


TENANT GUIDE TO ADDRESSING SECONDHAND SMOKE

 Secondhand smoke is a serious health hazard, causing premature death and disease in children and adults who do not smoke.¹ Exposure to secondhand smoke can result in severe asthma attacks, respiratory infections, sinus infections, and other cardiovascular and pulmonary diseases.²

The U.S. Surgeon General has concluded that there is no risk-free exposure to secondhand smoke.³ Despite the significant health hazards associated with secondhand smoke, a substantial number of individuals living in multi-unit housing continue to be involuntarily exposed.

Smoking is the leading cause of preventable death in the United States, causing approximately 480,000 deaths each year, including 41,000 deaths from secondhand smoke exposure.⁴ The California Air Resources



Board has added secondhand smoke to its list of toxic air contaminants,⁵ and in 2006, the California Environmental Protection Agency added secondhand smoke to the list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm.⁶

The American Heart Association and the American Lung Association recommend that all adults and children be protected from secondhand smoke in multi-unit housing.⁷

Research demonstrates that secondhand smoke in multi-unit housing can and does transfer between units, seeping into smoke-free areas from areas where smoking occurs.⁸ Secondhand smoke can travel to living spaces and common areas through ventilation systems, plumbing, or electrical lines.⁹ The only sure way to guard against involuntary exposure to secondhand smoke is to eliminate smoking in all indoor spaces.

Secondhand smoke concerns extend beyond tobacco smoke. The combustion or vaporization of marijuana produces carcinogens, irritants, and toxins as well. For more on addressing marijuana use in multi-unit housing, see our publication. Evidence also continues to build that exposure to aerosol emitted by electronic smoking devices can have immediate impacts on respiratory and cardiovascular systems, that could pose a risk to human health.¹⁰

Despite some popular misconceptions, there is no constitutional right to smoke.¹¹ If you live in multi-unit housing and are being impacted by secondhand smoke in your home, you have legitimate cause for concern.

This guide will help California tenants understand the options available to them if they are exposed to secondhand smoke in their home. It is organized roughly in the order that options should be considered, with litigation included as a last resort.

Approach your Neighbor or Landlord

The first option to consider is to talk with your neighbor, if you feel comfortable doing so. Nicotine is highly addictive — as addictive as cocaine, heroin, or alcohol.¹² Most smokers want to quit, but have trouble doing so. They may be unaware of the impact their smoking is having on you and may respond to requests to stop smoking in their unit or other ways that are impacting you. In conversing with your neighbor, be prepared to discuss your exposure to secondhand smoke and the health risks associated with that exposure. Smoking has been normalized in many communities and people may not appreciate the risks associated with secondhand smoke, so educating your neighbor on these issues and how the smoke is affecting you may go a long way to resolving the issue amicably.

If speaking to your neighbor fails, notify the property owner of the issue in writing and ask to take steps to eliminate the exposure. Document the requests you are making and any response. Sometimes, requesting the landlord's help directly is all that is needed to resolve the situation. For helpful tips, see [*The Smoker Next Door*](#) from the American Nonsmokers' Rights Foundation.¹³

Enforce Lease

Should a simple request to your landlord not succeed, review your lease. California law authorizes landlords to prohibit smoking in multi-unit buildings, specifying in the lease areas where smoking is prohibited.¹⁴ If your landlord has prohibited smoking, you can ask in writing that the smoke-free policy be enforced.

If you do not live in smoke-free housing, your lease may contain language prohibiting tenants from engaging in nuisances or requiring the premises to be safe. You may be able to argue to the landlord that because secondhand smoke is a health hazard, it is a nuisance, and that the landlord should enforce the lease terms.

Review Local Laws

California law permits local governments to restrict the smoking of tobacco in multi-unit residences.¹⁵ As of April 2020, 60 California cities and counties have restricted smoking in all multi-unit housing, and 18 have partially restricted smoking in multi-unit housing.¹⁶ If you live in one of these jurisdictions, you can call the enforcing entity in your city or county, such as a public health department or building inspector, to report that your multi-unit building is not complying with the ordinance.

The City of Pleasanton's smoke-free multi-unit housing ordinance, for example, places on the landlord the primary obligation of enforcing the smoke-free housing restrictions.¹⁷ One of the city's enforcement mechanisms requires the landlord to provide documentation of the landlord's attempt to achieve compliance with the smoke-free housing restriction. It is therefore important to review local laws to see if they provide ways in which the landlord can be encouraged to enforce smoking restrictions.

