



SMOKE-FREE PUBLIC HOUSING

Reasonable Accommodations



Smoke-free multi-unit housing offers many benefits, including better air quality and health, as well as lower fire risk and maintenance costs.²

While these benefits apply to all residents of a smoke-free property, certain groups of people with higher rates of tobacco use and secondhand smoke exposure may benefit more if policies are implemented equitably.

For example, while people with mental health or substance use conditions make up 25 percent of the general population, they smoke 40 percent of all cigarettes.³ Well-implemented smoke-free policies that reach this population have the potential to reduce health disparities and promote health equity.

Safe, quality, affordable housing with the necessary supports is “one of the most basic and powerful social determinants of health.”¹





In its final rule, “Instituting Smoke-Free Public Housing,”⁴ the U.S. Department of Housing and Urban Development (HUD) states that smoke-free public housing helps HUD realize its mission of providing safe, decent, and sanitary housing for vulnerable populations nationwide, including people with disabilities. The rule also reminds public housing agencies (PHAs) that individuals with disabilities have the right to seek a reasonable accommodation. This fact sheet explains the legal framework for, and highlights a number of considerations to assist PHAs with, smoke-free reasonable accommodation requests.⁵

Although this fact sheet focuses primarily on reasonable accommodation requests to PHAs, the analysis applies in general to other types of housing providers, such as private, market-rate housing, or state and federally-subsidized housing.⁶

Interplay between fair housing, disability laws, and smoke-free policies

Laws protecting individuals with disabilities help ensure equal access to fair housing. Under those laws, housing providers are prohibited from discriminating on the basis of disability. The Fair Housing Act, Section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act (ADA) require that PHAs provide a reasonable accommodation, when requested, if it is necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling.⁷ State and local anti-discrimination and fair housing laws also may provide similar⁸ or additional⁹ protections to people with disabilities.

These laws are important because treating people with disabilities exactly the same as those without disabilities can sometimes have unequal results. For example, a no-pet policy might deny a vision-impaired resident an equal housing opportunity by prohibiting a service animal. At the same time, individuals living in federally-assisted housing,¹⁰ people with behavioral health issues,¹¹ and those with disabilities have disproportionately high tobacco use rates.¹² These disparities in smoking rates are concerning because tobacco use remains the leading cause of preventable death and disease in the U.S.,¹³ and there is no safe level of exposure to secondhand smoke.¹⁴ These individuals are not exempt from the negative health consequences of tobacco use and secondhand smoke exposure, but they disproportionately bear the burdens. Such inequities “are not natural or inevitable. They are the result of choices that we as a community, as states, and as a nation have made, and can make differently.”¹⁵ While efforts are needed to address these inequities, smoke-free policies are one opportunity to provide safe, clean, and healthy air for all. Smoke-free public housing has the potential to reverse tobacco-related inequities among public housing residents, including those with disabilities.

Q: What is a “reasonable accommodation” in housing?

A: A reasonable accommodation is a change in a policy, practice, or service that will allow people with disabilities to have an equal opportunity to use and enjoy a dwelling.¹⁶ Reasonable accommodation requests must be granted when individuals can demonstrate that (1) they qualify as persons with a disability; and (2) their requested accommodation is necessary to afford an equal opportunity to use and enjoy a dwelling. If an individual can demonstrate both requirements, the only reason a PHA may deny a request is because it is not reasonable. In other words, PHAs may only deny a reasonable accommodation request if: (1) the request was not made by or on behalf of a person with a disability; (2) there is no disability-related need for the accommodation; or (3) the requested accommodation is not reasonable.¹⁷ In each of these

instances, PHAs are encouraged to work with residents to help them meet their needs and find other ways to comply with the smoke-free policy.

Q: How can residents demonstrate that they qualify as persons with a disability?

A: There are three ways to qualify as a person with a disability under the law. Individuals qualify for disability discrimination protection if they (1) have a physical or mental impairment that substantially limits at least one major life activity, (2) have a record of such an impairment, or (3) are regarded as having such an impairment.¹⁸

Q: Does someone who smokes qualify as a person with a disability?

