Legal Options for Tenants Suffering from Drifting Tobacco Smoke

April 2007 (revised December 2012)

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.

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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
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 are few laws in California addressing secondhand smoke in apartments, the focus on fairness over legal precision may end up working in your favor.
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.

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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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, Fairfield, Huntington Park, Larkspur, Loma Linda, Novato, Pasadena, Pinole, Pleasant Hill, Richmond, Rohnert 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.changelabolutions.org/tobacco-control/tobaccoquestions


6 Id.

7 Id.

8 See, e.g., Dworkin 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.
This glossary, designed to accompany our fact sheet, “Legal Options for Tenants Suffering from Drifting Tobacco Smoke,” defines the legal claims mentioned in that fact sheet. Depending on your situation, you may be able to sue your neighbor or your landlord, and sometimes you may be able to sue both of them because you have legal claims against each. Remember, if you decide to file a lawsuit, it is very difficult to predict the outcome because there have been so few cases about drifting secondhand smoke.

Each entry summarizes the legal claim and gives an example of a case involving that claim. Where possible, the examples are cases from California concerning drifting tobacco smoke in an apartment. However, since there are only a few California cases on this issue, some examples are from an analogous situation or from other states. Although the cases in the examples provide useful illustrations, a California court would not be required to follow the rulings in the cases from outside California.

If you take your case to trial court, your lawyer will evaluate which claims are best suited to your situation. If you choose to bring a case in small claims court—where lawyers are not allowed—you do not need to learn the names or details of these legal claims.

**Possible Claims Against a Neighbor**

**Battery**
Intentional contact with another person that results in harm or offense. A battery can involve intentionally causing another person to come into contact with a foreign substance.

*Example:* A Georgia court held that it is possible for a smoker to inflict a battery on another person with his tobacco smoke. 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.”

**Negligence**
Failure to exercise the amount of care that a reasonable person would use in a similar circumstance.

*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.”

**Harassment**
Willful conduct directed at a specific person that seriously alarms or annoys the person, and that serves no legitimate purpose.

*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.

**Intentional infliction of emotional distress**
Extreme and outrageous conduct that intentionally or recklessly causes severe emotional suffering.

*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.

**Trespass**
Unauthorized invasion of another’s property. It can include the “deposit of particulate matter” or the “casting of substances” 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.
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.

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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 (1966); State Rubbish Collectors Ass’n v. Silznoff, 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; Vanjebadan 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.


15 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”).

16 Merrill v. Bosser, No. 05-4239 (Fla. Broward County Ct. June 29, 2005) (emphasis in original).


26 Babbitt v. Superior Court, supra note 3, at 776.


28 Babbitt v. Superior Court, supra note 3, at 776.

29 Richardson v. Henny, supra note 3, at 776.


33 Cal. Civ. Code § 1941 (West 2007); Green v. Superior Court, 10 Cal. 3d 616, 622-29 (1974) (first recognizing that there is a common law implied warranty of habitability in residential leases in California).


35 Knight v. Hallsthammar, 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”). Quoting Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 327 (1979) (discussing the implied warranty of habitability doctrine and noting that it applies not only to code violations but also to “conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disasters”).

Smokefree Multi-Unit Housing Policies

Strategies to Support Resident Compliance

Smokefree multi-unit housing policies affect all tenants living on the premises. Overall, these policies provide significant health benefits by greatly reducing the amount of secondhand smoke to which residents are exposed. In addition, smoking is a fire hazard. By facilitating compliance among all tenants, landlords improve tenant and property safety.

But it’s important to remember that because smokefree housing policies require tenants to smoke outside the home, some tenants who smoke may face difficulties complying with the policy. For example, some tenants may have physical impairments that affect their ability to go outside to smoke. Similarly, tenants with a cognitive disability may forget that they are required to smoke outside. In these ways, a smokefree policy may pose particular compliance challenges for residents with disabilities.

Ensuring compliance among residents with disabilities is important because a smokefree policy will not succeed without consistent observance from all residents. Furthermore, tenants with disabilities deserve to be able to meet the demands of the smokefree policies while also avoiding the potential adverse consequences of non-compliance.
Smokefree Multi-Unit Housing Policies: Strategies to Support Resident Compliance

Strategies to Support Compliance with Smokefree Policies

Landlords can take proactive, voluntary steps to ensure that all tenants who smoke can successfully comply with a smokefree policy. Based on research and prior experience, ChangeLab Solutions recommends the following strategies to help facilitate compliance.

