

CAN LANDLORDS BAN SMOKING IN THEIR PROPERTIES?

Also, the Reasons Why, If You Care

Copyright 2005 Landlord.com

Rather than begin this article with some improbable statistic or glittering generality, as cleverly designed to draw the reader into reading further as it is unproveable, I thought I would instead begin it with the gist of a conversation I had with a colleague the other day. At least I know it is true.

“Can you write an article on whether a landlord can prohibit smoking in his rental units?”
my colleague asked.

“Sure,” I replied.

“So, what will the article say?” he asked.

“Sure.”

“Don’t be smart. What is the law?”

“But there is no law. That’s why a landlord can do it.”

“There must be some law that allows a landlord to ban smoking,” he insisted.

“No.”

“But there must be.”

And so on and on for a while, till we both got tired.

The most striking aspect of the conversation, to me, was that I was the only party to it who saw the grotesquerie of the idea that a landlord needed a law to ban smoking. But it is doubtless true that many might, in all innocence, believe the same. The truth is that you have the right and the power if you are a person in the United States of America. We are not Britain or Germany. The government, state or federal, did not give you any rights. Nor did your state or federal constitutions. You, through your ancestors, ceded certain rights to the government when the individual states and the United States were formed. They needed no government to grant them rights, they had them already. They had inherited them, as the result of something that occurred in 1215 at Runnymede, perhaps the most benign act of extortion in the history of the world, the Kings submission to the Magna Carta. When Americans broke from the British Crown, they still had these rights, privileges, and immunities, obtained over nearly 6 centuries of prescription, including a number of wars. They had no need whatsoever for bloviations on the rights of man, etc. This was the true revolution that occurred in 1776, and it was truly revolutionary. This is not theoretical, but fact. Reading Burke’s *Reflections on the Revolution of France*, which is roughly contemporaneous with the ratification of our constitution, will provide a clear perspective. Of particular interest is Burke’s demonstration – and remember, this Scotsman was an admirer of America and supporter of American independence, as well as a loyal subject of the British Crown – that the King exercised his rights and powers “in contempt” of the consent of his people. Yet he could wholeheartedly support America’s concept of government by consent of the governed, and deplore France’s deracination and descent into mob rule in 1790. But maybe this is for another article. In any event, you have the power to do anything you choose unless the government legitimately prohibits it. You need not wait for the government to say you can do something.

The short answer to “Can I ban smoking in my rental properties?” is “yes.” Unless your state has some law prohibiting such a ban, which is difficult to imagine, you have the right to ban smoking in any property you own. The real questions are whether it is a good idea, and how it should be enforced.

There are many excellent reasons you should ban smoking in your rental units. One article even cites surveys on the subject. Most people, however, don't need surveys and studies to prove that smoke damages the interior surfaces of any home and that the air is not fresh and the dawn rosy-fingered. In these cases it's obvious. Maintenance costs and complaints from tenants are reduced; the landlord saves money and the environment is more pleasant for your tenants, etc., when smoking is banned. But you can further reduce tenant complaints by prohibiting tenants from cooking certain things that emit very unpleasant and annoying odors, such as cabbage, or even prohibit micro waving bagged popcorn (we all know what burnt popcorn smells like). However, you are not the Lung Association and you are renting *living* quarters, in which certain functions of living are accepted. In short, you are a landlord.

For this reason, the only issue of relevance is whether a smoking ban will increase your profits. The generation and protection of assets is your business, and nothing else, unless you really do think of yourself as an eleemosynary institution. For this reason, you should make a careful analysis of your area's demographics and the profile of the individual to whom you wish to rent. Some organizations, such as the Initiative for Smokefree Apartments, operating out of Minnesota, state the blanket claim that making apartments smoke free broadens the pool of tenants to whom you can rent. But such claims should be viewed with skepticism. Not only do most such organizations have an axe to grind, persons with actual experience in enforcing smoking bans, such as bar owners in California, might say the opposite.

Nevertheless, there were smoke free bars, restaurants, movie theaters, and other public places before legal bans were put in place, and many of them thrived, finding they were catering to an otherwise unperceived need. That is what you need to answer for yourself. If you think there is a niche for a smoke free rental units in your community, and you believe you can tolerate turning away smokers who might want to rent, too – and both of these are probably true, especially in large communities – then you, as the landlord, should definitely view a smoking ban favorably and, perhaps, implement it. The shorter way to put this is: “Is there a market?” And how will you be affected by introducing a new rental standard to your prospective tenant prequalification list?

If the answer to that last is not much affect and to the first, affirmative, you need to consider implementation and enforcement of a no smoking policy. This includes the exact extent and nature of the ban. This is an important issue, because you are delving into a social, not legal, issue here. It is one thing to say that there will be no smoking in the rental unit. It is quite another to say that there will be no smoking on the property. Keep in mind; most non-smokers have friends, and some even spouses, who are smokers. If you say there will be no smoking on the property, you may cut these out of your pool of potential tenants, as their friends refuse to visit if they have to walk out onto the street to indulge their vice. The problem with spouses is obvious. On the other hand, prohibiting smoking in the units, but *providing designated smoking areas equipped with ashtrays*, etc., may give you an optimum solution. You would derive most of the cost saving and safety benefits of smoke free rental units, without forfeiting a good part of your market. If thoughtfully located, smoking areas could be easily avoidable by the more sensitive of your non-smoking clientele. This is your call.

