

Smoke-Free Multi-Unit Housing

Legal Topics Smoke-Free Multi-Unit Housing

May 27, 2015

Warren Ortland
Staff Attorney
Tobacco Control Legal Consortium



Tobacco Control
Legal Consortium

The Tobacco Control Legal Consortium

A national legal network
supporting tobacco control policy
change.



Tobacco Control
Legal Consortium

Justification - Ventilation

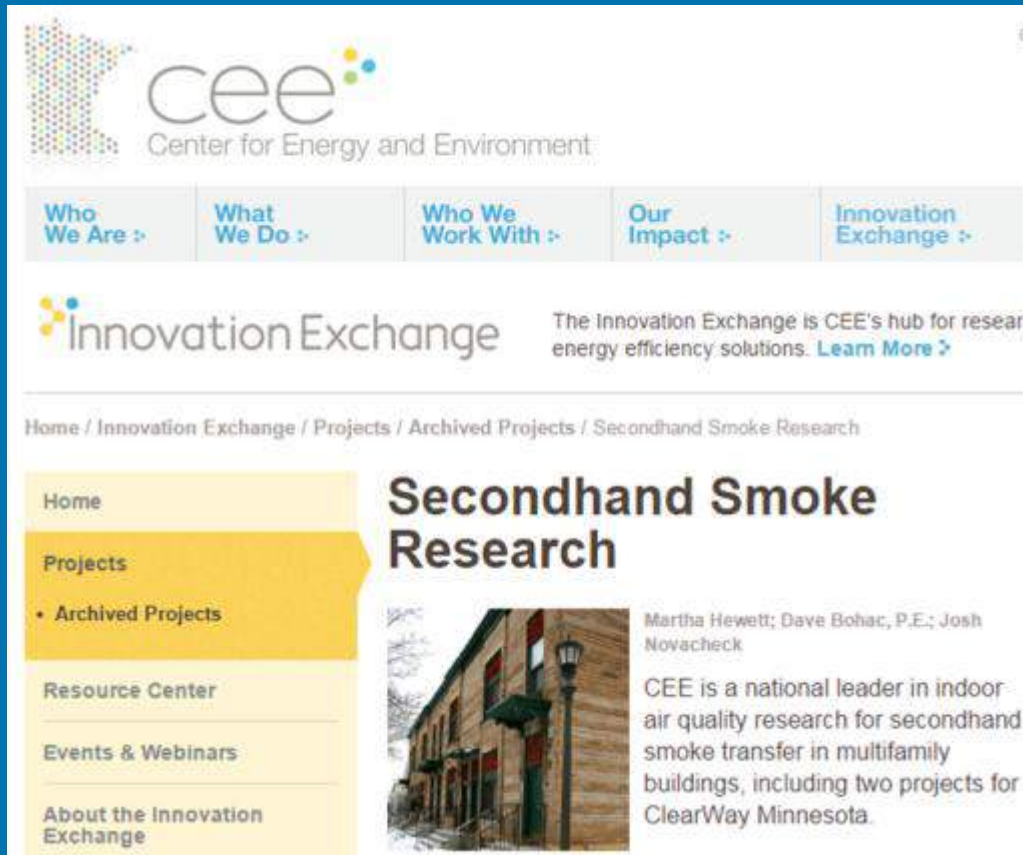


ASHRAE Position Document on Environmental Tobacco Smoke

At present, the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity.

No other engineering approaches, including current and advanced dilution ventilation or air cleaning technologies, have been demonstrated or should be relied upon to control health risks from ETS exposure in spaces where smoking occurs.