• **Advanced Notice:** When a landlord implements a voluntary smokefree policy on a property where smoking was previously allowed, a landlord may grant more advanced notice than the legally required amount. For example, landlords may include smokefree lease terms immediately as each lease is renewed or rolls over to month-to-month. In some cases, this could leave tenants with as little as 30 days notice that smoking is no longer allowed on the property. To give tenants a longer period of time to prepare themselves for the new policy, many landlords instead choose to set a future date for the new smokefree policy to become effective that is at least one year in advance. This allows all tenants equal time to prepare regardless of when the smokefree policy was incorporated into their lease.

• **Clear Communication:** Residents with disabilities should receive notices or documents regarding the smokefree policy in a way they can understand or read (e.g., at an appropriate reading level or in Braille).

Tenants with Disabilities and Disability Rights Law

Disability rights laws such as the Americans with Disabilities Act (ADA), the Rehabilitation Act, the federal Fair Housing Act (FHIA), the California Fair Employment and Housing Act (FEHA), and the Unruh Civil Rights Act protect tenants with disabilities from discrimination in housing. In cases where a tenant or prospective tenant has a legally recognized disability that interferes with their ability to fully benefit from the tenancy, landlords must consider “reasonable accommodations” in rules, policies, practices, or services to ensure the tenant has an equal opportunity to use and enjoy their housing unit. Common examples of reasonable accommodations are waiving a pet-free policy to allow a vision-impaired tenant to have a service dog, or providing a sign language interpreter to a hearing impaired person during their application process.

Some tenants who smoke because of an addiction to nicotine have attempted to argue that they should receive a reasonable accommodation that would allow them to continue to smoke on the premises, despite a smokefree policy. But, because smoking and nicotine addiction are not legally recognized disabilities, landlords have no legal obligation to make exceptions for people simply because they claim they need to smoke.

Similarly, tenants with legally recognized disabilities, such as impaired mobility, have at times requested exemptions from smokefree housing policies as an accommodation to their disability. Landlords are not legally obligated to grant this request. Because drifting secondhand smoke poses a serious health hazard to other tenants, an accommodation that exempts any tenant, even a resident with disability, from a smokefree policy should not be considered “reasonable.” This is especially true given that there are alternative means for using tobacco or nicotine (e.g., nicotine gum, nicotine patches, etc.) that would not expose non-smoking tenants to secondhand smoke.

In fact, existing disability laws may obligate landlords to accommodate the needs of disabled tenants who are harmed by exposure to secondhand smoke. For more details see ChangeLab Solutions’ fact sheet “How Disability Laws Can Help Tenants Suffering from Drifting Tobacco Smoke.” For example, a tenant with chronic obstructive pulmonary disorder (COPD) may experience a severe worsening of symptoms if he or she is exposed to secondhand smoke coming from a neighbor’s unit, and may be entitled to what is called a reasonable accommodation to their unit in order to reduce exposure to secondhand smoke.
**Health/Cessation Resources:** 70% of tobacco users, including individuals with disabilities, would like to stop smoking. Landlords can help tenants who smoke by including informational health pamphlets in tenant notices (e.g., a pamphlet on quitting tobacco). Additionally, landlords can contact their local health department to request assistance or information. Many resources such as nicotine replacement products, medication, and counseling are also available at low or no cost through government programs. Notably, the Illinois and Michigan Health Departments provide tobacco cessation programs specifically tailored to smokers with disabilities.

**Multi-step Enforcement Policy:** Eviction or threat of eviction should not be the consequence of a first-time failure to comply with a smokefree policy, especially if a resident’s failure to comply may have been due to a cognitive, emotional, or physical disability. Instead, multi-phase enforcement policies which include incremental penalties are more effective and fair. For example, a multi-step enforcement policy could include an initial notice of violation and a reminder of the policy (by person and/or mail), an in-person meeting as a second warning of potential eviction, and the third step could be the landlord’s decision to end the lease. The Boston Housing Authority uses a five-step enforcement policy and an internal review showed that the Boston Housing Authority has not had to go past the third step of its enforcement policy. If residents are granted a chance and proper warning, residents are likely to abide by a smokefree multi-unit policy.

**Designated Smoking Areas:** Landlords are under no legal obligation to provide smoking areas on their property, however some landlords choose to designate an outdoor portion of their property as a smoking area. If provided, designated smoking areas should be ADA accessible. In choosing to designate a smoking area, location is important. A designated smoking area should be far enough away from doors, windows, or vents so that smoke does not drift into the building, and so that people entering or exiting the property are not exposed to smoke as they arrive or leave.

**Conclusion**
Smokefree multi-unit housing policies protect the health of everyone who lives in or visits apartment buildings.

Although tenants who smoke, in particular those with disabilities, may have a difficult time complying with a smokefree policy, landlords aren’t legally obligated to make exceptions to permit smoking on the property. Indeed, landlords may have a legal obligation to accommodate disabled tenants if they have a disability that is triggered or worsened by exposure to secondhand smoke coming from a neighbor’s unit.