A: The law defines disability “with respect to an individual” and in terms of the impact of an impairment on “such individual,” which means disability determinations must be made on a case-by-case basis.¹⁹ That said, the HUD guidance on the smoke-free public housing rule states that neither smoking nor nicotine addiction are disabilities.²⁰

Under the ADA, before it was amended by the ADA Amendments Act of 2008, at least one court decided that neither smoking nor nicotine addiction qualified as a disability under the law.²¹ While the ADA Amendments expanded the definition of disability to more broadly cover individuals with disabilities, and while other addictions have been found to qualify as disabilities in certain instances, individuals are still required to show their impairment “substantially limits” at least one “major life activity.” Additionally, the law does not protect all activities of people with disabilities that either pose a “direct threat” to the health or safety of others or would result in substantial physical damage to the property of others.²² Neither HUD nor the Department of Justice, nor any court has yet determined that smoking or nicotine addiction itself requires protection against discrimination.

It is more likely that an individual’s underlying health condition may be considered a disability. For example, individuals with respiratory conditions, behavioral health issues, and mobility limitations may qualify as people with a disability, regardless of whether they smoke. In these situations, PHAs should then assess if the requested accommodation is both (1) necessary to afford equal opportunity to use and enjoy a dwelling and (2) reasonable.

Q: How can a resident with a disability demonstrate that the requested accommodation is necessary to afford equal opportunity to use and enjoy a dwelling?

A: Laws protecting individuals with disabilities help ensure equal access to fair housing. The laws require accommodations to achieve equal housing opportunities between those with disabilities and those without.²³ To show that a requested accommodation is necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability.²⁴ In other words, the requested accommodation must be related to the resident's disability in a way that, without it, the resident would be denied a housing opportunity afforded to a resident without a disability. This relationship must be determined on a case-by-case basis.²⁵

Q: Is a smoke-free accommodation necessary to afford a resident with a disability equal opportunity to use and enjoy a dwelling?

A: It depends on the requested accommodation. A PHA or housing provider will evaluate how the requested accommodation is related to the resident's disability. Without the accommodation, will the resident be denied a housing opportunity that residents without disabilities are able to enjoy?

Prior to HUD's smoke-free rule, many PHA reasonable accommodation requests related to smoking were **by non-smoking individuals for smoke-free environments**.²⁶ As the smoke-free movement has evolved, PHAs are seeing more **requests from individuals who smoke to allow or facilitate smoking in some way** (e.g., a transfer to a lower-level apartment unit or a unit closer to an exit). The relationship between a non-smoking resident's disability and an accommodation for a smoke-free environment is clear. Because there is no safe level of exposure to secondhand smoke, without a smoke-free environment residents might not be able to reside in their home because of their disability. For example, a resident with a respiratory condition such as asthma might be unable to sleep through the night because secondhand smoke exposure from a neighboring unit makes it more difficult to breathe.

The relationship between the disability of a resident who smokes and accommodations to allow or facilitate smoking is less clear. While no one is exempt from the negative health consequences of tobacco use, including those with behavioral health conditions and disabilities, there are a number of myths about tobacco use among these populations. For example, many believe that smoking is a coping strategy and that quitting smoking interferes

with recovery from behavioral health conditions. However, studies have shown that tobacco use is an ineffective treatment for this population, people with mental illness can refrain from smoking, and quitting smoking can improve mental health and substance use disorder treatment outcomes.²⁷ Despite this evidence, reducing tobacco use among this vulnerable population remains an ongoing effort, making reasonable accommodation requests challenging to address. The considerations are not only legal in nature; PHAs should assess a range of reasonableness factors when deciding how to handle smoke-free reasonable accommodation requests. These factors are addressed in the response to the following questions.

Q: If a resident demonstrates that he or she qualifies as a person with a disability and the requested accommodation is necessary, how does a PHA decide whether the request is reasonable?

A: This determination is also unique to the resident, the request, and each PHA. Some important considerations include the fundamental purpose of the policy in question, the circumstances of the resident's situation, the administrative and financial capacity of the PHA, the feasibility of granting the requested accommodation, the availability of other solutions, and the precedent a PHA wants to set. Some residents and PHAs might have more access to resources and services than others.

Housing policies are not discriminatory if changing them would fundamentally alter the nature of the PHA's operations or impose undue financial and administrative burdens on the PHA.²⁸ Thus, if a requested accommodation would financially or administratively challenge the very core of a PHA's policies, programs, or activities, it might not be reasonable.²⁹ That said, PHAs are encouraged to engage with residents to find other ways to meet the needs of both parties.³⁰

Q: Can a request to smoke inside public housing be granted?

A: No. Under HUD's smoke-free public housing rule, PHAs must have smoke-free policies that prohibit the use of tobacco products in all indoor areas and within 25 feet of buildings.³¹ In additional guidance on the rule, HUD makes clear that reasonable accommodations must comply with the requirements of a PHA's smoke-free policy and that smoking in restricted areas is not permitted.³² Depending on the details of the request, there may be other reasons to deny a request to smoke indoors, including (1) there is no qualifying disability, (2) there is no disability-related need for the accommodation, or (3) other factors make such a request unreasonable.