Justification – Air Movement



The screenshot shows the CEE (Center for Energy and Environment) Innovation Exchange website. The header includes the CEE logo and navigation links: Who We Are, What We Do, Who We Work With, Our Impact, and Innovation Exchange. The main content area features the 'Innovation Exchange' title and a description: 'The Innovation Exchange is CEE's hub for research energy efficiency solutions. [Learn More](#)'. Below this is a breadcrumb trail: Home / Innovation Exchange / Projects / Archived Projects / Secondhand Smoke Research. A left sidebar contains links to Home, Projects (with a sub-link for Archived Projects), Resource Center, Events & Webinars, and About the Innovation Exchange. The main content area is titled 'Secondhand Smoke Research' and includes a photo of a brick building, the names of the researchers (Martha Hewett, Dave Bohac, P.E., Josh Novacheck), and a paragraph stating: 'CEE is a national leader in indoor air quality research for secondhand smoke transfer in multifamily buildings, including two projects for ClearWay Minnesota.'



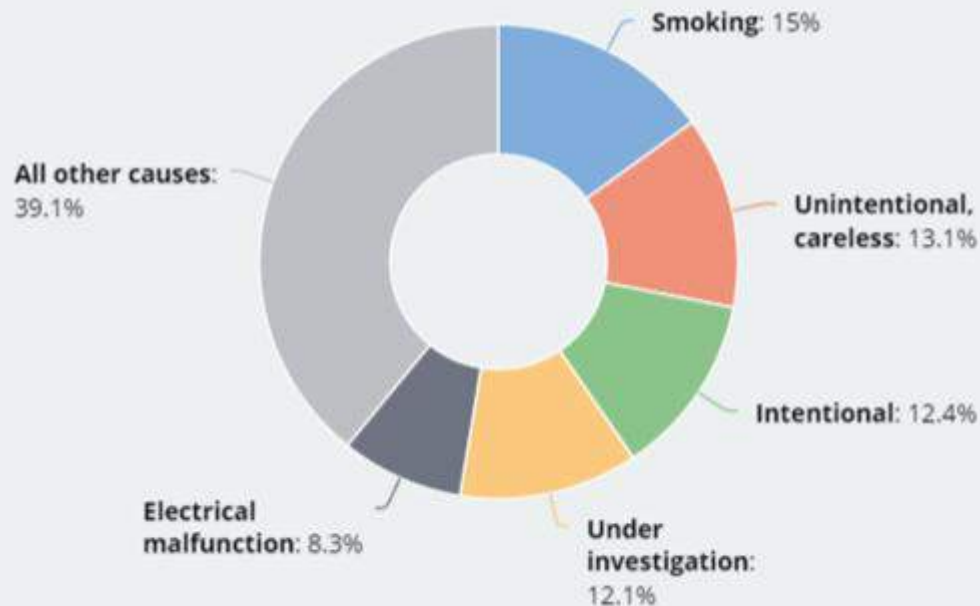
Between 35 – 60% of air in unit comes from another unit

Justification - Costs

According to Kennedy Restoration Co. (Portland, OR), the following items in a smoke-damaged apartment will need to be cleaned, restored, or replaced. Individual units may vary, but a thorough restoration of a 2-bedroom apartment could cost up to \$15,000.



