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Landlord News

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SECONDHAND SMOKE A PROBLEM THAT DEFIES A SOLUTION

Residents frequently complain about secondhand smoke ("SHS"). Is secondhand smoke harmful? Residents certainly think so. The complaining residents are supported by significant, if not overwhelming, published literature that concludes SHS is harmful. A 1993 EPA study is often cited to support claims regarding the effects of SHS. The study concludes that inhaling SHS can increase the risk

of lung cancer by up to 25%. However, the 1995 congressional panel commissioned to review the EPA study found that the EPA exaggerated its facts, cherry-picked the data, and came to baseless conclusions.

Then, in 2006, The United States Surgeon

General stated, "the debate is over. The science is clear. Secondhand smoke is not a mere annoyance but a serious health hazard." The Surgeon General's 2006 report warned that there is no risk-free level of exposure to secondhand smoke and that "even small amounts of secondhand smoke exposure can be harmful to people's health." The critics quickly responded that the Surgeon General's 2006 Report represented a massive case of deliberate scientific misconduct, misrepresentation, fabrication, and falsification.

Regardless of the scientific or medical data, some residents will always complain about SHS and argue that even the smallest amounts are very harmful to their health. In some cases, a resident will complain even though the smoker has lived there five years and no previous residents have complained. Since these complaints are inevitable, you should evaluate your policy and how you will respond. Unfortunately, there is no perfect solution to dealing with SHS complaints. Each solution has advantages and disadvantages.

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LEGISLATURE DEBATING CARBON MONOXIDE BILL

The new Colorado state legislative session is barely underway and already the multi-family and rental housing industry are facing legislation dealing with carbon monoxide detector requirements in all dwellings throughout the state.



HBO9-109I differs from carbon monoxide legislation introduced in previous sessions of the legislature. This bill requires that detectors be placed in every dwelling unit (single residential or multi-family housing).

The bill specifically requires that existing single family or multi-family dwellings leased after July 1, 2009 or one that has a change in tenant occupancy shall install an operational carbon monoxide alarm within ten feet of the entrance to each room lawfully used for sleeping purposes. Alarms must produce a distinct audible warning and be listed by a nationally recognized, independent product-safety testing

and certification laboratory to conform to the latest standards for carbon monoxide detection alarms. The bill also sets forth the maintenance and installation requirements for carbon monoxide alarms.

This legislation is known as the "Lofgren Memorial Bill" named for



the Lofgren family of four who lost their lives in an Aspen home due to elevated carbon monoxide levels. Other recent deaths attributed to carbon monoxide poisoning have occurred in both a Colorado Springs and a Denver apartment. HBO9-109I is sponsored by Rep. John Soper (D) -Thornton and Senator Chris Romer (D) -Denver.

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SECONDHAND SMOKE A PROBLEM THAT DEFIES A SOLUTION

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Some argue that a no smoking policy will solve all smoking related problems, including SHS complaints. No smoking, therefore no residents complaining about SHS. Your problem literally goes up in smoke. Some clients have asked if implementing a smoking ban violates



fair housing laws. Making your community non-smoking is not a fair housing violation. Smokers are not a protected class. However, smokers are twenty percent (20%) of the U.S. adult population. This translates into

43 million prospective residents.

Policy makers deciding not to ban smoking quickly argue that this is the major disadvantage of a no smoking policy. A no smoking policy eliminates 1 out every 5 potential residents. In tough economic times (or even in good times), communities (owners) can't or won't eliminate 20% of the potential resident pool. A similar alternative to a smoking ban would be to designate smoking versus non-smoking buildings. Based on your community layout, this may not be possible. Further, it may have similar disadvantages as a complete smoking ban. For example, if your smoking building is full and the next qualified applicant is a smoker, you've just sent a new potential resident to your competitor. There is also the problem of enforcing a no smoking policy.

Those advocating a no smoking policy argue that the exact opposite is true. When you ban smoking from your community, you actually attract more residents, mainly those seeking smoke free apartments. A smoking ban is like having an extra amenity, a strong selling point to prospective residents, and overall makes the community more attractive. This appears to be a logical marketing decision to a point. Since 20% of adults smoke, it's impossible for them to ever be a resident. As more communities adopt smoking bans, this would be less of an advantage. If more and more communities adopt no smoking policies, the smoking residents would have to go somewhere. Logically, at some point, those communities that allow smoking would theoretically have a marketing advantage. Smoking ban advocates also argue that long term renovation and turn costs are significantly reduced.

