking in a Unit of a Multi-Unit Residence that is not a New Unit, on or after [insert effective date of ordinance + 1 year], is a violation of this [article / chapter].

**COMMENT:** The Smoking restrictions in existing Units become effective a year after the ordinance is adopted to allow time for people to become familiar with the new law and take the necessary steps to comply with it.

Implementing a smokefree housing law by using a reasonable phase-in period, followed by a specific date on which everyone is required to abide by the law, is generally
perceived to be the most fair approach. This strategy balances public health needs against the potential inconvenience the ordinance puts on people who smoke and those who must implement the new policy. A 12-month phase-in period takes into account both the potential legal rights of tenants under existing rental agreements and the legal authority of Landlords to modify those agreements, as this ordinance requires.

Sec. [____ (*3)] NO SMOKING PERMITTED IN COMMON AREAS EXCEPT IN DESIGNATED SMOKING AREAS.

COMMENT: If your Municipal Code already has Smoking restrictions, it may contain a provision for smokefree Common Areas of multi-unit housing. Review the Code and make any necessary modification to existing definitions and/or operative provisions to ensure consistency with new ordinance language.

(a) Smoking in a Common Area, on or after, [insert effective date of ordinance], other than in a designated Smoking area established pursuant to subsection (b), is a violation of this [article/chapter].

(b) A Person with legal control over a Common Area, such as, for example, a Landlord or homeowners’ association, may designate a portion of the Common Area as a designated Smoking area provided the designated Smoking area complies with paragraph (c) below at all times.

COMMENT: Establishing a designated Smoking area is optional, not mandatory. While a designated Smoking area is convenient for people to use for Smoking, a Landlord or homeowners’ association may decide not to create a designated Smoking area. In this case, a person may go off-site to smoke, or remain on the property and use a smokeless tobacco product or an FDA-approved nicotine replacement therapy (e.g., nicotine gum or nicotine patch). More information on these nicotine replacement products can be found through the California Smokers’ Helpline (www.nobutts.org or 1-800-no-butts).

Should a designated Smoking area be created, the following criteria are highly recommended.

(c) A designated Smoking area:

(1) Must be an Unenclosed Area;

(2) Must be at least twenty-five (25) feet from Unenclosed Areas primarily used by children and Unenclosed Areas with improvements that facilitate physical activity including, for example, playgrounds, tennis courts, swimming pools, and school campuses;
(3) Must be located at least twenty-five (25) feet from any Nonsmoking Area. The location of Nonsmoking Areas may change due to the new enactment of a law, execution of an agreement, or other event that affects the area’s Smoking designation. If an event occurs that changes a Nonsmoking Area, a Person with legal control over a designated Smoking area within less than twenty-five (25) feet of that Nonsmoking Area must modify, relocate, or eliminate that designated Smoking area so as to maintain compliance with the requirements of this subsection (b). In the case of a Nonsmoking Area on a neighboring property established only by private agreement or designation and not by this [chapter / article] or other law, it shall not be a violation of this [chapter / article] for a Person with legal control to designate a Smoking area within twenty-five (25) feet of the Nonsmoking Area unless that Person has actual knowledge of, or a reasonable person would know of, the private agreement or designation. It shall not be a violation of this [chapter / article] for a Person to Smoke within a Nonsmoking Area if the area is erroneously designated as a Smoking area unless a reasonable person would know of the error;

**COMMENT:** This clause limits where a designated Smoking area can be located in order to prevent drifting Smoke from entering neighboring property. It includes areas designated as Nonsmoking either by law or by a neighboring business or homeowner by contract or private designation.

In some communities, it may be difficult to designate a Smoking area twenty-five (25) feet away from a Nonsmoking Area (e.g., where neighboring buildings are close together or when there are limited Unenclosed Areas on site). In this case, a community may reduce the distance requirement.

Another option is to remove the specific distance requirement. To do so, replace the first sentence of subsection (b)(2) “Must be located at least twenty-five (25) feet from any Nonsmoking Area” with “Must be located so that Smoke does not drift into an Enclosed Nonsmoking Area. Should complaints be received, the designated Smoking area must be relocated or removed.” In addition, the reference to twenty-five (25) feet in the second to last sentence of (b)(2) “…within twenty-five (25) feet of …” should be replaced with “near.”

(4) Must be no more than [ten percent (10%)] of the total Unenclosed Area of the Multi-Unit Residence for which it is designated;

(5) Must have a clearly marked perimeter;

(6) Must be identified by conspicuous signs; and
(7) Must not overlap any Enclosed or Unenclosed Area where Smoking is prohibited by this [chapter / article] or other law.