If you do not live in one of these jurisdictions, you could consider working to change the law in your location. The Law and Policy Partnership to End the Commercial Tobacco Epidemic has released a model Smoke-Free Multi-Unit Housing policy that your city or county can adapt.

Rent Withholding

Every California lease contains an implied lease term that the property is safe and healthy.¹⁸ This is known as the "warranty of habitability," and requires landlords to keep rental units free from conditions that are seriously harmful to health and safety, or else they breach the lease agreement.¹⁹ The property owner's breach of a lease entitles a tenant to certain remedies,



including withholding rent. Withholding rent, however, is likely to prompt the property owner to initiate eviction proceedings.

In cases of an eviction (unlawful detainer) action in California, withholding rent for uninhabitable conditions is allowed as a defense.²⁰ To successfully raise this defense, the court must find that there was a substantial breach of either the warranty of habitability or a specific list of conditions that make a unit unlivable (like plumbing or heating issues).²¹ Tenants are not generally entitled to withhold their entire rent, but instead courts determine a reasonable rental value (sometimes called “rent abatement”) until the conditions are addressed.²² In California, courts frequently look for housing code violations when assessing whether there is a violation of the warranty of habitability, but this is not always required.²³ Because of the health risks associated with secondhand smoke, a tenant could argue that continued, unabated exposure to secondhand smoke is a health hazard that violates the warranty of habitability.

Although no reported cases in California have addressed whether exposure to secondhand smoke violates the warranty of habitability, courts in other states have recognized that, in some instances, the warranty of habitability can apply to protect tenants from involuntary continuous

exposure to secondhand smoke. For example, an Ohio court found that rent abatement was appropriate where a tenant withheld rent after the landlord failed to successfully address severe cigarette smoke infiltration in his bedroom and bathroom that forced him to sleep in his living room.²⁴ A New York court similarly found that a landlord's failure to effectively stop secondhand smoke from entering through a neighboring unit, despite repeated complaints from the tenant, justified the tenant's withholding of rent and abatement of rent by the court.²⁵

Given the significant consequence of eviction if a court found rent withholding was not justified, the decision to withhold rent should be made cautiously after first seeking advice from an attorney licensed to practice in California. At the end of this publication is a list of legal aid organizations that may assist in answering questions about rent withholding.

Lawsuits

If you have tried the above options or decided not to pursue them, another option is a lawsuit. There are two types of courts to consider: small claims court and trial court.

Small Claims Court

For a small claims court, tenants must represent themselves and claims are limited to no more than \$10,000.²⁶ The courts cannot impose injunctions, but can impose "conditional judgments" like requiring offending neighbors to stop smoking on their balcony or pay a fine.

California has many helpful resources for individuals considering pursuing small claims court, such as a guide from the California Department of Consumer Affairs²⁷ and a guide from the California Courts.²⁸

Trial Court

Another option would be to consult an attorney about suing in a trial court. In general, you will only want to consider a lawsuit if you can demonstrate substantial harm from repeated, significant exposure to secondhand smoke. This could include documented health impacts, such as a written note from your doctor describing how secondhand smoke impacts you, particularly when you stay in your unit for an extended period.

Below are brief overviews of some types of claims you and your lawyer might consider bringing against your landlord. The lawsuit could seek damage payments or an order to stop the impact of the secondhand smoke. You could also choose to bring a lawsuit against your neighbor, but those claims are not discussed here. The legal aid organizations listed in this publication can assist in answering questions regarding pursuing the following claims.

Breach of Contract

If you live in a smoke-free building that fails to address severe levels of secondhand smoke, you may have a contract claim for breach of the lease. Under California law, tenants can sue landlords who have breached lease agreements.²⁹ This can cover landlords failing to address conditions caused by other tenants.³⁰

Other lease provisions can sometimes be used to bring a breach of contract claim. In 2013, a California jury found a homeowners' association liable for breach of contract, as well as negligence, when it failed to respond to repeated complaints about secondhand smoke from a neighboring condominium, which had aggravated the family's young son's asthma and caused them to move out.³¹ The lease provision in question was a general provision against nuisances, prohibiting "noxious or offensive" activity or anything interfering with quiet enjoyment of the residence.³²