Still, there are steps landlords can and do take to make it easier for their residents to comply with a smokefree policy. Some strategies include: providing an extended period for tenants to prepare for the new policy, providing clear notices, connecting tenants to resources that can help them to quit or to manage their smoking, multi-step enforcement policies, and, in some cases, providing an outdoor designated smoking area where tenants may go to smoke, so long as smoke from the area doesn’t enter nonsmoking areas of the property.
Smokefree Multi-Unit Housing Policies: Strategies to Support Resident Compliance

1. The suggested strategies are not legally required, but instead reflect voluntary actions by property owners to improve the efficacy of their smokefree policy.
12. The webpage for California Smokers’ Helpline is a helpful starting place for health and cessation resources in California. Available at: www.nobutts.org/ and for a list of local resources visit www.nobutts.org/CountyListings.aspx. In California, “Local Lead Agencies” (LLAs) coordinate tobacco prevention efforts in local cities and counties. To find your local LLA see: California Department of Public Health, California Tobacco Control Program. “Local Health Department Programs.” Accessed on June 18, 2014. Available at: www.cdph.ca.gov/programs/tobaccoPages/LocalHealthDepartmentPrograms.aspx. The American Lung Association’s California office also offers helpful information on health and cessation resources, www.lung.org/associations/states/california/programs/
13. See the “Illinois Disability and Health Program” web page for more information about Illinois’ health and disability programs. The link also lists program contacts if further information is needed. Accessed June 17, 2014. Available at: www.idph.state.il.us/idhp/index.htm
14. Michigan Department of Community Health. Everyone Has the Right To Be Healthy: Information for People with Disabilities and Their Caregivers on How to Quit Tobacco. Available at: www.midisabilityhealth.org/documents/Tobacco_brochure.pdf
15. Boston’s five–step enforcement policy includes: (1) in-person policy reminder; (2) meeting and warning; (3) written notice; (4) reminder of policy; and (5) decision to pursue court.
There is a growing awareness that tenants of apartment buildings are often exposed to drifting secondhand smoke. To address this problem, communities are beginning to consider laws to restrict smoking in common areas and individual units of multi-unit housing. As these communities craft such laws, they face an important question: How will the new law be enforced?

Changelab Solutions has created a comprehensive *Smokefree Housing Ordinance: A Model California Ordinance Regulating Smoking in Multi-Unit Residences*, which gives a number of different groups – local government, landlords, tenants, and members of the public – the power to enforce the smoking restrictions.

To show how the different enforcement options would play out in a community, this booklet looks at a common problem: a nonsmoking tenant living in an apartment where tobacco smoke is drifting in from a neighboring unit.

This booklet illustrates how different enforcement options could be used, highlighting the advantages and disadvantages of each.

**NOTE:** The enforcement options in this booklet only apply to communities that have passed a law similar to Changelab Solutions’ sample ordinance that prohibits smoking in multi-unit housing. If your community has not, these options merely demonstrate some of the benefits to be gained should your local government enact such a law. If you are a tenant affected by drifting smoke and your community has not passed a smokefree housing law, please see Changelab Solutions’ other fact sheets on smokefree housing at www.changelabsolutions.org/tobacco-control.
Our story takes place in the City of Progress, where the forward-thinking city council has adopted a law that restricts smoking in multi-unit housing. The law requires that indoor and outdoor common areas be smokefree and allows landlords to designate an outdoor smoking area. The new law also requires that the landlord designate a certain percentage of individual units as nonsmoking, including their balconies and patios. Smoking is still allowed in a small portion of units. It is against the law to smoke in nonsmoking units and common areas.

The City of Progress has included the full range of enforcement options suggested in Changelab Solutions’ sample ordinance. Local government, landlords, tenants, and members of the public are all empowered to enforce the new smokefree housing law.
Larry Landlord owns Main Street Apartments in the City of Progress. He has complied with the smokefree housing law by designating his units as either nonsmoking or smoking. He has posted No Smoking signs in the hallways and near the pool. And he has designated a small portion of the parking lot as the smoking area.

Larry has a vacant nonsmoking unit. Larry tells Nancy Nonsmoker, a prospective tenant, that neither she nor her guests can smoke in the unit or on its balcony. Nancy says she understands the restrictions and signs the year lease.

Soon after Nancy moves in, the nonsmoking unit next to hers becomes vacant. Larry shows this unit to Tommy Tobacum and his family, pointing out that smoking is not allowed in the unit or on the balcony. Tommy admits that he smokes occasionally, so Larry shows Tommy the designated smoking area. If Tommy and his family choose to rent the nonsmoking unit, he says, the designated smoking area is where Tommy is allowed to smoke. Tommy says he understands the restrictions and signs the year lease. He, his wife, and their two-year-old son move in.