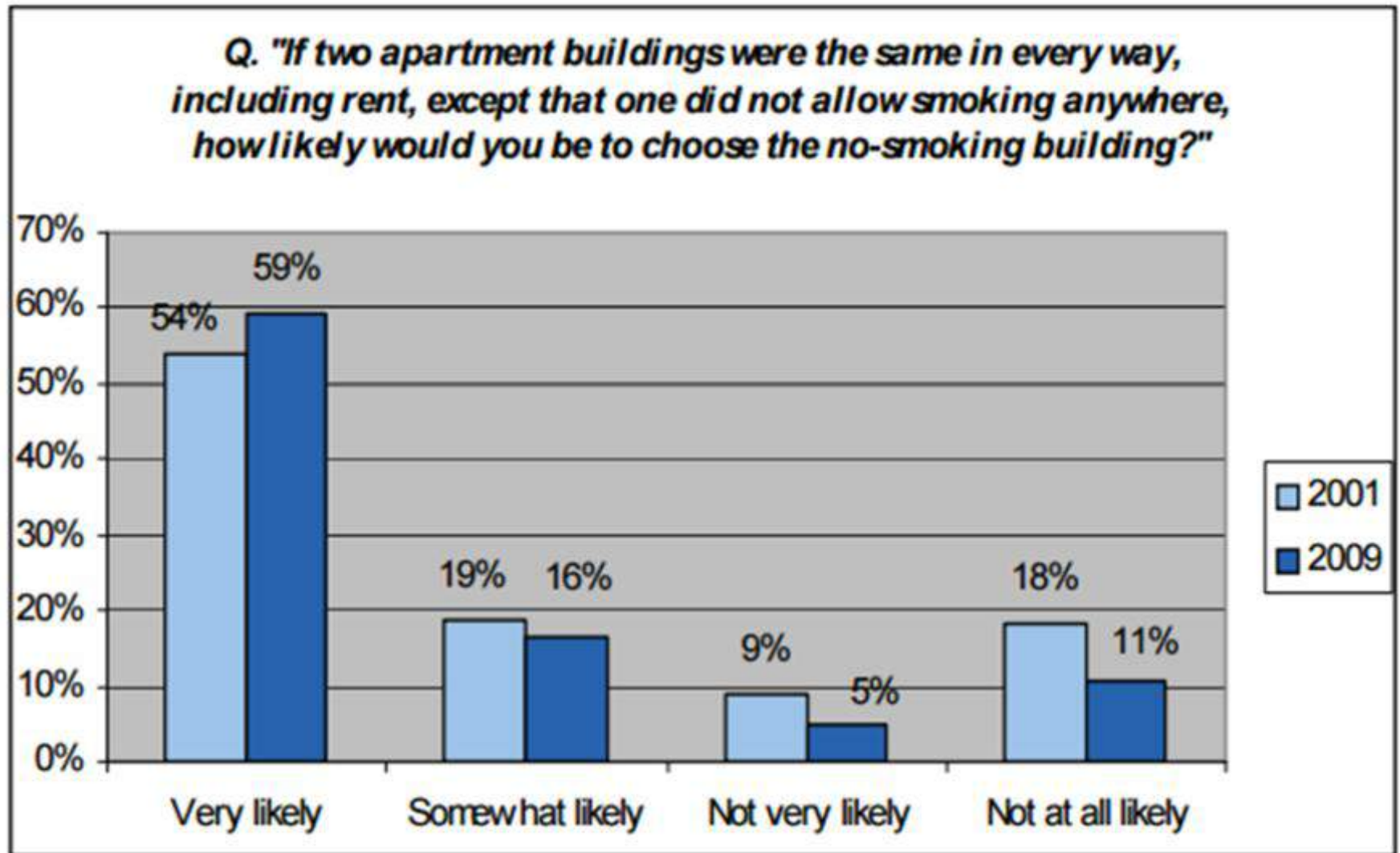
Justification – Fire Risk



Home Fires

- In 2011, U.S. fire departments responded to 370,000 home structure fires. These fires caused 13,910 civilian injuries, 2,520 civilian deaths, \$6.9 billion in direct damage.
- On average, seven people die in U.S. home fires per day.
- Cooking is the leading cause home fires and home fire injuries, followed heating equipment. **Smoking is a leading cause of civilian home fire deaths.**
- Most fatal fires kill one or two people. In 2011, 12 home fires killed five or more people resulting in a total of 67 deaths.