Disability Claims

If a resident has a health condition that is exacerbated by exposure to secondhand smoke — such as asthma, chronic obstructive pulmonary disorder, multiple chemical sensitivity disorder, environmental illness, or other respiratory or heart conditions — then the resident may be considered to have a disability, typically referred to as hypersensitivity to smoke.³³ In the fair housing context, a person with a disability generally means "a physical or mental impairment which substantially limits one or more of such person's major life activities."³⁴ If a person has a disability, the person is entitled to a reasonable accommodation so that the person may have equal opportunity to use and enjoy living in a home. A person who is hypersensitive to smoke is entitled to a reasonable accommodation because the exposure to smoke meets the requirement to substantially limit a major life activity — in this case, breathing.³⁵ A reasonable accommodation in the context of multi-unit housing could be adopting a smoke-free policy, or reducing or eliminating exposure to secondhand smoke. In some cases, moving a resident to another unit has been proposed as a reasonable accommodation.³⁶ As noted above, however, since the only means of stopping exposure to secondhand smoke is to eliminate it in all indoor places, simply moving a resident to a new unit without making additional remedial measures may not be sufficient to prevent exposure to secondhand smoke. Whether a condition is considered a disability and the possible accommodations for that disability are decided on a case-by-case basis.

Federal statutes that might be used to aid tenants bothered by secondhand smoke include the Americans with Disabilities Act, the Rehabilitation Act, and the Federal Fair Housing Act.

California statutes that could help tenants with health conditions include the California Fair Employment and Housing Act and the Unruh Civil Rights Act. For a helpful guide to pursuing

disability claims for secondhand smoke, including a sample demand letter and doctor's note, see the ChangeLab Solutions guide *How Disability Laws Can Help Tenants Suffering from Drifting Tobacco Smoke*.³⁷ Another helpful resource is the Public Health Law Center's *Smoke-free Public Housing: Reasonable Accommodations*.³⁸

If you have a disability and your request to your landlord for secondhand smoke accommodation has been rejected, one remedy you can pursue outside of bringing a lawsuit is to file a complaint within one year with the California Department of Fair Employment and Housing. Its complaint process for discrimination complaints can be accessed [online](#) or you can call 800-884-1684. Filing a complaint with the Department of Fair Employment and Housing is free, and the department may investigate and pursue the claim on your behalf. You could also choose to file a housing discrimination complaint with the U.S. Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity (FHEO), which can also investigate the complaint and may try to facilitate an agreement or may initiate enforcement actions. You can file a complaint [online](#) or you can call 800-669-9777.

Nuisance Claims

A nuisance is anything harmful to health that interferes with the comfortable enjoyment of life or property.³⁹ Courts have been open to nuisance claims based on secondhand smoke,⁴⁰ but often require a showing that the harm is "beyond mere inconvenience."⁴¹ For example, a California court concluded that an apartment resident with a five-year old daughter with asthma and chronic allergies could bring a nuisance claim based on secondhand smoke preventing use of an outdoor common area.⁴² But while the case was allowed to go forward to trial, the resident in the end was not able to prove that the secondhand smoke was "substantially and unreasonably harmful" enough to be a nuisance.⁴³ Other courts have also tended to reject nuisance lawsuits for secondhand smoke if there was not a sufficiently serious harm, and have seen secondhand smoke more as an annoying odor that is part of living in a multi-unit building.⁴⁴

It is often difficult then for residents to meet the standard that courts have set for nuisance claims. Most California jurisdictions that have adopted smoke-free housing laws, however, have lowered the traditional standard of proving a nuisance. The majority of smoke-free multi-unit housing laws declare that exposure to secondhand smoke is a nuisance. This declaration — making exposure to secondhand smoke a nuisance per se — means that a person who is exposed to secondhand smoke need not prove that the smoke is substantially and unreasonably harmful. It is therefore important to review your local laws to determine the nuisance standard used in your jurisdiction.