Tommy knows that secondhand smoke can be bad for children, so he always goes outside to smoke. After moving into the Main Street Apartments, he went out to the designated smoking area a couple of times. But his wife works weekday...
evenings, and when Tommy is home taking care of his son, Tommy can’t leave him alone to go to the designated smoking area. Instead, Tommy just goes out onto the balcony every hour or so and smokes a cigarette.

The problem is that the smoke drifts into Nancy Nonsmoker’s apartment, especially on warm evenings when she keeps her windows open. Nancy has seen Tommy on his balcony smoking, and she knows that his unit is a designated nonsmoking unit. Nancy has asked Tommy several times, unsuccessfully, to stop smoking.

Nancy decides to see if there is something her landlord can do under the new smokefree housing law to keep her neighbor from smoking on the balcony of his unit.

In fact, the City of Progress’ smokefree housing law does provide a way for landlords to enforce the smoking restrictions. The law requires that three new lease terms be inserted into all residential rental agreements:

1] Smoking is prohibited in a unit and its balcony or patio, if it is designated as a nonsmoking unit.
2] It is a breach of the lease to smoke in a nonsmoking unit or common area.
3] Occupants of this multi-unit housing complex have limited rights to enforce the above provisions. (This is covered later in this booklet; see “Enforcement Options for Tenants” on page 11.)

These first two provisions allow a landlord to enforce the smoking restriction just like any other condition in the lease, such as a no-pets rule.

Larry Landlord now includes these new lease terms in all his rental agreements, including those for the nonsmoking units he rented to Nancy Nonsmoker and Tommy Tobacum.
Nancy tells Larry of the problem she is having with Tommy and the drifting smoke. She shows Larry a newspaper article describing the smokefree housing law and points out that the newly required no-smoking lease terms give landlords the power to enforce these restrictions – even to evict a tenant when the lease terms are violated.

Larry decides to contact an attorney to find out more about this new law and what his rights and responsibilities are.
Larry’s attorney explains that, yes, he can enforce the new no-smoking lease provision against his tenant Tommy Tobacum. First, Larry should notify Tommy that he is violating the terms of the lease by smoking on the balcony of a designated nonsmoking unit. Larry might want to do this informally, through a conversation with Tommy.

If this doesn’t resolve the problem, Larry will want to write a letter or two, sent by certified mail, notifying Tommy of the problem and warning him of the consequences if he continues to smoke in the nonsmoking unit – including the possibility of eviction.

Larry asks what would happen if the letters don’t work. His attorney explains that if Tommy continues to smoke on the balcony, and Larry wants to begin the eviction process, Larry would post a three-day notice to “quit.” This notice would demand that Tommy and his family move out of the unit within three days. If Tommy refuses to leave, then Larry would have to file a lawsuit to evict Tommy and force him to move.

But Larry tells his attorney that he wouldn’t want to evict Tommy because he is a good tenant – he pays his rent on time, is quiet, and keeps the apartment in good condition. And he has a wife and a two-year-old son. The attorney reminds Larry that the smokefree housing law doesn’t require him to do anything. It is up to him to decide what steps to take, if any. The smokefree housing law only requires that the no-smoking terms be included in leases, giving the landlord the option to enforce the new terms.

Larry decides to have a casual conversation with Tommy, letting him know that he has received a few complaints about his smoking on the balcony. Larry reminds Tommy that the apartment is a designated nonsmoking unit, and that he can only smoke in the designated smoking area in the parking lot. Tommy apologizes and says that it has only happened once or twice when he has been home alone watching his son.
This approach seems to have solved the problem – at least for a few weeks. But then Nancy begins to notice the drifting smoke again, and she sees Tommy out on his balcony smoking.

Nancy calls Larry to complain and ask that he do something about the problem. Larry says that he has already talked with Tommy. He’s sorry about the problem she is having, but he does not want to make this into a big issue.

Larry knows that he could legally evict Tommy for violating the smokefree housing law. There was a presentation at the Apartment Owners Association last week by a landlord who actually was successful at evicting a tenant for violating the smoking restrictions. But Larry doesn’t want to do that, and he doesn’t have to.

Maybe Nancy could just close her windows, he suggests.

But Nancy knows that the new smokefree housing law includes other enforcement approaches, so she decides to try another tack.
Nancy read in the newspaper that the City of Progress has designated the police department as the local government agency to enforce the smokefree housing law. (Cities also could choose the environmental health department, code enforcement, or another government agency to enforce their law.)

Nancy decides to call the police department and report the violation of the new smokefree housing law. She asks them to send someone over to deal with the problem. The first day she calls, no one comes out. She calls again the next time she sees Tommy smoking on the balcony. And again the time after that.