Justification – Resident Demand



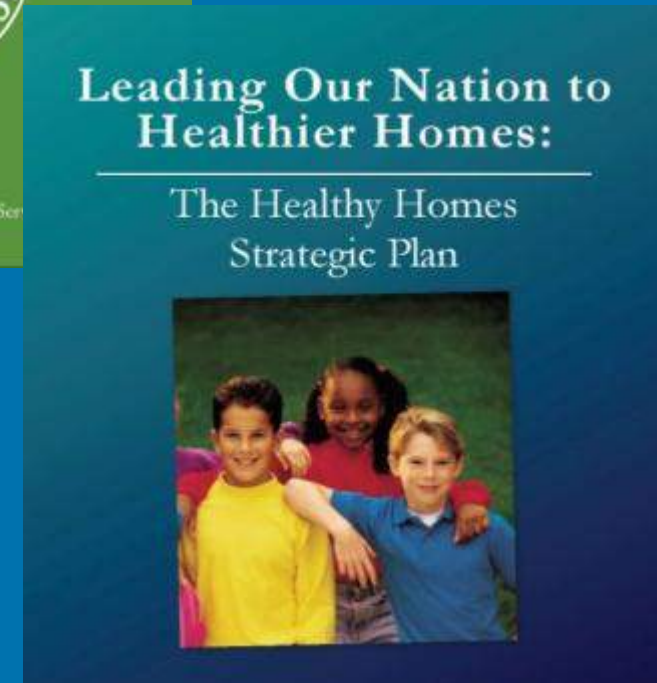
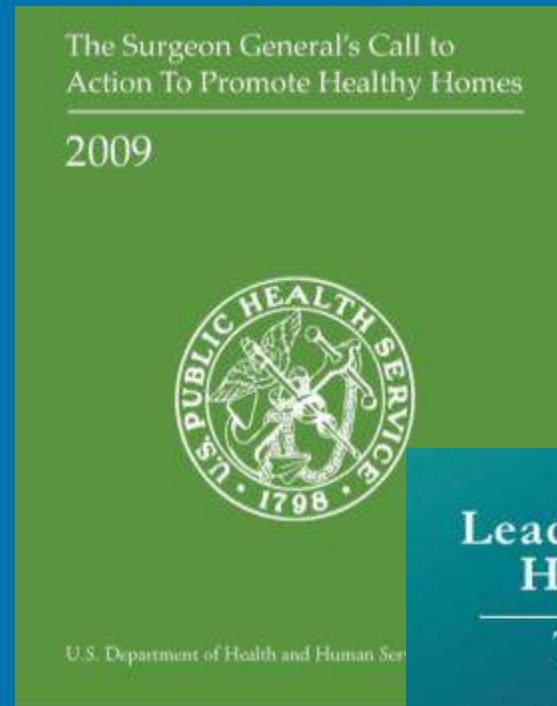
Federal Law

- **Current federal law and smoking in rental apartment buildings**
 - No federal law prohibits smoke-free buildings
 - No indefinite “grandfathering” required
 - Disability statutes / Reasonable accommodations



Federal Government Position

- Surgeon General Call to Action - 2009
- HUD Healthy Homes Strategic Plan - 2009



HUD Action Guide

U.S. Department of Housing and Urban Development
Office of Lead Hazard Control and Healthy Homes



CHANGE IS IN THE AIR

**An Action Guide for Establishing Smoke-Free
Public Housing and Multifamily Properties**

October 2014

Public Housing – 2009 / 2012

- Susceptible populations
- Fire risk
- Maintenance costs



**U.S. Department of Housing and Urban Development
Office of Public and Indian Housing
Office of Healthy Homes and Lead Hazard Control**

SPECIAL ATTENTION OF:

NOTICE: PIH-2012-25

Regional Directors; State and Area
Coordinators; Public Housing Hub
Directors; Program Center Coordinators;
Troubled Agency Recovery Center Directors;
Special Applications Center Director;
Administrators; Resident Management
Corporations Public Housing Agencies;
Healthy Homes Representatives

Issued: May 29, 2012

Expires: Effective until amended,
revoked or superseded


Cross Reference:
24 CFR 903.7 (e)(1)
24 CFR 966.3

Subject: Non-Smoking Policies in Public Housing

1. **Purpose.** This notice is a reissuance of PIH Notice 2009-21 which strongly encourages Public Housing Authorities (PHAs) to implement smoke-free policies in some or all of their public housing units. According to the American Lung Association, cigarette smoking is the number