Implementation of the ban is going to take a good deal of planning and diplomacy, especially, but not exclusively, if your property is multi-unit. Because smoking is a legal activity, and your tenant has the right to use the premises you rented to him for legal purposes, your ban, whatever its extent, will have to be by way of agreement between you and your tenants. This should be a ban in a written rental agreement for new tenants, or could be by way of modification, voluntary or otherwise, to periodic tenancies, if your state permits that, by way of notice. We will discuss this last in more depth below. If you are in a rent control jurisdiction, beware that the imposition of a smoking ban on existing tenants may constitute an increase in the burdens of tenancy, i.e., a rent increase and therefore may not be the right course of action to take, except for new tenants.

If the property in question is a single family dwelling, your problems are simplified, but still deserve some thought. If you are renting on a lease, it will expire on a date certain. That may be your opportunity to put a ban in place. If it is a periodic tenancy, in most states you can impose the ban with an appropriate written notice. But do not be in too great a hurry to invoke your rights as a landlord. Diplomacy may serve you well or you may lose otherwise excellent tenants.

Probably the best way to include a smoking ban at your property is to start with your new tenants. Test the market, if

you get a lot of resistance and vacancies are not renting as fast as they usually do, then you may have to do a strategic retreat. On the other hand, you may find that new tenants like the idea and embrace it accordingly. If you have a lease renewal, you may want to test the waters and advise your current tenant, well in advance, that at the conclusion of the lease, you intend to offer a new lease, but with the smoking ban in place (OK to smoke outside in any designated areas). Ask him if it is agreeable to him. It may be that he is comfortable with it, even if he is a smoker or some member of his family is. Giving him this informal notice is not only polite, but also it puts him in the position of making the decision, and gives him an ample opportunity to find alternative housing. Having him in a cooperative mood will go a long way of reducing your costs, avoiding retaliatory damage to the property and the possible necessity of commencing an eviction at the end of the term. All this applies to the case of a periodic tenancy (i.e., month to month, week to week). In such a case, first attempt to obtain a voluntary agreement by way of an addendum to the existing rental agreement. But you cannot wait forever for his answer. I have seen some periodic tenancies that have gone on for over a decade. While this is barely likely, it is possible, and in effect you will have no smoking ban at all. At some point you will have to decide whether to give a notice of change of terms of tenancy or termination of tenancy, or abandon your no smoking ban altogether. This last, if the ban is justified at all, is grossly unfair to you.

The case of multi-unit premises is more complicated. You could, if you wish, just include the ban in rental agreements for new tenants, or maybe in lease renewals. While this is superficially attractive, there is one huge pitfall in all of it. Remember the reason for the ban. It is to occupy a particular niche that will improve the bottom line. But if the only ban is new tenants, and, presumably, most, if not all, will be non-smokers anyway, your building is no different from any other. No one is *required* to smoke in his rental unit. So living in your building, with a mix of smokers and non-smokers who will be there for an indefinite time, is hardly different from any other building. The matter is compounded by the fact that smokers to whom you might rent, and there will be some, will soon become resentful as they see others doing something they are prohibited from doing, especially if the ban extends outside of the individual rental unit.

The only way such a ban would give you any benefit yet control damage is, I believe, to simply give notice that in a certain amount of time, 3 to 6 months, say, the interior building will go non-smoking. Advise those on leases that at expiration you will be submitting a new lease with the ban in place. Advise those on periodic tenancies that their agreements will be modified at that time. Advise all, including new tenants, that only no-smoking agreements will be accepted starting immediately. In this way, you can truthfully tell new applicants who are interested that they can expect a non-smoking building shortly, which will probably satisfy most if you are starting a trend or have some other attractive features to your property, yet give no just cause for ill will or retaliation to existing tenants who may be impacted.

As I have touched upon before, just because you have a non-smoking building does not mean that all your tenants must be non-smokers, though they can be if you think that wise in your situation. Smokers may still be willing to rent from you if there are other benefits, and particularly if your ban is a relatively mild one and your smoking only areas are reasonable. So consider the option of offering attractive features and perhaps even incentives to your existing tenants who smoke, in order to induce them to stay. Of course it makes no sense to increase your costs to such an extent that you wipe out all benefit of the ban.

Enforcing the ban against violators is precisely the same as enforcing any other term of the rental agreement. Once the ban is in place as a condition of tenancy even the ultimate weapon – eviction – can be used. You should follow the same policy you have for all other non-rent related violations of tenancy.

It is your property. You make the decisions on the basis of your own best interest. If you think you can improve your position by imposing a smoking ban, then, with the help of our suggestions, exercise your legal right to do so.

SOURCE:
Landlord.com http://www.landlord.com/info_center2_subject_bansmoking.htm