Finally, a police officer shows up, but Tommy is already back inside his apartment. The officer talks with Nancy for a few minutes. She shows the officer her written log where she has recorded all the dates and times she has seen Tommy smoking on his balcony and when she has called the police.

The police officer goes over to Tommy’s apartment and tells him that he has received a complaint about Tommy smoking in violation of the smokefree housing law. The officer reminds Tommy that there is no smoking allowed in designated nonsmoking units, including the balcony. Tommy apologizes, explaining that he is home alone watching his two-year-old son and didn’t want to leave the apartment to go to the designated smoking area. The officer decides to let Tommy off with a warning... this time.
The officer returns to Nancy’s apartment and tells her that he gave Tommy a warning, and he will write up a report of the incident. He tells Nancy that he issued a ticket just last week at another apartment complex where a woman was smoking while sunbathing at the pool. He knows of a few other officers who have issued tickets, but overall most people seem to be complying with the new law. Usually just informing people about the new smoking restrictions is enough to get them to obey the law. He wishes Nancy a good day and leaves.

The visit by the police officer appears to have fixed the problem – at least for a while. A few weeks later, Tommy comes out onto his balcony for another cigarette. A few hours later, he comes out for another one. And then another.

Fortunately, Nancy recalls seeing in the news coverage after the law was passed that there are other options, besides calling the police, that could help her resolve this problem.
Nancy decides to see what she can do to enforce the City of Progress’ smokefree housing law herself.

She learns that the city’s smokefree housing law grants tenants limited rights to enforce the new smoking restrictions, giving those who are directly affected by drifting smoke the power to do something about it. In addition to the provisions allowing landlords to enforce the smoking restrictions (see “Enforcement Options for Landlords” on page 4), the law requires that all rental agreements contain a “tenant enforcement” provision, the third one below:

1) Smoking is prohibited in a unit and its balcony or patio, if it is designated as a nonsmoking unit.
2) It is a breach of the lease to smoke in a nonsmoking unit or a smokefree common area.
3) Occupants of this multi-unit housing complex have limited rights to enforce the above provisions.

This provision allows tenants to file a lawsuit against their neighbor to enforce the no-smoking lease terms. While tenants cannot evict a neighbor who smokes, they can seek an order from the court requiring the neighbor to stop smoking in nonsmoking areas or pay money to compensate the nonsmoking tenant.
Nancy Nonsmoker decides to use the new lease language to enforce the no-smoking terms against her neighbor Tommy.

Nancy writes a letter to Tommy notifying him that he is violating both the City of Progress’ smokefree housing law and the no-smoking provisions of his lease agreement. She informs him that as a tenant in his apartment complex, she has the ability to enforce the smoking restrictions in his lease. She asks him to stop smoking on his balcony, and she warns him that if he doesn’t, she will take him to court. She sends the letter certified mail (keeping a copy for herself) and keeps her fingers crossed.

Several days pass, and nothing changes. Tommy does not respond to Nancy’s letter, nor does he stop smoking on his balcony. Nancy takes a deep, smoke-filled breath, and begins the process of finding a lawyer to represent her.
Nancy calls the county bar association’s lawyer referral service and gets several names of attorneys that handle landlord/tenant disputes and personal injury cases. She calls all of them, but none wants to represent her. They tell her that because only a small amount of money will be recovered, it just wouldn’t be worth their time and effort.

She tells the last attorney on her list that she would be willing to pay him; she just wants help to solve this problem. He suggests that she might want to try and bring the complaint against her neighbor in small claims court – that way she wouldn’t need to hire a lawyer. There is one problem with small claims court, he warns her: The judge cannot issue an injunction, an order to do or stop doing something. A small claims court judge can only issue a conditional judgment, which allows the person being sued to choose between taking a certain action or paying a fine. In this case, Nancy could ask the court to order Tommy to stop smoking; if he doesn’t, then he will have to pay Nancy a fine.

Nancy decides to file a lawsuit against Tommy Tobacum in small claims court.
On the day of the hearing, Nancy brings several documents to prove her case. She has a copy of the smokefree housing law, a map of the apartment complex showing which units are designated as smoking and nonsmoking, and photographs of Tommy smoking on his balcony. She also brings her written log tracking when Tommy smoked on his balcony, a copy of the report filed by the police officer, and a copy of the letter she sent to Tommy asking him to stop smoking on his balcony. She also has several reports outlining the dangers of secondhand smoke.
After presenting her case, the judge asks Tommy to respond. Tommy says that he has a right to smoke in his own home and that he can’t be made to smoke somewhere else. And besides, barely any smoke went into Nancy’s apartment; certainly not enough to hurt her.

The judge asks Tommy if the landlord told him the apartment was a nonsmoking unit. Tommy says yes, but...

That is all the judge needs to hear.