Covenant of Quiet Enjoyment

Another possible claim is the covenant of quiet enjoyment, which is sometimes used with the warranty of habitability discussed above under “Rent Withholding.” As with the warranty of habitability, the covenant of quiet enjoyment is an implied term in a lease and protects the resident from actions that interfere with the right to use and enjoy the premises.⁴⁵ Several courts outside of California have found that secondhand smoke from a neighboring unit is sufficient to sue for a breach of the covenant of quiet enjoyment. Some courts have allowed covenant of quiet enjoyment cases to proceed even if the tenant is not hypersensitive to smoke.⁴⁶ But often courts have looked for severe impacts from smoke, such as a situation in which a neighbor “incessantly” smoked in a shared hallway of a tenant extremely allergic to tobacco smoke, forcing the tenant to move.⁴⁷

Constructive Eviction

If a tenant is forced to move out because secondhand smoke makes the unit unfit for occupancy, that can also lead to a claim called “constructive eviction.”⁴⁸ Constructive eviction claims can only be brought after a tenant vacates the unit.⁴⁹

Legal Assistance

Although these trial court options provide various legal avenues through which residents exposed to secondhand smoke may seek a remedy, none should be pursued without the assistance of an attorney licensed to practice law in California. The following nonprofit organizations may be able to assist in pursuing these options.

California Housing Legal Organizations

Below is a list of nonprofit organizations that assist individuals in California with housing claims, generally without charging for services. The fair housing councils focus on housing discrimination and helping those with disabilities make accommodation requests.

Central California

Bakersfield	615 California Ave., Bakersfield, CA 93304
Greater Bakersfield	gbla.org
Legal Assistance, Inc.	661-325-5943

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California Housing Legal Organizations *Central California continued*

Fresno
California Rural Legal Assistance Foundation
Offices in Fresno & Sacramento
Main office: 2210 K St. Ste. 201, Sacramento, CA 95816
crlaf.org
916-446-7904
info@crlaf.org

Fresno
Central California Legal Services
Offices in Fresno, Merced, & Visalia
Main office: 2115 Kern Street Ste. 200, Fresno, CA 93721
centralcallegal.org
800-675-8001

Fresno
Fair Housing Council of Central California
333 W. Shaw Ave. Ste. 14, Fresno, CA 93704
fhc-cc.org
888-498-FAIR or 559-244-2950
CentralCAFairHousing@gmail.com

Northern California

Berkeley
East Bay Community Law Center
2921 Adeline Street, Berkeley, CA
ebclc.org
510-548-4040
info@ebclc.org

Hayward
Eden Council for Hope & Opportunity Housing
Offices in Antioch, Hayward, Livermore, Monterey, & Oakland
Main office: 22551 Second Street #200, Hayward, CA 94541
echofairhousing.org
855-ASK-ECHO

Napa
Fair Housing Napa Valley (FHNV)
1804 Soscol Ave. Ste. 203, Napa, CA 94559
napafairhousing.org
707-224-9720
info@napafairhousing.org

Oakland
Bay Area Legal Aid
Offices in Napa, Oakland, Redwood City, Richmond, San Francisco, San Jose, & San Rafael
Main office: 1735 Telegraph Ave., Oakland, CA 94612
baylegal.org
510-663-4755

continued

California Housing Legal Organizations *Northern California continued*

Oakland
Housing and Economic
Rights Advocates
Offices in Oakland, Palo Alto, San Mateo, & Los Angeles
Main office: 3950 Broadway Ste. 200, Oakland, CA 94611
heraca.org
510-271-8443
inquiries@heraca.org

Oakland
Legal Access Alameda
1000 Broadway, Oakland, CA 94607
vlsc-acba.org
510-302-2222

Redwood City
Legal Aid Society of
San Mateo County
330 Twin Dolphin Drive Ste. 123, Redwood City, CA 94065
legalaidsmc.org
650-558-0915

Sacramento
California Rural Legal
Assistance Foundation
Offices in Fresno & Sacramento
Main office: 2210 K St. Ste. 201, Sacramento, CA 95816
crlaf.org
916-446-7904
info@crlaf.org

Sacramento
Legal Services of
Northern California
Offices in Sacramento, Auburn, Chico, Eureka, Redding, Ukiah, Vallejo,
& Woodland
Main office: 515 12th Street, Sacramento, CA 95814
lsnc.net
916-551-2150

San Francisco
Housing Rights Committee
of San Francisco
Offices in Mission District & Richmond District
Main office: 1663 Mission #504, SF 94103
hrssf.org
415-703-8634

San Jose
Law Foundation of
Silicon Valley
4 North Second Street Ste. 1300, San Jose, CA 95113
lawfoundation.org
408-280-2424

San Rafael
Fair Housing Advocates
of Northern California
1314 Lincoln Ave. Ste. A, San Rafael, CA 94901
fairhousingnorcal.org
415-457-5025

continued

California Housing Legal Organizations *Northern California continued*

San Rafael
Legal Aid of Marin
1401 Los Gamos Drive Ste. 101, San Rafael, CA 94903
legalaidsmarin.org
628-253-5755