Q: What can PHAs do to help residents with disabilities who smoke?

A: PHAs should consider the specific circumstances of each resident's request and disability, as well as each PHA's reasonable accommodation process,³³ the budget to pay for accommodations, current vacancies, and access to resources and services that could assist residents. The notice accompanying HUD's smoke-free public housing rule has suggestions for PHAs, such as:

- Moving residents with mobility limitations to a floor or unit that is closer to an exit;
- Providing designated smoking areas outside the required smoke-free perimeter that are accessible;³⁴ or
- Special assistance to help residents understand the policy and resources for quitting smoking.³⁵

For example, one "PHA helped a resident with a mental disability comply with its smoke-free policy by having a social worker place signs in the home reminding the resident about the requirement to go outside to smoke."³⁶ PHAs with social service providers on-site or with access to additional community-based resources and services can provide specialized assistance to highly addicted individuals with disabilities who smoke, which can ease the transition to a smoke-free environment. For example, PHAs could consider offering access to quitting aids approved by the U.S. Food and Drug Administration (FDA), such as nicotine gum and nicotine patches, as well as helping residents find other ways to respond to their urges to smoke.

Smoke-free policies are meant to improve the health and well-being of everyone impacted by them. HUD makes clear that its rule is aligned with the goal of ending homelessness and

is structured to discourage overly aggressive and punitive enforcement approaches.³⁷ HUD encourages a graduated approach to enforcement with specific and progressively escalating monitoring and enforcement practices. While PHAs must enforce their policies, a single violation of a smoke-free policy cannot be grounds for termination.³⁸ The goal of smoke-free policy implementation is to help residents find ways to comply.

For additional information on the HUD rule and on equitable enforcement strategies, please see the Public Health Law Center's fact sheets, [*HUD's Smoke-free Public Housing Rule: An Overview*](#) and [*Smoke-free Multi-Unit Housing: Equitable Enforcement Strategies*](#).

Conclusion

Eliminating smoking indoors is the only way to protect fully against the negative health impacts of secondhand smoke exposure.³⁹ Smoke-free policies reduce exposure to smoke and can also prevent people from starting to smoke, support quitting efforts, reduce the social acceptability of smoking, and yield considerable cost-savings in health care and renovation expenses.⁴⁰ While the benefits of smoke-free multi-unit housing do not discriminate and have the potential to reverse tobacco-related inequities that exist among public housing residents by encouraging quitting, there remains a risk that the implementation of smoke-free policies can lead to unequal results. Equitable compliance-focused enforcement is one way to guard against such inequities. The purpose of smoke-free policies is to ensure all residents have access to a healthy and safe place to live. Reasonable accommodations in this context require the careful balance of ensuring all residents have the same equal opportunity to use and enjoy a dwelling while also ensuring that any reasonable accommodation does not infringe on other residents' health and safety.⁴¹

HUD makes clear that allowing smoking in violation of a PHA's smoke-free policy is not permitted. This fact sheet provides a legal framework to assist PHAs with smoke-free reasonable accommodation requests. It emphasizes the flexibility that PHAs have to make determinations and acknowledges that the answers are not always clear. The law recognizes a number of non-legal considerations, such as individual clinical diagnoses and symptoms, public health, business operations, resource allocation, ethics, and social and economic conditions. PHAs are tasked with balancing these considerations when making decisions regarding reasonable accommodations. While asking what the law requires is a helpful starting place, ultimately PHAs will need to conduct their own assessments of each individual request, keeping in mind the precedent they want to set and the goal of smoke-free policies to ensure equal access to safe, clean, and healthy air for all.

