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Tenants pressure landlord to change smoking policy

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Q: We own a fourplex apartment building with long-term tenants in every unit. The couple upstairs has asked us to implement a smoke-free policy for the building. They claim that the smoke from their downstairs neighbors enters their unit no matter what they do, through the staircase and even the adjacent windows. The downstairs people are perfectly fine tenants, have no intention of quitting, and tell us that we can't do anything about it. What should we do? --Wes and Judy Z.

A: What do you want to do? In this area, because the law is relatively unformed, you have some options. If you want to declare your property to be smoke-free, you can write this rule into every tenant's lease or rental agreement. No court has held that smokers have a right to smoke that trumps a landlord's no-smoking policy, nor have smokers been declared a "protected class," like people of a certain race or religion, giving them protection from onerous treatment. Of course, you'll have to wait until your tenants' leases are up before you implement your new lease rule. If tenants are renting month to month, you can announce a change with proper notice, which is 30 days in most states.

If you don't want to have a smoke-free property, you can do nothing (and probably lose the tenants upstairs). But this doesn't mean that your complaining tenants could not, in the end, stay and have their way. Tenants are using lots of creative strategies to force owners to ban smoking in their multi-unit buildings -- and they're doing it without waiting for owners to announce new policies in new leases or amended rental agreements. Here's how these tenants are clearing the air:

Smoking is a nuisance. A legal nuisance is any condition that's harmful to health or morals, such as accumulated garbage or the constant presence of drug dealers. Tenants have successfully argued that smoke is unhealthy (there's plenty of evidence on the effects of secondhand smoke to back them up). If a judge buys this argument, it doesn't matter what everyone's leases say -- the activity has to stop.

Smoking violates the warranty of habitability. By state law everywhere but Colorado and Arkansas, landlords must maintain fit and safe rental housing. When they fail to do so, courts will step in and order them to shape up, and in some states, tenants can repair problems and deduct the cost from their rent (or withhold rent altogether until the issue is addressed). Tenants have convinced judges that secondhand smoke is so harmful that it creates an unsafe building. When that happens, the landlord has the necessary ammunition to tell smoking tenants to stop, no matter what their leases say.

Smoking violates the covenant of quiet enjoyment. This quaint-sounding phrase actually packs quite a punch -- it means that tenants have the right to peacefully enjoy the homes they rent. Tenants who can't breathe easily because of seeping smoke are hardly enjoying their rented home. Landlords must remedy any problem that substantially interferes with the tenant's right to quiet enjoyment.

Secondhand smoke may harm tenants with disabilities. In extreme cases, secondhand smoke can exacerbate an otherwise nondisabling condition. For example, someone with mild asthma could experience severe difficulties as the result of inhaling smoke. This person might qualify as a person with disability under the Fair Housing Act, because the smoke significantly interferes with a major life activity: breathing. You'd be legally bound to address the problem by doing all you could to stop the smoking. (It's unlikely that a judge handling a fair housing complaint could directly order the neighbors to quit, however.)

Finally, your local government may someday have something to say. Cities all around the country are passing ordinances that prohibit smoking in multifamily housing. These ordinances (which typically have a "grandfather clause" for current lease-holding tenants) are usually supported by landlord constituents, simply because smoke-free rentals have a marketing edge over properties with smoke.

Q: I live in a completely flea-infested apartment. I do not own a pet, nor has a pet ever been inside the apartment. The property manager will not fix the problem nor offer me any solution (except of course to move at my own expense and forfeit my security deposit). The fleas come from some kind of rodent that lives inside the walls. What is my next step? --Jim H.

A: In all states but Colorado and Arkansas, landlords must offer and maintain rental housing that is fit and habitable -- and by any state's standards, this means free of vermin such as fleas. When the infestation is traceable to the tenant, the tenant pays for the extermination, but when the problem is not of the tenant's making, the landlord has to take care of business.

States give tenants various remedies when landlords won't step up. You can complain to your local or state housing or health department. You can also take matters into your own hands, but only if your state gives you "repair and deduct" or "rent withholding" options. These tools allow you either to fix the problem yourself and deduct the cost from the rent or to withhold rent until the landlord addresses the issue. Not every state offers tenants these remedies, however. If your state gives you these options, it's very important to follow the rules precisely (such as giving your landlord written notice of the problem and a certain amount of time in which to fix it).

One remedy that all tenants have (except those in Colorado and Arkansas) is the right to move out of an unfit rental, without liability for future rent. So if you're fed up and just want to get out, that avenue should be available to you. Be sure to give your landlord written notice of your intentions and a reasonable time to fix the problem.

If you leave and lose your deposit, you'll have a good argument for getting it back (though you'll have to sue in small claims court to do so). Deposits are meant to give landlords a way to cover their costs if the tenant damages the rental beyond normal wear and tear or leaves owing rent. Because your leave-taking is justified, you will not owe rent. Assuming that you leave the rental in good shape (but for normal wear), that leaves no legal justification for the landlord to keep your deposit.

Janet Portman is an attorney and managing editor at Nolo. She specializes in landlord/tenant law and is co-author of "Every Landlord's Legal Guide" and "Every Tenant's Legal Guide." She can be reached at janet@inman.com.

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