(d) No Person with legal control over a Common Area in which Smoking is prohibited by this [chapter / article] or other law shall knowingly permit the presence of ash trays, ash cans, or other receptacles designed for or primarily used for disposal of Smoking waste within the area.

Sec. [ ____ ([*4] ). NONSMOKING BUFFER ZONES.

(a) Smoking is prohibited in Adjacent Unenclosed Property within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area of a Multi-Unit Residence.

COMMENT: To create the most comprehensive smokefree buffer zone around Multi-Unit Residences, include this Section. Subsection (a) creates a smokefree buffer zone that extends to Unenclosed Areas on neighboring property that is within 25 feet of any doorway, window, etc., of the Multi-Unit Residence. This comprehensive provision can be fine-tuned. By using a version of the “Adjacent Unenclosed Property” definition to exempt certain types of neighboring property, such as property containing detached single-family homes, a community can still prohibit Smoking on other private property, such as bar patios or parking lots. If this Section is not included in your community’s ordinance, the defined term “Adjacent Unenclosed Property” in Section [*1 should be deleted.

[b] Subsection (a) above does not apply to a Person who is Smoking in the restricted buffer zone area for less than a minute while actively passing on the way to another destination, and who does not enter the buffer zone area while Smoking more than twice per day. ]

COMMENT: This optional exemption for a passerby who is Smoking (e.g., Smoking while walking or driving by) is a common component of entryway Smoking bans. However, such an exemption could prove problematic in the multi-unit housing context because a Person who is Smoking on neighboring property could claim to be just passing through but in fact be intentionally violating the ordinance. The timing restriction is an attempt to limit this problem, but it does not eliminate it completely. Without this exemption, a Person who is Smoking in a buffer zone while passing through it will be in violation of the law.
Sec. [____ (*5)]. REQUIRED AND IMPLIED LEASE TERMS FOR ALL NEW AND EXISTING UNITS IN MULTI-UNIT RESIDENCES.

**COMMENT:** This section requires that Smoking restrictions be included in a lease for the rental of a Unit in any type of Multi-Unit Residence (e.g., an apartment building, condominium complex, or single room occupancy facility). Note that the term “Unit” includes the defined term “New Unit,” so whenever the term Unit is used in the ordinance, it includes all Units, both existing and new.

By including these provisions in lease agreements, Smoking becomes a violation of both the lease and the local ordinance. Thus, Landlords may enforce the Smoking lease terms just like any other condition in the rental agreement, such as common provisions regarding noise, use of laundry facilities, and damage to common areas. Further, by including the “third-party beneficiary” provision, other residents of the Multi-Unit Residence can enforce a lease’s Smoking restrictions.

In addition to the lease restrictions, Smoking is unlawful under the ordinance (see Section *2 Smoking Restrictions in New and Existing Units of Multi-Unit Residences) and local government may enforce the Smoking restrictions pursuant to the law (see Section *8 Enforcement).

(a) Every lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, entered into, renewed, or continued month-to-month after [ insert effective date of ordinance ], shall include the provisions set forth in subsection (b) below on the earliest possible date when such an amendment is allowable by law when providing the minimum legal notice.

**COMMENT:** This provision calls for the Landlord to amend a rental agreement at the first opportunity. It is also designed to provide tenants with adequate legal notice of the pending change in their lease terms. The overall objective is to insert the new terms into every lease as soon as legally allowable, which will generally be within one year after the effective date of the ordinance (because most standard residential leases are for one year). For multi-year leases, these terms will be added as soon as legally possible when the lease renews.

(b) Every lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, entered into, renewed, or continued month-to-month after [ insert effective date of ordinance ], shall be amended to include the following provisions:

**COMMENT:** The following subsections contain both an explicit directive regarding the legal effect the required clause must achieve and a model clause to implement the directive. Because leases vary in terms, format, and language, it is not possible to provide verbatim wording that can be easily dropped into any lease. These clause requirements provide a Landlord with needed flexibility to conform an existing lease while using terms consistent with the rest of the lease. In many cases, a Landlord can probably just use the example language provided with minimal changes. Members of the
(1) A clause providing that as of [insert effective date of ordinance], it is a material breach of the agreement to allow or engage in Smoking in the Unit, including exclusive-use areas such as balconies, porches, or patios. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant to engage in smoking in the unit or exclusive use areas such as balconies, porches, or patios as of [insert effective date of ordinance].”

(2) A clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant to engage in Smoking in any Common Area of the Multi-Unit Residence other than a designated Smoking area. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in any common area of the property, except in an outdoor designated smoking area, if one exists.”