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Endnotes

- 1 CORP. FOR SUPPORTIVE HOUS., *HOUSING IS THE BEST MEDICINE: SUPPORTIVE HOUSING AND THE SOCIAL DETERMINANTS OF HEALTH* (2014), http://www.csh.org/wp-content/uploads/2014/07/SocialDeterminantsofHealth_2014.pdf.
- 2 This fact sheet addresses smoking of tobacco products. For information on smoking of marijuana in multi-unit housing, see Public Health Law Center, *Marijuana in Multi-Unit Residential Settings* (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/Marijuana-in-Multi-Unit-Residential-Setting-2019-1.pdf>.
- 3 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *THE NSDUH REPORT: ADULTS WITH MENTAL ILLNESS OR SUBSTANCE USE DISORDER ACCOUNT FOR 40 PERCENT OF ALL CIGARETTES SMOKED* (2013), <https://www.samhsa.gov/data/sites/default/files/spot104-cigarettes-mental-illness-substance-use-disorder/spot104-cigarettes-mental-illness-substance-use-disorder.pdf>.
- 4 Instituting Smoke-Free Public Housing, 81 Fed. Reg. 87,430, 87,441 (Dec. 5, 2016) (to be codified at 24 C.F.R. pt. 965 & 966) [hereinafter HUD Instituting Smoke-free Public Housing], <https://www.federalregister.gov/documents/2016/12/05/2016-28986/instituting-smoke-free-public-housing>.
- 5 This fact sheet does not address reasonable modifications, or structural changes made to existing premises to afford a person with a disability full enjoyment of the premises. 42 U.S.C. § 3604(f)(3)(A), 29 U.S.C. § 794, 24 C.F.R. pt 8 (2020). Generally, the framework for analyzing reasonable modifications is similar to the reasonable accommodation analysis, except regarding the party responsible for costs. However, reasonable modifications in housing that receives federal financial assistance are considered reasonable accommodations. Additional information about reasonable modifications can be found in the Joint Statement of the Department of Housing and Urban Development and the Department of Justice. U.S. DEP'T OF HOUS. & URB. DEV. & DEP'T OF JUSTICE, *REASONABLE MODIFICATIONS UNDER THE FAIR HOUSING ACT* (Mar. 5, 2008) [hereinafter HUD JOINT STATEMENT], https://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf.
- 6 The Fair Housing Act provides protections for people with disabilities who live in rental housing (public or private) with limited exceptions. 42 U.S.C. § 3604. For example, the FHA does not apply to owner-occupied buildings with no more than four units. *Housing Discrimination Under the Fair Housing Act*, HUD.GOV, https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview (last visited Mar. 1, 2021).
- 7 Section 504 of the Fair Housing Act places additional obligations on housing providers that receive federal financial assistance, and the Americans with Disabilities Act applies to state and local "public entit[ies]" and "place[s] of public gathering" by private entities. 29 U.S.C. § 794; 42 U.S.C. §§ 12131, 12181.
- 8 For example, the Minnesota Human Rights Act closely resembles federal law with regard to protecting individuals with disabilities from housing discrimination. MINN. STAT. §§ 363A.03, 363A.10 (2020).
- 9 For instance, California's laws are meant to provide greater protections than federal law. CAL. GOV'T CODE §§ 12926(j), (m); 12955.6 (2020).
- 10 Veronica E. Helms et al., *Cigarette Smoking and Adverse Health Outcomes Among Adults Receiving Federal Housing Assistance*, 99 *PREV. MED.* 171 (2017), <https://pubmed.ncbi.nlm.nih.gov/28192095>.
- 11 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 3; *Behavioral Health*, U.C.S.F. SMOKING CESS. LEAD. CTR. (2019), <https://smokingcessationleadership.ucsf.edu/behavioral-health>.

