

Where There is Smoke... There is Litigation

by: Neil S. Shankman, Esq.

One of the biggest controversies currently facing landlords and property managers is the balancing of the rights of smokers to smoke tobacco, and non-smokers to be protected from the affects of secondhand smoke. Can you establish a "non-smoking" policy for a building when your tenants began their tenancy with the freedom to smoke? While there is an inherent risk in every decision for change, the fact is that you are more likely to be exposed to liability by permitting smoking.

Generally speaking, the common areas of buildings must be smoke free pursuant to Maine's Public Places Smoking law, Title 22 M.R.S.A. §1542. There is nothing in the law that requires a landlord to forbid tenants from smoking in their rooms. But what happens when the smoke from one unit spreads into the hallway, or into the unit of another tenant?

The Americans With Disabilities Act and the Federal Fair Housing Act both enable individuals with disabilities to seek a "reasonable accommodation". Tenants who have breathing disorders may use either law to bring legal action against landlords for not making "reasonable accommodations" to protect them from secondhand smoke in common areas of the building. This would include the consequences of seepage between apartments.

The Maine Human Rights Act prohibits discrimination in housing on account of physical disability. The definition of discrimination includes "the refusal to make reasonable accommodations" in rules, policies, practices or services when those accommodations are necessary to give an individual equal opportunity to use and enjoyment of a rental unit.

While there have been no reported cases in the State of Maine, there have been lawsuits filed in other jurisdictions pursuing claims against landlords who permit smoking. Areas of liability have included breach of the covenant of quiet enjoyment, negligence, nuisance, breach of the warranty of habitability, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, trespass and constructive eviction.

Your ability to change rules will be determined by the terms and conditions of your lease or rental agreement. If there is a provision authorizing you to change the rules upon thirty (30) days' notice, then that is all you have to do. If the lease or rental agreement is written in such a way that it is nothing more than a month-to-month tenancy, then you must give a minimum of thirty (30) days' notice of a "new lease" which would essentially be your old lease with a new provision. If there is no written document, then you are dealing with a tenancy at will situation. Under those circumstances you would have the right to change the terms and conditions of the tenancy upon thirty (30) days' notice (again, essentially creating a new tenancy).

In dealing with public housing, or other subsidized housing, you may add a non-smoking provision to the lease at the time it is renewed. If you are dealing with a housing authority, make sure the lease change is approved by them in advance.



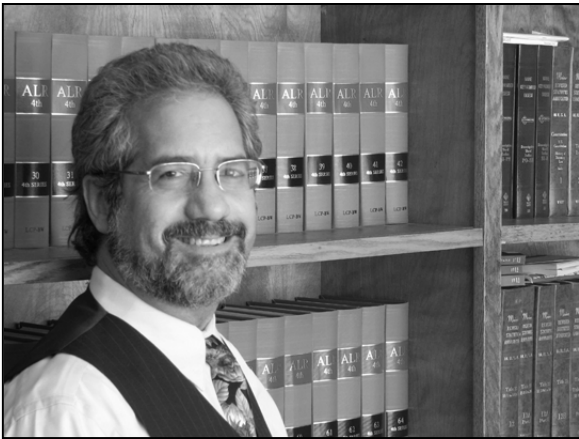
For those landlords who want to get more creative, you have the option of establishing a non-smoking policy for new tenants, while allowing existing tenants to continue to smoke in their units. The key to all of this is making sure that any change in policy has been properly noticed to all affected individuals.

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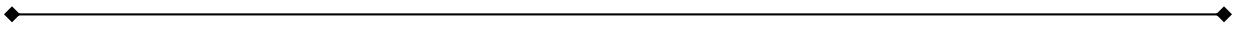
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The law is quite clear at this point. Landlords in this State have the right to prohibit smoking. The only issue is whether the change in the lease terms or building rules has been done properly... with proper notice and in full compliance with the applicable lease and/or applicable Federal or State regulations. The right to smoke is not protected under the law. As long as the policy is not used to target a protected class or minority, smoking restrictions (or prohibitions) are legal and binding.

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