(3) A clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant to violate any law regulating Smoking while anywhere on the property. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to violate any law regulating smoking while anywhere on the property.”

(4) A clause expressly conveying third-party beneficiary status to all occupants of the Multi-Unit Residence as to the Smoking provisions of the lease or other rental agreement. Such a clause might state, “Other occupants of the property are express third-party beneficiaries of those provisions in this agreement regarding smoking. As such, other occupants of the property may enforce such provisions by any lawful means, including by bringing a civil action in a court of law.”

**COMMENT:** Declaring other residents third-party beneficiaries grants people living in the Multi-Unit Residence limited rights to enforce the Smoking restrictions in leases. Without the declaration, other residents usually lack the legal right to enforce the lease terms (because they are not a “party” to the agreement), and the power to enforce the terms of the lease rests solely with the Landlord.
(c) Whether or not a Landlord complies with subsections (a) and (b) above, the clauses required by those subsections shall be implied and incorporated by law into every agreement to which subsections (a) or (b) apply and shall become effective as of the earliest possible date on which the Landlord could have made the insertions pursuant to subsections (a) or (b).

**COMMENT:** This is a back-up provision to ensure that the Smoking-related terms are included by law, even if the Landlord fails to comply with subsections (a) or (b).

(d) A tenant who breaches a Smoking provision of a lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, or who knowingly permits any other Person subject to the control of the tenant or present by invitation or permission of the tenant, shall be liable for the breach to (i) the Landlord; and (ii) any occupant of the Multi-Unit Residence who is exposed to Smoke or who suffers damages as a result of the breach.

**COMMENT:** This provision provides other tenants legal standing to seek damages or possibly an injunction against someone Smoking in violation of a lease term.

There are two additional enforcement mechanisms in this ordinance:

Section *8 “Enforcement” provides for traditional enforcement by local government officials. It also contains an optional “private enforcement” provision that grants any member of the public the right to enforce the ordinance. Thus, a Landlord, a tenant, or a member of the public could bring a lawsuit to enforce the ordinance in either Superior Court or small claims court if the optional language is included.

(e) This [article / chapter] shall not create additional liability for a Landlord to any Person for a tenant’s breach of any Smoking provision in a lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence if the Landlord has fully complied with this Section.

**COMMENT:** This provision expressly states that the Landlord is not the guarantor of the ordinance’s enforcement. That is, the Landlord is not contractually required to enforce the no Smoking lease terms, and other residents cannot force the Landlord to act against a tenant who violates one. Including this provision can be extremely important in efforts to gain Landlord support for the ordinance.

(f) Failure to enforce any Smoking provision required by this [article / chapter] shall not affect the right to enforce such provision in the future, nor shall a waiver of any breach constitute a waiver of any subsequent breach or a waiver of the provision
Sec. [ ____ (*6) ]. OTHER REQUIREMENTS AND PROHIBITIONS.

(a) Every Landlord shall deliver the following, on or before [ insert effective date of ordinance + 6 months ], to each Unit of a Multi-Unit Residence:

(1) a written notice clearly stating:

(i) all Units are designated nonsmoking Units and Smoking will be illegal in a Unit, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of [ insert effective date of ordinance + 1 year ]; and

(ii) Smoking in all Common Areas, except for specifically designated Smoking areas, will be a violation of this [ chapter / article ] as of [ insert effective date of ordinance ].

(2) a copy of this [ article / chapter ].

COMMENT: This subsection describes the information Landlords must give to residents of Multi-Unit Residences to notify them of the new Smoking restrictions.

A copy of this ordinance must accompany the notice of the smokefree housing law so that residents may assess for themselves their full rights and obligations. Alternatively, Landlords can provide residents a summary of their rights and obligations under the law instead of (or in addition to) a copy of the ordinance itself. If this approach is adopted, steps should be taken to ensure the accuracy and appropriateness of any summary, as summaries are inherently incomplete. The city/county may also want to send information directly to renters about the new smokefree housing law. Research by the American Lung Association in California finds tenants are more likely to be aware of the new Smoking restrictions when information comes from the local government.

Your community may want to provide additional recommendations or guidelines for implementing the smokefree housing law. These could include holding a tenant or building meeting to discuss the new policy and/or hosting cessation classes for residents of Multi-Unit Residences. If your community has residents who have limited English proficiency, notices regarding the smokefree housing policy could be translated. Because
smaller housing providers/managers may not have the resources to do this, the city/county could develop sample translated notices.

Communities may want additional requirements to involve tenants and landlords with implementation and enforcement of the law. These could include such things as requiring tenants to inform visitors about the no smoking requirements; requiring tenants to tell landlords promptly about drifting smoke; and/or requiring landlords to take reasonable steps to enforce the no Smoking provisions. Should your community wish to add these types of provisions, please contact ChangeLab Solutions for assistance.