Santa Clara
Project Sentinel
Offices in Santa Clara, Fremont, Redwood City, Modesto, Gilroy, Sacramento, & Milpitas
Main office: 1490 El Camino Real, Santa Clara, CA 95050
housing.org
408-720-9888
info@housing.org

Santa Rosa
Legal Aid of Sonoma County
144 South E Street Ste. 100, Santa Rosa, CA 95404
legalaids.org
707-542-1290

Southern California

Long Beach
Fair Housing Foundation
Offices in Long Beach & Anaheim
Main office: 3605 Long Beach Blvd. Ste. 302, Long Beach, CA 90807
fairhousingfoundation.com
800-446-3247
info@fhfca.org

Los Angeles
Housing Rights Center
Offices in Los Angeles, Pasadena, & Van Nuys
Main office: 3255 Wilshire Blvd. #1150, Los Angeles, CA 90010
housingrightscenter.org
800-477-5977
info@housingrightscenter.org

Los Angeles
Legal Aid Foundation of Los Angeles
Offices in Los Angeles, Long Beach, & Santa Monica
Main office: 1550 W. 8th Street, Los Angeles, CA 90017
lafla.org
800-399-4529

Los Angeles
Mental Health Advocacy Services
3255 Wilshire Blvd. Ste. 902, Los Angeles, CA 90010
mhas-la.org
213-389-2077
info@mhas-la.org

continued

California Housing Legal Organizations *Southern California continued*

Ontario
Inland Fair Housing
& Mediation Board
1500 S. Haven Ave. Ste. 100, Ontario, CA 91761
ifhmb.com
800-321-0911

Panorama City
Fair Housing Council of
the San Fernando Valley
14621 Titus St. #100, Panorama City, CA 91402
fairhousingcouncil.org
818-373-1185

Riverside
Fair Housing Council
of Riverside County
Offices in Riverside, Moreno Valley, Palm Springs, Corona, Perris,
& Hemet
Main office: 4164 Brockton Ave., Riverside, CA 92501
fairhousing.net
951-682-6581
fhcrc@fairhousing.net

San Diego
The Fair Housing Council
of San Diego
1764 San Diego Ave. #130, San Diego, CA 92110
fhcsd.com
619-699-5888
msk@fhcsd.com

San Diego
Legal Aid Society
of San Diego, Inc.
Offices in San Diego & Oceanside
Main office: 110 S. Euclid Ave., San Diego, CA 92114
lassd.org
877-534-2524

Santa Ana
Community Legal Aid SoCal
Offices in Santa Ana, Norwalk, Anaheim, & Compton
Main office: 2101 North Tustin Ave., Santa Ana, CA 92705
communitylegalsocal.org
800-834-5001

Santa Ana
Fair Housing Council
of Orange County
2021 E. 4th Street Ste. 122, Santa Ana, CA 92705
fairhousingoc.org
800-698-FAIR or 714-569-0823
info@fairhousingoc.org

Santa Barbara
Legal Aid Foundation
of Santa Barbara County
Offices in Santa Barbara, Santa Maria, & Lompoc
Main office: 301 E. Canon Perdido Street, Santa Barbara, CA 93101
lafsb.org
805-963-6754

