



## Multi-Unit Housing Smoke-Free Policies Legal Issues – Nevada

### Introduction

Landlords and property owners are sometimes hesitant to consider no-smoking or smoke-free policies due to concern about the legality of the policy. Does the policy infringe on any individual “rights”? Is the policy discriminatory? Will adoption of a policy expose the property owner to additional liability risks? This fact sheet reviews these common legal issues that arise in relation to smoke-free policies for multi-unit properties in the context of Nevada law.

### “Right to Smoke”

When smoke-free laws, ordinances or policies are debated, the claim of a “right to smoke” is frequently raised by those opposing the policies. Courts have considered the argument that individuals have a right to smoke and have consistently found that no such right exists.<sup>1</sup> Although not prohibited from doing so, the federal government does not have any laws or regulations regarding smoke-free policies in multi-unit dwellings. No states have yet adopted any statutes requiring smoke-free policies for apartment or condominium dwelling units. Some states have so-called “smoker protection laws.” These laws prohibit firing, disciplining or not offering employment to individuals based on consumption of legal consumable products, including tobacco, outside of the workplace and work hours.<sup>2</sup> They do not establish a right to smoke.

### Preemption

Some state-level clean indoor air acts may affect smoking in multi-unit buildings,<sup>3</sup> but the vast majority do not prohibit local units of government from adopting laws that are more stringent than the state’s smoke-free law. Similarly, Nevada’s Clean Indoor Air Act [“NCIAA”] is not preemptive of smoke-free policies, and thus, local

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<sup>1</sup> Samantha K. Graff, Tobacco Control Legal Consortium, *There is No Constitutional Right to Smoke: 2008* 2 (2d edition, 2008).

<sup>2</sup> Steven Keyes, Employment Law Counselor, *Can Employees Be Fired for Off-Duty Smoking or Other Lawful Consumer Activities Outside of Work? (It Depends on What State They’re In)* (May 2007).

<sup>3</sup> North Carolina’s smoke-free law has been interpreted as preempting implementation of smoke-free policies by local units of government, including public housing authorities. See North Carolina Alliance for Health, *What is Preemption and What Does It Mean for North Carolinians?*, available at <http://www.rtpnet.org/alliance/pdfs/TalkingPointsPreemption2-07.pdf>.

units of government can adopt smoke-free laws that are more stringent than the NCIAA.<sup>4</sup>

In addition to allowing local governments to create more smoke-free places, Nevada's law also specifically allows private property owners to impose smoking policies that are more stringent than the state law:

In areas or establishments where smoking is not prohibited by this section, nothing in state law shall be construed to prohibit the owners of said establishments from voluntarily creating nonsmoking sections or designating the entire establishment as smoke free.<sup>5</sup>

Therefore, private property owners of multi-unit apartment buildings, condominium homeowners' associations, and public housing authorities are not restricted under Nevada law from adopting smoke-free policies for dwelling units or for the entire property.

### **Discrimination**

Property owners and landlords frequently express concerns that a no-smoking or smoke-free policy may be discriminatory to smokers. When addressing these concerns, it is important to understand that discrimination is only illegal if it is directed at a person within a "protected category." Legal protection is generally only granted to populations with characteristics that are considered innate (something the individual is born with) and immutable (impossible to change). Obviously, no one is born a smoker, and smokers are successful in quitting the habit. Therefore, absent specific legislation, smoking is not a "protected category."<sup>6</sup>

Smoking policies are also not discriminatory against individuals with disabilities. In one case, a smoker argued that he was disabled due to an addiction to nicotine. As a reasonable accommodation to the disability, the smoker wanted to be able to smoke indoors in violation of a no-smoking policy. The court disagreed with that argument, stating that smokers should not be considered disabled and should not receive the protection of federal and state disability statutes.<sup>7</sup>

### **Disability Accommodation**

Individuals with severe health conditions that affect their daily lives can request reasonable accommodations in housing policies or building features in order to allow them to live in their unit. Federal disability statutes and state human rights acts can require landlords to change policies or modify a building to accommodate a resident or potential renter with a disability.

<sup>4</sup> NEV. ST. ANN. § 202.2483, subdiv. 5 (2010).

<sup>5</sup> NEV. ST. ANN. § 202.2483, subdiv. 4 (2010).

<sup>6</sup> Graff, *supra* note 1, at 3.

<sup>7</sup> *Brashear v Simms*, 138 F. Supp. 2d 693 (D. Md. 2001)

In the context of multi-unit properties and smoke-free policies, the issue of accommodations most frequently arises when residents have a mobility challenge or mental health issues. Landlords wonder if they will be required to allow an individual with these disabilities to smoke in violation of a smoke-free policy as a reasonable accommodation. While no courts have ruled on this issue, federal guidelines and statutes do not require accommodations that may put other residents at risk.

### **Liability**

Some property owners are concerned that adopting a smoke-free policy will expose them to additional liability. If the property is represented as being smoke-free with a smoke-free policy, and a resident becomes ill due to violations of the policy, property owners and landlords are worried that they could be liable.

Because smoke-free policies in multi-unit settings have become more common only over the last several years, this specific issue has not been addressed by the courts. A property owner can help protect against a claim in several ways. They can:

- include language in a smoke-free lease addendum that the landlord is not guaranteeing a smoke-free environment, but only making a best effort;
- communicate the policy effectively through notices and signage;
- implement the policy thoroughly by eliminating exceptions; and
- enforce the policy effectively.

Landlords who have not adopted smoke-free policies are more likely to be at risk than property owners with smoke-free policies. Specifically, in some states residents of multi-unit housing have successfully brought lawsuits alleging that smoking, and the lack of a smoke-free policy, has resulted in a violation of local nuisance laws or in breaches of the warranty of habitability.<sup>8</sup> Also, requests for reasonable accommodations from individuals with severe respiratory conditions have been granted in some instances, requiring property managers to adopt a smoke-free policy.<sup>9</sup>

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<sup>8</sup> See Susan Schoenmarklin, Tobacco Control Legal Consortium, *Infiltration of Secondhand Smoke into Condominiums, Apartments and Other Multi-Unit Dwellings: 2009* (2009).

<sup>9</sup> *Id.*