(b) As of [insert effective date of ordinance], every Landlord shall provide prospective tenants with written notice clearly stating that:

(i) Smoking is prohibited in Units, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of [insert effective date of ordinance]; and

(ii) Smoking is prohibited in all Common Areas, except for specifically designated Smoking areas, as of [insert effective date of ordinance].

(c) As of [insert effective date of ordinance], every seller of a Unit in a Multi-Unit Residence shall provide prospective buyers with written notice clearly stating that:

(i) Smoking is prohibited in Units, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of [insert effective date of ordinance]; and

(ii) Smoking is prohibited in all Common Areas, except for specifically designated Smoking areas, as of [insert effective date of ordinance].

(d) Clear and unambiguous “No Smoking” signs shall be posted in sufficient numbers and locations in Common Areas where Smoking is prohibited by this [article / chapter] or other law. [In addition, signs shall be posted in sufficient numbers and locations in the Multi-Unit Residence to indicate that Smoking is prohibited in all Units.] Such signs shall be maintained by the Person or Persons with legal control over the Common Areas. The absence of signs shall not be a defense to a violation of any provision of this [article / chapter]. “No Smoking” signs are not required inside or on doorways of Units, except for hotels or motels as defined in California Civil Code section 1940, subdivision (b)(2).
(e) No Person with legal control over any Nonsmoking Area shall permit Smoking in the Nonsmoking Area, except as provided in Section [ ____ (*)](a ).

Sec. [ ____ (*7)]. SMOKING AND SMOKE GENERALLY.

(a) The provisions of this [ article / chapter ] are restrictive only and establish no new rights for a Person who engages in Smoking. Notwithstanding (i) any provision of this [ article / chapter ] or of this Code, (ii) any failure by any Person to restrict Smoking under this [ article / chapter ], or (iii) any explicit or implicit provision of this Code that allows Smoking in any place, nothing in this Code shall be interpreted to limit any Person’s legal rights under other laws with regard to Smoking, including, for example, rights in nuisance, trespass, property damage, and personal injury or other legal or equitable principles.

COMMENT: The subsection spells out that the intent of this ordinance is to create new smokefree areas and enhance the right of nonsmokers to smokefree environments. This ordinance does not provide smokers with any “safe harbors” from existing laws that might already impose potential liability for Smoking.

Subsection (a) does not expand traditional nuisance law in any way, and should generally be included in all ordinances based on this model. Subsection (b) below does potentially expand traditional nuisance law.

(b) For all purposes within the jurisdiction of the [ City / County of ___], nonconsensual exposure to Smoke [ occurring on or drifting into residential property ] is a nuisance, and the uninvited presence of Smoke on [ residential ] property is a nuisance and a trespass.

COMMENT: The declaration in subsection (b) that Smoke is a nuisance extends far beyond the residential context, unless limited by including the optional language in brackets. Once Smoke is declared a nuisance, nuisance abatement laws can be used to address Smoke around doorways, at businesses, in public venues, and anywhere else it may occur. However, declaring Smoke a nuisance is particularly helpful in the housing context because it eliminates the need to prove that some particular level of exposure has occurred and that such exposure is an unjustified intrusion or hazard.
California Government Code section 38771 explicitly authorizes cities to declare nuisances by ordinance. Counties may declare a nuisance pursuant to the broad police power set forth in the California Constitution, article XI, section 7.

Sec. [ ____ (*8) ]. PENALTIES AND ENFORCEMENT.

(a) The remedies provided by this [ article / chapter ] are cumulative and in addition to any other remedies available at law or in equity.

**COMMENT:** The following provisions are designed to offer a variety of options to the drafter and the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use in any given case. As a practical matter, all these enforcement options would not be applied in a single case, although multiple remedies might be used against a particularly egregious violator over time.

(b) Every instance of Smoking in violation of this [ article / chapter ] is an infraction subject to a [ one hundred dollar ($100) ] fine. Other violations of this [ article / chapter ] may, in the discretion of the [ City Prosecutor / District Attorney ], be prosecuted as infractions or misdemeanors when the interests of justice so require. Enforcement of this chapter shall be the responsibility of [ ____ ]. In addition, any peace officer or code enforcement official may enforce this chapter.