The judge issues her ruling: Because Tommy’s lease says the unit is nonsmoking, he is violating the lease. Tommy must stop smoking in his apartment, including the balcony, or pay Nancy $500. And the judge tells Tommy that he has no constitutional right to smoke. Tommy’s mouth drops open in shock.

Nancy is relieved: She won her case.
After winning her case in small claims court, Nancy reads in her local paper that the city’s tobacco control coalition is interested in learning how the new law is working. She calls to find out how to attend a meeting of the coalition to share her experience.

At the meeting, Bonnie Bronchial, the executive director of the Pulmonary Protection Association, tells Nancy that the Association recently brought a lawsuit against one of the largest apartment owners in the city, Humongous Housers, for failing to comply with the new smokefree housing law.

Nancy is intrigued. She asks Bonnie to explain how the new law made that possible.

Bonnie tells Nancy that the smokefree housing law includes something called a private enforcement option that allows someone other than the local government to enforce the law. Normally, only the local government can prosecute a violation of the law, but the private enforcement option gives private citizens the power to file a lawsuit against a violator and uphold the law.

Nancy asks why the private enforcement option is necessary. Bonnie explains that sometimes a smokefree housing law may not require the no-smoking lease terms – or, if these lease terms are required, tenants may not be given the power to enforce them. But if the law includes a private enforcement option, tenants can bring a lawsuit to enforce the law itself.
Bonnie explains that although it might seem confusing, the important thing to remember is that both enforcement options—enforcing the lease and enforcing the law—allow individuals who are most affected by drifting smoke to take action to solve the problem themselves. In the City of Progress, affected tenants are able to either enforce the lease terms (as Nancy did) or use this private enforcement option to enforce the law.

The other way the private enforcement option can be used, Bonnie explains, is when a member of the public or a public interest organization brings a lawsuit on behalf of the community against a person or business that is disobeying the law. That is how the Pulmonary Association brought its lawsuit.

Bonnie says that the Association had received numerous complaints about Humongous Housers because it had not designated its units as either smoking or nonsmoking, even though this was now required by the smokefree housing law. The Pulmonary Association decided to use the private enforcement provision to file a lawsuit, because ensuring that people have smokefree air to breathe is a top priority for the organization.

Humongous Housers has many tenants who would benefit if the firm complied with the law, Bonnie explains, and a win against such a high-profile company could provide extra incentive to smaller landlords and property managers to follow the smokefree housing law.

As it turned out, a week before the hearing, the attorneys for both the Pulmonary Association and Humongous Housers were able to resolve the case without going to trial. Humongous Housers realized that if it lost the case, the court could order it not only to implement the smokefree housing law but also to pay a huge fine. The Pulmonary Association was willing to settle as long as Humongous Housers adhered to the smokefree housing law immediately and the Association was able to publicize its success in enforcing the law.

Nancy is impressed by the many possible ways to enforce the smokefree housing law, and says she will definitely keep the private enforcement provision in mind if she hears of other violations.
As communities begin to adopt local laws to address the problem of drifting smoke in multi-unit housing, it is important to consider the pros and cons of the various enforcement options available before the law is passed. Learning how different groups can be empowered to enforce a smokefree housing law – from local government officials to landlords and tenants to members of the public – will help advocates and policymakers evaluate which combination of enforcement options will work best in their community and, as a result, create the most effective law possible.

As your community considers a smokefree housing law, Changelab Solutions is available to answer questions about enforcement options and to help adapt its Smokefree Housing Ordinance: A Model California Ordinance Regulating Smoking in Multi-Unit Residences to meet your needs. Please visit Changelab Solutions at www.changelabsolutions.org/publications/model-ord-smokefree-housing.

Changelab Solutions extends much appreciation to Carmen Castro-Rojas, Lisa Feldstein, Adam Grauer, Kelvin Quan, and James Zellers, who donated their time and talent to make this booklet possible, and to Sylvia Darr, for allowing the use of her home as the “scene of the crime.” Changelab Solutions’ Advisory Board members also provided valuable input on this project throughout its development. Thanks also to Randy Kline and Karen Parry for their creative vision, and to Changelab Solutions’ suitemates at 180 Grand Avenue for their assistance.
Changelab Solutions
www.changelabsolutions.org/tobacco-control
Changelab Solutions’ Smokefree Housing Ordinance: A Model California Ordinance Regulating Smoking in Multi-Unit Residences is designed as a comprehensive approach to regulate smoking in multi-unit housing and provides a variety of options for limiting exposure to secondhand smoke, from restricting smoking in common areas to prohibiting smoking in individual units. For a checklist and copy of Changelab Solutions’ sample ordinance, visit www.changelabsolutions.org/publications/model-ord-smokefree-housing.