- 12 *Cigarette Smoking Among Adults with Disabilities*, CTRS. FOR DISEASE CONTROL & PREV. (2020), <https://www.cdc.gov/ncbddd/disabilityandhealth/smoking-in-adults.html>.
- 13 U.S. DEP'T OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING — 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL* (2014), <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>; *Health Effects of Cigarette Smoking*, CTRS. FOR DISEASE CONTROL & PREV. (2020), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm.
- 14 U.S. DEP'T OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL* (2006), https://www.ncbi.nlm.nih.gov/books/NBK44324/pdf/Bookshelf_NBK44324.pdf; *Health Effects of Secondhand Smoke*, CTRS. FOR DISEASE CONTROL & PREV. (2020), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/index.htm.
- 15 Larry Adelman, *A statement from the Executive Producer*, UNNATURAL CAUSES (March 2008), http://unnaturalcauses.org/producer_perspectives.php.
- 16 U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE PIH-2017-03, HUD GUIDANCE ON INSTITUTING AND ENFORCING SMOKE-FREE PUBLIC HOUSING POLICIES (Feb. 15, 2017) [hereinafter HUD GUIDANCE], <https://www.hud.gov/sites/documents/PIH2017-03.PDF>.
- 17 See HUD JOINT STATEMENT, *supra* note 5.
- 18 42 U.S.C §§ 12102(1); 12102(3).
- 19 42 U.S.C §§ 12102(1); 12102(1)(A); 29 C.F.R. 1630.2(j)(iv) (2021).
- 20 HUD GUIDANCE, *supra* note 16 at 5.
- 21 *Brashear v. Simms*, 138 F. Supp. 2d 693, 695 (D. Md. 2001).
- 22 42 U.S.C. § 3604(f)(9). “Direct threat” is defined by HUD at 24 C.F.R. § 9.131(b) as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”
- 23 *Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George*, 685 F.3d 917, 923 (10th Cir. 2012).
- 24 See HUD JOINT STATEMENT, *supra* note 5.
- 25 See HUD GUIDANCE, *supra* note 16 at 6.
- 26 Examples of successful discrimination claims against housing providers involving reasonable accommodation requests to provide a smoke-free environment include *Matarese v. Archstone Pentagon City*, 795 F. Supp. 2d 402 (E.D. Va. 2011); *U.S. Dep’t of Hous. & Urb. Dev. v. Magnolia Walk Apartments II, Ltd.*, Case No. 04-10-0110-8 (2011); *U.S. v. Seattle Hous. Auth.*, C01-1133L (W.D. Wa., 2002) (consent decree); *In re U.S. Dep’t Hous. & Urb. Dev. & Kirk & Guilford Mgmt. Corp. & Park Towers Apartments*, Case No. 05-97-0010-8, 504, Case No. 05-97-11-0005-370 (1998).
- 27 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *ENHANCE YOUR STATE’S TOBACCO CESSATION EFFORTS AMONG THE BEHAVIORAL HEALTH POPULATION: A BEHAVIORAL HEALTH RESOURCE* (June 2016), https://smokingcessationleadership.ucsf.edu/sites/smokingcessationleadership.ucsf.edu/files/State%20TA%20Resource%20on%20Tobacco%20Cessation%20in%20BH_June%202016_final.pdf; *What We Know: Tobacco Use and Quitting Among Individuals With Behavioral Health Conditions*, CTRS. FOR DISEASE CONTROL & PREV. (2020), <https://www.cdc.gov/tobacco/disparities/what-we-know/behavioral-health-conditions/index.html>; Wilson Compton, *The need to incorporate smoking cessation into behavioral health treatment* 27 AM. J. ON ADDICTIONS 42 (2018).
- 28 24 C.F.R. § 8.33.
- 29 See HUD JOINT STATEMENT, *supra* note 5.

- 30 *Id.* Courts vary in whether they view this interactive process as necessary. NAT'L HOUSING L. PROJECT, REASONABLE ACCOMMODATION IN FEDERALLY ASSISTED HOUSING 8 (2012), <https://www.fairhousingnc.org/wp-content/uploads/2014/10/NHLP-Reasonable-Accommodation-Outline-Current-10-2012.pdf>.
- 31 HUD Instituting Smoke-free Public Housing, *supra* note 4.
- 32 HUD GUIDANCE, *supra* note 16, at 5-6. In its questions and answers to the proposed version of the rule, HUD states that allowing residents to smoke in areas required to be smoke-free is not an accommodation that can be granted. U.S. DEP'T OF HOUS. & URBAN DEV., QUESTIONS AND ANSWERS ON HUD'S SMOKE FREE PUBLIC HOUSING PROPOSED RULE, <https://portal.hud.gov/hudportal/documents/huddoc?id=finalsmokefreeqa.pdf>.
- 33 This process is often contained within a PHA's Admissions and Continued Occupancy Plan, or ACOP.
- 34 Designated smoking areas are not required by HUD's smoke-free public housing rule, but they are permitted so long as they comply with the law. Some housing providers report that designated smoking areas help with compliance while others say they cause additional problems. The decision whether to provide a designated smoking area will depend on the specific PHA property and resident population.
- 35 HUD GUIDANCE, *supra* note 16 at 6.
- 36 U.S. DEP'T OF HOUS. & URBAN DEV., CHANGE IS IN THE AIR: AN ACTION GUIDE FOR ESTABLISHING SMOKE-FREE PUBLIC HOUSING AND MULTIFAMILY PROPERTIES 70 (2014), <https://portal.hud.gov/hudportal/documents/huddoc?id=smokefreeactionguide.pdf>.
- 37 HUD Instituting Smoke-Free Public Housing, *supra* note 4.
- 38 *Id.*; see also HUD GUIDANCE, *supra* note 16 at 4-5.
- 39 See U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 13; see also U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 14.
- 40 See Helms et al., *supra* note 10.
- 41 Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George, 685 F.3d 917, 923 (10th Cir. 2012).