Section 8 Project-Based 2010 / 2012

- Section 8
- Senior Housing
- Housing for Disabled
- Not Vouchers

 **U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Special Attention of:

Multifamily Hub Directors
Multifamily Program Center Directors
Rural Housing Services (RHS) Directors
Supervisory Housing Project Managers
Housing Project Managers
Contract Administrators
Multifamily Owners and Management Agents

NOTICE: H 2010-21
Issued: September 15, 2010
Expires: September 30, 2011
Cross References:

Subject: Optional Smoke-Free Housing Policy Implementation

I. Purpose

The purpose of this Notice is to encourage owners and management agents (O/As) participating in one of the Multifamily Housing rental assistance programs listed in Section III of this Notice to implement smoke-free housing policies in some or all of the properties they own or manage. This Notice provides instructions to O/As on the requirements for implementing smoke-free housing policies and only applies to O/As who choose to establish such policies.

Rural Development 2008 / 2012



United States Department of Agriculture
Rural Development

October 9, 2008

Mr. Warren Ortland, Staff Attorney
Tobacco Law Center
William Mitchell College of Law
875 Summit Avenue, Room 371
St. Paul, Minnesota 55105

Mr. Ortland;

In your letter dated October 7, 2008 you requested this Development's policy as to the establishment of smoke-free housing by this agency.

Your research upon reviewing Rural Development's 30-year policy of not having a regulation concerning smoke-free housing in multi-family housing financed under the 515 program. It is the policy of the agency to establish or adopt a prohibition of smoking in common areas of individual house rules.

You also mention the issue of "grandfathering of tenants." You are correct that USDA Rural Development does not have a grandfathering policy. However, agency representatives are urged to caution tenants carefully craft such a policy in order to avoid suits based on breach of contract by tenants who have leases prior to the implementation of the policy.

TO: State Directors
Rural Development

ATTN: Program Directors and Coordinators
Multi-Family Housing

FROM: Tammye Treviño *(Signed by Tammye Treviño)*
Administrator
Housing and Community Facilities Programs

SUBJECT: Multi-Family Housing - Optional Smoke-Free Housing Policy

This Unnumbered Letter (UL) is reissued to provide continued guidance for Multi-Family Housing (MFH) borrowers should they choose to implement optional smoke-free housing policies. This guidance is similar to previous guidance provided by the U.S. Department of

Indiana Law



The screenshot shows the Indiana State Department of Health (ISDH) website. At the top is the IN.gov logo and a navigation bar with links to various state departments. Below this is the ISDH header with the state seal and the text 'Indiana State Department of Health'. The main content area is titled 'INDIANA'S STATE SMOKE FREE AIR LAW' and includes a welcome message and a paragraph explaining the law's implementation starting July 1, 2012. A left sidebar contains links to 'ISDH HOME', 'TOBACCO PREVENTION & CESSATION', and 'INDIANA'S TOBACCO CONTROL PROGRAM'.

IN.gov A State that Works ISDH Search

About Indiana Agriculture & Environment Business & Employment Education & Training Family & Health Law & Justice Public Safety

 **Indiana State Department of Health**

[Tobacco Prevention & Cessation](#) > Indiana's State Smoke Free Air Law

 **ISDH HOME**

TOBACCO PREVENTION & CESSATION

Contact Us

Resources

INDIANA'S TOBACCO CONTROL PROGRAM

Mission, Vision, and 2015 Priority Areas

Community Programs ▶

Evaluation & Research ▶

INDIANA'S STATE SMOKE FREE AIR LAW

Welcome to Smoke Free Indiana

Beginning July 1, 2012, nearly all public places in the state, including restaurants and other workplaces, will be smoke free. This change comes as the result of Indiana's first ever statewide smoke free air law, House Enrolled Act 1149. In more places than ever, Hoosiers will now be able to enjoy the benefits of smoke-free air and reduce their risk of developing chronic diseases and other health problems associated with breathing secondhand smoke. Smoke Free Indiana was created to help Hoosier residents and business owners understand the new law. This site is still under development. More resources and information will be added as they become available, so please continue to visit and check for updates.