A smoking ban will solve resident complaints about SHS. However, at what cost? Until you adopt the policy, you're not going to know how it will impact occupancy, costs, and revenue. When recently briefed on this issue, a very experienced and well-respected management company executive, who we represent, determined that the potential loss of residents outweighed the potential

benefits.

If you're not going to ban smoking, what are your other options? One option is to address the resident's potential complaint in your lease. For example, the lease could provide that "we don't guarantee a smoke-free environment". This probably would shut down most minor SHS resident complaints. Besides running the risk of losing potential residents over this approach (non-smokers outnumber smokers 4 to 1), the problem with this approach is that there are too many legal loopholes. For example, a resident could claim that the SHS is a breach of the new warranty of habitability law. You can't eliminate this warranty in your lease. Thus, your lease can say that you don't guarantee a smoke free environment, but the resident would have a valid legal theory (despite the lease language), be entitled to sue, and have their day in court. The resident is not likely to prevail on this claim for a host of reasons, but you still have to deal with the lawsuit. Similar to other options, lease clauses aimed at barring residents from making complaints about SHS will not solve all aspects of the SHS problem. However, the mere presence of a "no guarantee of a smoke free environment" clause may discourage or thwart at least some complaints.

Some argue that the SHS problem should be addressed in your lease by targeting the smoking resident. For example, your lease could provide that if another resident complains, the smoking resident has to stop smoking, or relocate at the smoker's expense. This is not a desirable solution for a host of reasons. Such a provision will likely serve as a "red flag" to non-smokers and greatly increase the number of SHS complaints made by non-smoking residents.

If the complaining resident doesn't feel that you're doing enough, the resident would argue that you're breaching the lease. We realize that many complaining residents are arguing this now, but a lease provision targeting smokers would only further embolden complaining residents. Even if you move the smoker, you have no guarantee that the smoker's new neighbors won't start complaining. You also have no guarantee that this will solve the complaining resident's problem. "I know you moved them, but smoke is still coming through the HVAC system." Short of a complete smoking ban, some complaining residents will never be satisfied.

Another option (the option currently being used by most communities) is to simply enforce existing

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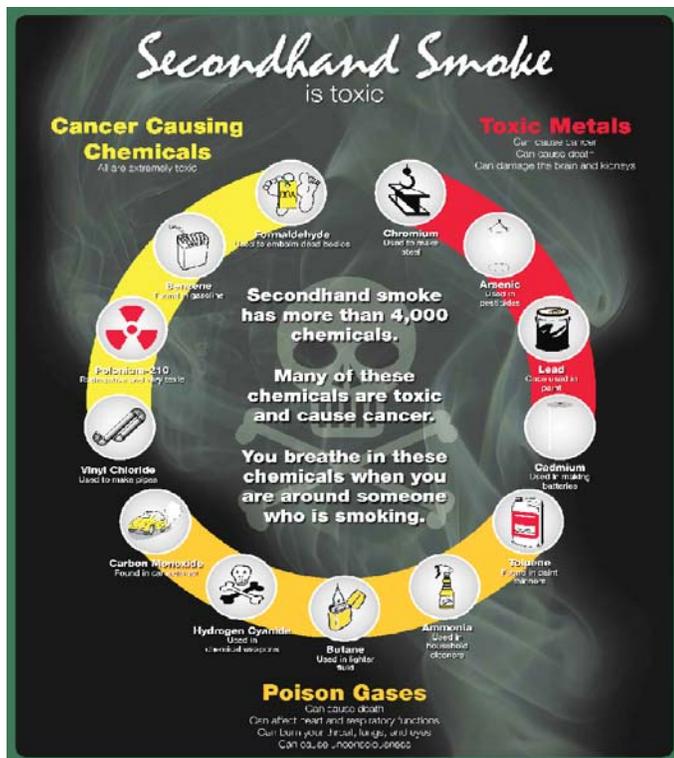
SECONDHAND SMOKE A PROBLEM THAT DEFIES A SOLUTION

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lease language. Almost all leases provide that residents shall not disturb the peace, comfort, or quiet enjoyment of other residents. The argument is that the smoker is disturbing the comfort of the complainer. However, this is a difficult argument to prove and win in court. If more than one person smokes in the building, the smoker could argue that the problem is not attributable to him. The smoker could also argue that it's not harmful. The smoker could also argue that the complainer is hypersensitive. You get the picture.