Changelab Solutions also has several fact sheets providing information and resources to address drifting secondhand smoke in multifamily housing. You can download these from Changelab Solutions’ website at www.changelabsolutions.org/tobacco-control. (See the Smokefree Housing category of 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’s Clean Air Project (CCAP)
www.ccap.etr.org
CCAP provides technical assistance, training, and educational materials statewide on secondhand smoke issues. The Secondhand Smoke Resources section has a category devoted to smokefree multifamily housing.

The Center for Tobacco Policy and Organizing
www.center4tobaccopolicy.org
The Center, a project of the American Lung Association of 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.
If you have a medical condition made worse by secondhand smoke drifting into your apartment, federal and state disability laws might help you address the problem. Depending on the nature of your disability, your landlord may be required to make changes to reduce your exposure.

Disability Laws
California and federal disability laws are designed to ensure that people with disabilities have an equal opportunity to access and enjoy their homes. If you rent, your landlord or property manager can be required to make reasonable changes to the rules to accommodate your disability. A tenant with a hearing impairment, for example, may ask to be exempted from a landlord’s no-pet policy if a service dog alerts her to sounds such as a knock at the door or a telephone ringing. Or a tenant with asthma could ask her landlord to prohibit smoking in the common areas of the building, if the smoke is coming into her unit from those areas.

In order to qualify for protection under these laws, your medical condition must meet the legal definition of a disability. A disability is a mental or physical condition that “limits” (under California law) or “substantially limits” (under federal law) a major life activity such as breathing, walking, or performing manual tasks. Courts have generally recognized that individuals are disabled when they have severe asthma, allergies, chemical sensitivities, or other respiratory conditions that limit their ability to breathe. Whether you are legally considered disabled will depend on the particular facts of your situation.

What is a reasonable accommodation?
There are several options you could request that would be considered reasonable and necessary to accommodate your respiratory condition. For example:

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

If you are not considered disabled under state or federal law, other legal remedies may apply to your situation. See our fact sheet “Legal Options for Tenants Suffering from Drifting Tobacco Smoke” at www.changelabsolutions.org/tobacco-control.
make these units nonsmoking, and it could be up to a year before smoking is prohibited. For more information on adopting smokefree policies, see “How Landlords Can Prohibit Smoking in Rental Housing,” a fact sheet available at www.changelabsolutions.org/tobacco-control.

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

Although disability laws also can be used to request building alterations such as sealing gaps and cracks or installing fans or air purifiers, these approaches rarely solve the problem of drifting tobacco smoke. One study found that as much as 60 percent of the air in one unit can come from another unit, and that sealing leaks and openings only reduces air flow by about 3 percent.15 Air cleaning technologies and ventilation systems also have been shown to be ineffective: according to a U.S. Surgeon General’s report, filters only remove large particles, not the minute particles and toxic gases in secondhand smoke.13

**What is not a reasonable accommodation?**

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

In addition, your accommodation request must not impose an undue burden on the landlord.15 For a tenant who begins to have difficulty climbing stairs, requesting that an elevator be installed would likely put an undue financial burden on the landlord, and that request could be legally rejected. However, a request by that tenant to move to a vacant ground-floor unit would be considered reasonable.16 While the law does not require a housing provider to absorb excessive costs, such as the elevator, it does envision that the landlord bear some costs.17

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

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

**How to make the request**

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

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

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

**Demand letter**

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

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

**Doctor’s note**

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

**Record of drifting smoke**

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

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

**If the request is denied**

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

**Conclusion**

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

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*We extend our appreciation to Liam Garland, Litigation Director of the Housing Rights Center, for his invaluable expertise in developing this fact sheet.*

*This material was made possible by funds received from the California Department of Public Health, under contract #04-35336. ChangeLab Solutions formerly existed under the name Public Health Law & Policy (PHLP).* Any references to PHLP in this publication should now be understood to refer to ChangeLab Solutions. 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.
These examples assume that you do not live in rental housing governed by a local rent control ordinance. A rent control ordinance might affect the ability of your landlord to implement various reasonable accommodation requests. Contact your local rent control board for specific information regarding this issue.


4 Cal. Gov’t Code § 12926(k).

5 42 U.S.C. § 3602(h).

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

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

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

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


14 That request, however, may be valid to protect your rights under other legal claims such as alleging the landlord breached the warranty of habitability. See ChangeLab Solutions’ fact sheet “Legal Options for Tenants Suffering from Drifting Tobacco Smoke.” Available at: www.changelabsolutions.org/publications/legal-options-tenants-shs.

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


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

18 For more information on adopting smokefree polices, see ChangeLab Solutions’ fact sheet “How Landlords Can Prohibit Smoking in Rental Housing.” Available at: www.changelabsolutions.org/publications/landlords-prohibit-smoking.