Specifically non-preemptive

Indianapolis Law

- Smoking is permitted in individual units in multi-unit apartments and condominiums
- State law does not reference common areas of multi-unit properties; city law does
- Specifically non-preemptive / private property owners can go farther
- Contains limited set-back provision



Discrimination



- **Is it discriminatory to designate an entire building or campus as smoke-free or tobacco-free? No**
 - Smoking or use of tobacco is not a protected activity or right
 - A smoker is not a protected category
 - Individual's addiction to nicotine is not a disability

Recommendation: implement policy based on activity (smoking) and not individual's status.

Accommodations



Mobility limited individual? Probably not

- “To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual’s disability.”

HUD Occupancy Handbook, Civil Rights and Nondiscrimination Requirements.

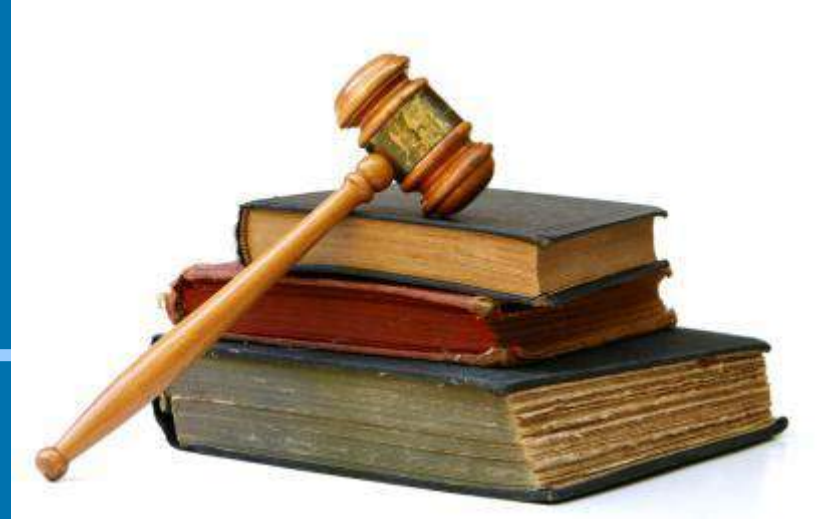
Mental health accommodation request? Probably not

- “Nothing...requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals.”

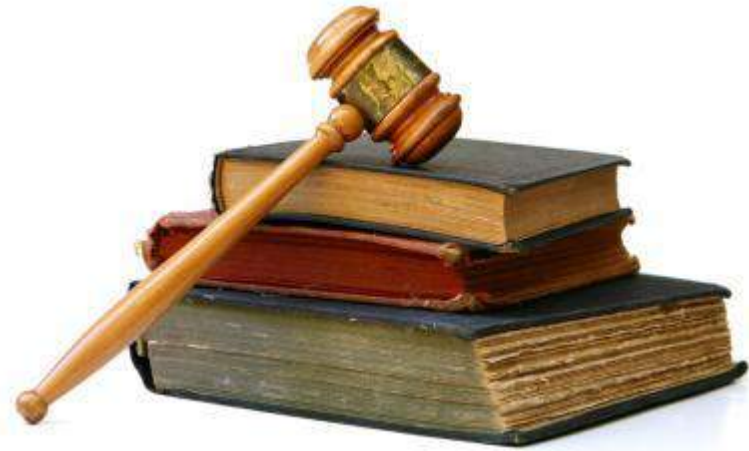
Fair Housing Act, 42 U.S.C. 3604(f)(9).