You can address SHS smoking complaints in many practical ways regardless of your lease language. You can seal the complainer's unit. Some clients say this has solved many problems. Others have said that is not very effective. You can always decide to let the smoker or the complainer out of their leases. Keep in mind, that in some cases, this is the complainer's goal. You can offer to relocate one or both residents involved. You can non-renew the smoker or the complainer if their lease is about to expire. Non-renewing either party is not a fair housing violation, especially if the policy is consistently carried out after other less drastic actions are attempted, but one or both parties are not satisfied regardless of substantial efforts on your part.

You can test the air quality in the complainer's



unit to establish that there is not a problem. Apparently, some techniques have been developed for monitoring carcinogenic pollutants in SHS, and these new tests supposedly are a thousand times more sensitive than previous

techniques. However, we've never been involved with a case that has used them, so we know little about the tests or their associated costs. If such tests are cost effective, they could conclusively establish that SHS levels in a complaining resident's unit are not harmful. But any kind of testing is a high risk, high reward proposition. If the test is negative, this should resolve the resident's SHS complaint. However, based on our experience with mold testing, negative tests do not always solve the problem. The complaining resident doubts and questions the test results, and the tests may lead to other anticipated problems. If the test is positive, you have just proven the resident's case. Testing is the equivalent of "going all in" in Texas Hold'em. Not always, but as a general rule, the risks and costs of testing are not worth the potential benefits.

Unfortunately, smoking complaints elude a perfect solution. You have to weigh the pros and cons of the various policies and responses, and their anticipated risks, costs, and benefits. We do strongly recommend that you evaluate your policy so that your onsite team will be clear on company policy and will follow that policy to promote consistency and avoid fair housing concerns. We also recommend that you be proactive in responding to SHS related complaints to avoid potential significant legal liability. As long as there are lawyers, there will be lawsuits. It's not outside the realm of possibility that a lawyer would file a lawsuit claiming that SHS from another resident killed his client, and that you did nothing. However, if you are diligent in responding to complaints and documenting your efforts, you are much more likely to take a reasonable course of action, and thus greatly minimize the potential risk of significant legal liability over SHS.

IMPORTANT HTS FEBRUARY DATES

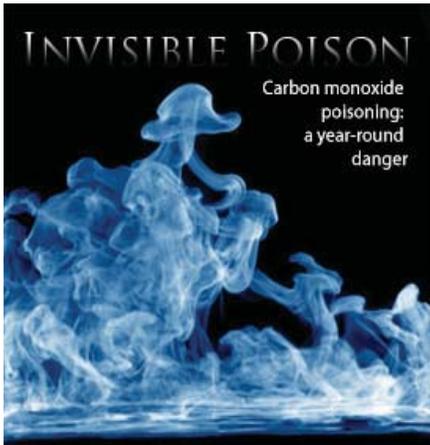
- February 11th - Basic Evictions
HTS 2851 S. Parker Rd
Tower I Conference Room
Lower Level
8:30 am. - Noon
- February 13th - South Client Luncheon
Piccolo's
11:30 a.m. - 1:00 p.m.
- February 16th - **ALL COURTS CLOSED**
Presidents Day Holiday
- February 20th - AASC Expo & Tradeshow
Crowne Plaza Hotel
Colorado Springs
8:00 a.m. - 5:00 p.m.



LEGISLATURE DEBATING CARBON MONOXIDE BILL

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Both of the sponsors have been receptive to the concerns of the multi-family housing industry.



Due to the current emotional and politically charged environment on this issue none of the Associations who have previously opposed Carbon Monoxide legislation are doing so this time. To review the current form of HB09-

1091 you can find and download a copy of the legislation from our website, www.htspsc.com -legislation link. Mark is a member of JLAC and is tracking this legislation closely as it moves forward.

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