**COMMENT:** The first sentence establishes the penalty for the core type of violation: Smoking where it is prohibited. The fine amount can be modified but cannot exceed $100 for a first infraction. (See California Government Code section 36900.) It is separated from the main enforcement provision that follows so that law enforcement officers can simply write a ticket for illegal Smoking. The second sentence, sometimes called a “wobbler,” affords the prosecuting attorney discretion whether to pursue a violation as an infraction (like a parking ticket) or a misdemeanor (a crime punishable by up to a $1,000 fine and/or six months in County Jail). Alternatively, violations can be set as **either** an infraction or a misdemeanor in all circumstances. Misdemeanors are more serious crimes for which a jury trial is available to defendants. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

This provision also designates a primary enforcement agency, which is recommended, but remains flexible by permitting any enforcement agency to enforce the law.

(c) Violations of this [ article / chapter ] are subject to a civil action brought by the [ City / County of ____ ], punishable by a civil fine not less than [ two hundred fifty dollars ($250) ] and not exceeding [ one thousand dollars ($1,000) ] per violation.
**COMMENT:** This provision provides civil fines for violating the ordinance. It requires that a traditional civil suit be filed by the city or county (possibly in small claims court). The fine amounts can be adjusted but cannot exceed $1,000 per violation. (See California Government Code section 36901.)

(d) No Person shall intimidate, harass, or otherwise retaliate against any Person who seeks compliance with this [article / chapter]. Moreover, no Person shall intentionally or recklessly expose another Person to Smoke in response to that Person’s effort to achieve compliance with this [article / chapter]. Violation of this subsection shall constitute a misdemeanor.

(e) Causing, permitting, aiding, or abetting a violation of any provision of this [article / chapter] shall also constitute a violation of this [article / chapter].

**COMMENT:** This is standard language that is typically included in a city or county code and may be omitted if duplicative of existing code provisions.

(f) Any violation of this [article / chapter] is hereby declared to be a public nuisance.

**COMMENT:** By expressly declaring that a violation of this ordinance is a nuisance, this provision allows enforcement of the ordinance by the city or county via the administrative nuisance abatement procedures commonly found in municipal codes.

Note that this declaration merely says that violating the ordinance qualifies as a nuisance (e.g., when Smoking in a nonsmoking area, the violation is the nuisance, not the Smoke). It is not the same thing as a local ordinance declaring Smoke a nuisance. Please see Section *7(b) for the declaration that nonconsensual exposure to secondhand is a nuisance.

(g) In addition to other remedies provided by this [article / chapter] or otherwise available at law or in equity, any violation of this [article / chapter] may be remedied by a civil action brought by the [City Attorney / County Counsel], including, without limitation, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

**COMMENT:** It is common to provide that the local government’s lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or permanent injunction as described in *IT Corp. v. County of Imperial*, 35 Cal.3d 63 (1983).
A public agency should think carefully about the nuisance abatement procedure it chooses in enforcing this ordinance after it is adopted. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.7. Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 and Health & Safety Code section 17980. Government Code section 38773.5 establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs.

[h] Any Person, including a legal entity or organization acting for the interests of itself, its members, or the general public, may bring a civil action to enforce this [article / chapter] by way of a conditional judgment or an injunction to prevent future such violations and may sue to recover such actual or statutory damages as he or she may prove.

COMMENT: In order to get an injunction, a plaintiff would have to sue in superior court, generally with the assistance of an attorney. A plaintiff, however, could seek a conditional judgment in small claims court and represent him/herself. Note that the difference between an injunction and a conditional judgment is that an injunction directly orders the defendant to do something (or to refrain from doing something). A conditional judgment, however, gives the defendant a choice between fulfilling certain conditions (e.g., ceasing the illegal conduct) or suffering a different judgment (e.g., paying monetary damages). (See 1 Consumer Law Sourcebook: Small Claims Court Laws and Procedures (California Department of Consumer Affairs 2005.) A conditional judgment could serve as an alternative to damages, or it could be in addition to damages. For example, a small claims court could order some monetary damages along with a conditional judgment giving the defendant a choice between stopping the violations or paying even more money.

[i] Except as otherwise provided, enforcement of this [article / chapter] is at the sole discretion of the [City / County of ___]. Nothing in this [article / chapter] shall create a right of action in any Person against the [City / County of ___] or its agents to compel public enforcement of this [article / chapter] against private parties.

COMMENT: This is an optional provision, which makes clear that a City or County cannot be liable to any Person for failure to enforce the Smoking restrictions in this ordinance.
SECTION III. CONSTRUCTION, SEVERABILITY.

It is the intent of the [City Council / Board of Supervisors] of the [City / County] of [__________] to supplement applicable state and federal law and not to duplicate or contradict such law and this Ordinance shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County] of [_____] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

COMMENT: This is standard language. Often this “boilerplate” is found at the end of an ordinance, but its location is immaterial.