Legal Risks of Allowing Smoking

- What are a property owner's potential risks if the property is designated as smoking-permitted?
 - Nuisance, warranty of habitability
 - Disability claims
 - Negligence, failure of duty to warn



Legal Liabilities of Going Smoke Free



- **What are a property owner's liabilities if the building is designated smoke-free?**
 - No cases have found landlord liable for not ensuring smoke-free environment
 - Best effort to provide smoke-free environment
 - Some responsibility on residents



Prepare everyone

Prepare everyone

- Distribute information
- Have presentations and/or meetings
- Conduct a survey
- Provide generous notice



Document Everything

- **Use written lease addendum**
 - Regardless of size of property
- **Make it comprehensive**
 - Include all provisions
 - Make it clear and easy to understand
 - Document exceptions / grandfathering
 - Include enforcement steps
 - Include list of evidence



Enforce every violation

Promptly –

- Enforce in a timely manner

Uniformly

- Impose the same penalties on everyone

Consistently

- Always enforce the penalties



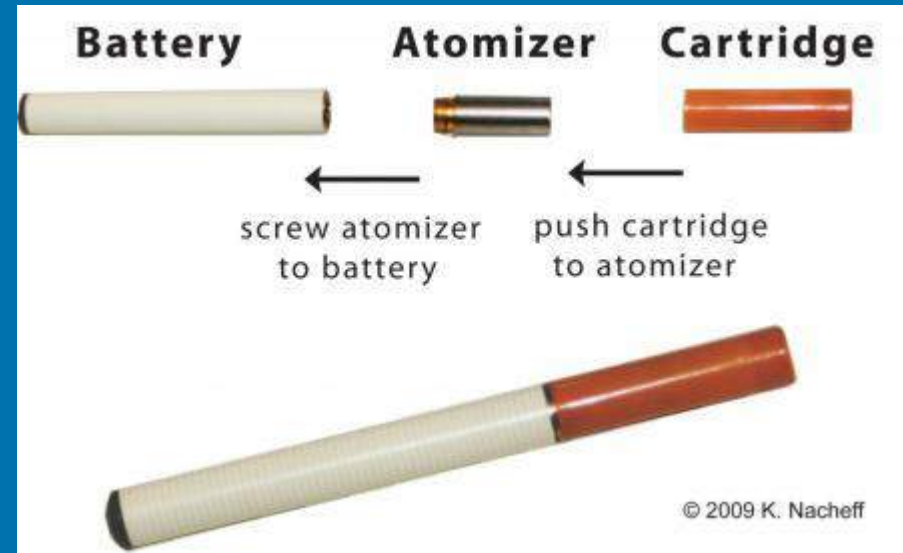
Special topics

- **Electronic cigarettes**
- **Incense**
- **Insurance**
- **Condominiums**



Electronic Cigarettes

- Not regulated by the FDA
- Component materials are not fully known
- Can cause confusion with enforcement
- Can pose role-modeling issue
- Presents poison risk



Incense

- Use of incense poses health and safety risks, like smoking
- Existing smoke-free housing policy definitions of smoking may cover incense
- Restrictions on incense would likely not be discriminatory of religious practices



Insurance

- Limited standard offering of discount
- Pollution exclusion



The screenshot displays the Capital Insurance Group (CIG) website. At the top, the CIG logo is accompanied by the tagline "DELIVERS MORE. Continuously.™" and the text "Capital Insurance Group". Below this, it states "Serving CA, NV, OR, WA, AZ". A navigation bar includes links for "About CIG", "Auto", "Homeowner", "Renter", "Building Owner" (which is highlighted in yellow), "Commercial", "Agricultural", and "Contact CIG". The main content area features a sidebar for "Building Owner Insurance" with a list of services: "Insurance for Commercial Buildings", "Apartment Insurance", "Smoke-Free Credit for Apartments" (in blue), "Leased Building Insurance", "HOA Insurance", and "Warehouse Insurance". The main headline reads "Smoke-Free Apartment and Condominium Premium Credit". Below the headline is a photograph of a modern, multi-story apartment building with a light-colored facade and dark shutters.

