



# nerej

## **Non-smoking liability and enforcement: The future is upon us**

June 18, 2015 - Spotlights

If you would like to be sued in as part of a class-action lawsuit and NOT save money for your complex then there is no need for you to read this article. However, if avoiding liability, improving your unit-owners and residents health and saving some cash are interests of yours then you may want to read on. As this brief article will show you, implementing a non-smoking policy for your community can do all of those things: help avoid liability, improve health and save money. Increasingly, we are seeing a rush to change by-laws and rules and regulations to implement non smoking policies at Condominiums and residential Apartment Communities. We will also explore some of the myths behind banning smoking.

There are an estimated 443,000 smoking related deaths per year in the United States. That means that about 1 in every 5 deaths in this country is due to smoking. Also, on average a smoker dies 13 to 14 years earlier than a non-smoker. It is further estimated that secondhand smoke causes about 49,000 deaths in the United States on an annual basis.

It is highly doubtful that residents who are smokers will sue you for their own injuries. However, there are a growing number of lawsuits out there in which either individuals or classes of people have successfully sued their landlords or condo trustees for secondhand smoke entering their units and causing a nuisance. In most of these cases courts have found that the Plaintiff's right to peaceful enjoyment of their unit was breached. For instance in 2005, a case in Florida was decided (Merrill vs. Bosser), in which a Condominium owner sued a neighbor over secondhand smoke entering her unit, alleging trespass, nuisance, and breach of covenant. The judge agreed on all three counts, and awarded Merrill medical expenses and legal fees.

Regarding Landlord-Tenant Law, in Massachusetts the courts have also been quite consistent on this issue. The often cited case of 50-58 Gainsborough St. Realty Trust v. Haile, presented a nonsmoker above a smoky bar who withheld her rent, claiming that the tobacco smoke seeping into her apartment from the bar directly below deprived her of the quiet enjoyment of that apartment. When the landlord sued the tenant for failure to pay rent, the Judge determined that the smoke from the bar below made the apartment "unfit for smokers and nonsmokers alike." The judge further found that "the evidence does demonstrate to the Court the tenants' right to quiet enjoyment was interfered with because of the second-hand smoke that was emanating from the nightclub below." The judge awarded the tenants \$4,350. The simple fact is, that a quick search of Google will provide a tenant with a plethora of websites that offer advice and case law on how to successfully sue your landlord over secondhand smoke.

You may not realize that implementing a non-smoking policy can also save a great deal of money for your complex. First, there is the obvious savings in legal fees to your trustees and also potentially the savings of having to pay out to a unit owner or class of them on a lawsuit. But also consider the fact that cigarette smoking is the leading cause of fires in multi-unit properties in the United States.

However, many landlords and condo trustees are under the (false) impression that they are somehow violating rights of their unit owners by implementing a non-smoking policy. The fact is that there is NO constitutional right to smoke. My personal favorite case that speaks about this issue was a 1990 case decided by the New York Supreme Court (Fagan vs. Axelrod). The court in that case stated, "There is no more a fundamental right to smoke cigarettes than there is to shoot up heroin or snort cocaine or run a red light." There are a host of other cases in which a non-smoking policy either adopted by a city or apartment or condo have been upheld.

In conclusion, if you want to avoid liability, improve the quality of your residents' health and save money contact us to discuss how to properly and legally implement a non-smoking policy for your condo or residential development. We have successfully implemented such rules and bylaws at hundreds of properties in New England. Additionally, we have been involved in numerous cases involving second hand cigarette smoke and have actually had to evict dozens of residents for violating the non smoking rules.

Frank Flynn, Esq. is managing partner at Flynn Law Group, Boston, Mass.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540