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

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

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

22 To file a complaint call (800) 669-9777. For more information about the federal housing complaint process, go to www.hud.gov/offices/fheo/promotingfh/atourservice.cfm.
Dear [Landlord or Property Manager]:

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

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


California courts and the U.S. Department of Housing and Urban Development (HUD) have required that reasonable accommodations be made for persons whose disabilities are aggravated by drifting tobacco smoke. See County of Fresno v. Dept. of Fair Employment and Hous. Comm’n, 226 Cal. App. 3d 1541 (employer liable for failure to accommodate two employees whose disabilities were aggravated by co-workers’ smoking); in re U.S. Dept’ of Hous. and Urban Dev. and Park Tower Apartments, HUD Case Nos. 05-97-0010-8 and 05-97-11-0005-370 (1998) (in response to complaint by disabled tenant with respiratory illness, landlord was required to include no-smoking term in all new tenants’ leases).

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

An editable version of this sample demand letter (in Microsoft Word format) is available on our website at www.changelabsolutions.org/tobacco-control.
rental agreement so can move, etc.)]. This change will eliminate my exposure to drifting tobacco smoke and alleviate the symptoms of my disability.

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

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

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

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

[Signature]

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

Enclosures:

Letter from Dr. [doctor’s name]

Log of exposure to drifting smoke

**Additional resources:**
- How Landlords Can Prohibit Smoking in Rental Housing
  www.changelabsolutions.org/tobacco-control
- There Is No Constitutional Right to Smoke
  www.changelabsolutions.org/tobacco-control
- Secondhand Smoke: The Science
  (fact sheet from Americans for Nonsmokers’ Rights)
  http://no-smoke.org/pdf/SHS.pdf
- There Is No Risk-Free Level of Exposure to Secondhand Smoke
  (fact sheet based on the 2006 U.S. Surgeon General’s Report)
Sample Doctor’s Note
(should be on doctor’s stationery)

[ Date ]

To Whom It May Concern:

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

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

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

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

Sincerely,

[ Signature ]

Dr. [ doctor’s name ]
Fair Housing Councils

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

**Eden Council for Hope & Opportunities**
*Offices in:* Concord, Hayward, Livermore, Oakland, and Palo Alto
[www.echofairhousing.org/home.html](http://www.echofairhousing.org/home.html)
Email: info@echofairhousing.org
(510) 581-9380 or (855) ASK-ECHO

**Fair Housing Council of Central California**
*Office in:* Fresno
[www.fhc-cc.org](http://www.fhc-cc.org)
(888) 498-3247 or (559) 244-2950

**Fair Housing Council of Orange County**
*Office in:* Santa Ana
[www.fairhousingoc.org](http://www.fairhousingoc.org)
Email: info@fairhousingoc.org
(800) 698-FAIR or (714) 569-0823

**Fair Housing Council of Riverside County, Inc.**
*Offices in:* Corona, Moreno Valley, Norco, Palm Springs, and Riverside
[http://fairhousing.net](http://fairhousing.net)
Email: fhcrc@fairhousing.net
(800) 655-1812 or (951) 682-6581

**The Fair Housing Council of San Diego**
*Office in:* San Diego
[www fhcsd com](http://www.fhcsd.com)
(619) 699-5888

**Fair Housing Council of the San Fernando Valley**
*Office in:* Panorama City
[www.fhcsfv.org/index.php](http://www.fhcsfv.org/index.php)
Email: info@fhcsfv.com
(818) 373-1185 or (800) 487-2617

**Fair Housing Foundation**
*Offices in:* Long Beach
[www fhfla com](http://www.fhfla.com)
(800) 446-3247 or (562) 989-1206

**Fair Housing of Marin**
*Office in:* San Rafael
[www fairhousingmarin com](http://www.fairhousingmarin.com)
(415) 457-5025

**Housing Rights Center**
*Offices in:* Los Angeles, Pasadena, and West Los Angeles and walk-in clinics throughout Los Angeles County
[www hrc la org](http://www.hrc-la.org)
Email: info@housingrightscenter.org
(800) 477-5977 or (213) 201-0867 (TTY)

**Inland Fair Housing and Mediation Board**
*Offices in:* Barstow, El Centro, Indio, Ontario, San Bernardino, and Victorville
[www inmedbd com](http://www.inmedbd.com)
Email: info@ifhmb.com
(800) 321-0911

**Project Sentinel**
*Offices in:* Fremont, Gilroy, Modesto, Redwood City, and Santa Clara
[www housing org](http://www.housing.org)
(888) 324-7468

**National Fair Housing Alliance**
*Office in:* Washington, D.C.
[www nationalfairhousing org](http://www.nationalfairhousing.org)
Email: nfha@nationalfairhousing.org
(202) 898-1661 or (202) 898-1670 (TTY)

Updated June 2014