CIG DELIVERS MORE. **Continuously.™**
Capital Insurance Group
Serving CA, NV, OR, WA, AZ

[About CIG](#) [Auto](#) [Homeowner](#) [Renter](#) **[Building Owner](#)** [Commercial](#) [Agricultural](#) [Contact CIG](#)

Building Owner Insurance

- Insurance for Commercial Buildings
- Apartment Insurance
- Smoke-Free Credit for Apartments
- Leased Building Insurance
- HOA Insurance
- Warehouse Insurance

| Home | Insurance | Building Owner Insurance | Apartment Insurance | Smoke-Free Credit for Apartments

Smoke-Free Apartment and Condominium Premium Credit



Common Interest Communities

- Smoke Free policies are legal
- Rules and Regulations or Declaration
- Grandfathering not required
- Longer process



Disclosure



- Informing renters of smoking policy prior to rental
- Prevention for tenants
- Education for landlords

Oakland, CA; Buffalo, NY; Duluth, MN; Maine and Oregon

Low Income Housing Tax Credit

Low Income Housing Tax Credit Program (Rental Housing Tax Credit)



<http://www.in.gov/ihcda/>

Indiana Resources



The screenshot displays the ISMA (Indiana State Medical Association) website. The header features the ISMA logo on the left, which includes a map of Indiana with a caduceus, and the text 'ISMA INDIANA STATE MEDICAL ASSOCIATION' to its right. On the far right of the header, the word 'Resources' is prominently displayed, with 'Smoke free toolkit' listed below it. A dark navigation bar contains links for 'About Us', 'Membership', 'Government Relations', 'Education', 'Legal Resources', 'News & Publications', 'Resources', and 'Quick Links'. Below this bar is a Google Custom Search box with a 'Search' button and a list of links: '» Dues renewal', '» Join Now', '» Member Directory', '» Member Benefits', and '» Login'. The main content area is titled 'Indiana Smoke Free Apartments Toolkit'. It contains a paragraph stating that a smoke-free apartment policy is not discriminatory, citing the U.S. Department of Housing and Urban Development. To the right of this text is a box containing a quote: 'The ISMA adopted a resolution in September 2006 to educate owners and managers of apartment complexes about the risks of...'. On the far right, there is a 'Calendar' section with a link to 'list of all events'. It has two tabs: 'ISMA events' (selected) and 'Other events'. The calendar shows the date 'May 27' and lists events for the '6th/8th Districts' and 'Willie and Reds Restaurant'.

ISMA
INDIANA
STATE
MEDICAL
ASSOCIATION

Resources
Smoke free toolkit

[About Us](#) [Membership](#) [Government Relations](#) [Education](#) [Legal Resources](#) [News & Publications](#) [Resources](#) [Quick Links](#)

Google Custom Search x

» Dues renewal » Join Now » Member Directory » Member Benefits » Login

Indiana Smoke Free Apartments Toolkit

A smoke-free apartment policy is NOT discriminatory, despite many myths against this statement. According to the U.S. Department of Housing and Urban Development, a person's right to smoke is not protected, therefore, landlords are free to enforce a smoke-free policy on their properties.

The ISMA adopted a resolution in September 2006 to educate owners and managers of apartment complexes about the risks of

Calendar | list of all events

ISMA events Other events

May 27

6th/8th Districts
Willie and Reds
Restaurant

<http://www.ismanet.org/INsmokefreeapartments.htm>

Indiana Resources

[A Letter from the ISMA president for Apartment Owners or Managers \(pdf\)](#)

[A Guide for Owners and Managers: Adopting a No-Smoking Policy in Apartment Buildings \(pdf\)](#)

[Smoke-free Apartments Fact Sheet \(pdf\)](#)

[Sample lease addendum \(pdf\)](#)

Some materials on this page were used with permission from the Association for Non-smokers-Minnesota.

<http://www.ismanet.org/INsmokefreeapartments.htm>

Contacts

Tobacco Control Legal Consortium

www.tclconline.org

Maggie Mahoney

(651) 290-7514

maggie.mahoney@wmitchell.edu

Public Health Law Center

www.publichealthlawcenter.org

Warren Ortland

(651) 290-7539

warren.ortland@wmitchell.edu