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Endnotes

- 1 US DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF THE SURGEON GENERAL, THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL, 31-32 (2006), <https://www.ncbi.nlm.nih.gov/books/NBK44324>.
- 2 U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL, 6 MAJOR CONCLUSIONS OF THE SURGEON GENERAL REPORT (2006), https://www.cdc.gov/tobacco/data_statistics/sgr/2006/pdfs/6major-conclusions.pdf.
- 3 *Supra* note 1 at 31-2.
- 4 CTRS. FOR DISEASE CONTROL AND PREVENTION, *Fast Facts: Smoking and Tobacco Use* (2020), https://www.cdc.gov/tobacco/data_statistics/fact_sheets.
- 5 Resolution 06-01, CAL. AIR RESOURCES BD. (2006) at 5, www.arb.ca.gov/regact/ets2006/res0601.pdf.
- 6 OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY. *The Proposition 65 list*. <https://oehha.ca.gov/proposition-65/proposition-65-list>. Accessed June 19, 2020.
- 7 American Heart Association, *Policy Position on Smoke-Free Policies in Multi-Unit Housing* (2013), <http://tobaccopolicycenter.org/wp-content/uploads/2017/11/030.pdf>; American Lung Association, *Public Policy Position — Healthy Air* (2019), <https://www.lung.org/policy-advocacy/public-policy-agenda/public-policy-position-healthy-air>.
- 8 Brian King et al., *Secondhand Smoke Transfer in Multiunit Housing*, 12 NICOTINE TOBACCO RES. 1133-41 (2010), <https://pubmed.ncbi.nlm.nih.gov/20889473>.
- 9 CTRS. FOR DISEASE CONTROL AND PREVENTION, *Going Smokefree Matters: Multiunit Housing* (2020), https://www.cdc.gov/tobacco/basic_information/secondhand_smoke/going-smokefree-matters/multi-unit.
- 10 National Academies of Sciences, Engineering, and Medicine, *Public Health Consequences of E-Cigarettes* (2018), <https://www.nap.edu/catalog/24952/public-health-consequences-of-e-cigarettes>.
- 11 Hudson B. Kingston, Public Health Law Center, *There Is No Constitutional Right to Smoke or Toke* (2019), <https://www.publichealthlawcenter.org/resources/there-no-constitutional-right-smoke-or-toke-2019>.
- 12 U.S. DEP'T OF HEALTH AND HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994).
- 13 American Non-Smokers Rights Foundation, *The Smoker Next Door, Handling Unwanted Tobacco Smoke in Apartments and Condominiums* (2009), <https://no-smoke.org/wp-content/uploads/pdf/the-smoker-next-door.pdf>.
- 14 CAL. CIV. CODE § 1947.5.
- 15 Under California law, areas not defined as “a place of employment” are subject to local regulation of the smoking of tobacco products. CAL. LABOR CODE § 6404.5.
- 16 American Non-Smokers Rights Foundation, *U.S. Laws for 100% Smokefree Multi-Unit Housing* (Apr. 1, 2020), <https://no-smoke.org/wp-content/uploads/pdf/smokefreemuh.pdf>.

- 17 PLEASANTON, CAL. MUNICIPAL CODE § 9.26.070 (2020).
- 18 *Martinez v. Welk Group, Inc.*, 907 F.Supp.2d 1123, 1142 (S.D. Cal. 2012) (citing *Green v. Superior Court*, 10 Cal.3d 616, 637-38 (Cal. 1974)).
- 19 *Hyatt v. Tedesco*, 96 Cal.App.4th Supp. 62, 67 (Cal. Ct. Ap. 2002).
- 20 CAL. CIV. PROC. CODE § 1174.2; see also CAL. DEP'T OF CONSUMER AFF., *California Tenants: A Guide to Tenants' and Landlords' Rights and Responsibilities*, at 43 (2012) ("California Tenants"), <https://www.hcd.ca.gov/manufactured-mobile-home/mobile-home-ombudsman/docs/Tenant-Landlord.pdf>.
- 21 *Id.*; CAL. CIV. CODE § 1941.1.
- 22 *Green*, *supra* note 18, at 638.
- 23 *Martinez*, *supra* note 18, at 1142 (citing *Green*, 10 Cal.3d at 637 to find "Violations of the implied warranty of habitability are tethered to violations of the state's housing codes. Accordingly, 'substantial compliance with applicable building and housing code standards, which materially affect health and safety, will suffice to meet the landlord's obligations under the common law implied warranty of habitability.'"); but see *Knight v. Hallsthammar*, 29 Cal.3d 46, 59 n.10 (Cal. 1981) ("violation of a housing code or sanitary regulation is not the exclusive determinant of whether there has been a breach").
- 24 *Heck v. Whitehurst Co.*, 2004 WL 1857131 (Ohio Ct. App. 2004) (awarding rent abatement upon finding that cigarette smoke was infiltrating tenant's apartment and that landlord had not made the repairs necessary to keep the apartment in a fit and habitable condition).
- 25 *Upper E. Lease Assoc., LLC v. Cannon*, 30 Misc. 3d 1213(A), 924 N.Y.S.2d 312 (Dist. Ct. 2011), *aff'd*, 37 Misc. 3d 136(A), 961 N.Y.S.2d 362 (App. Term 2012) (finding that secondhand smoke qualifies as a condition that invokes the protections of warranty of habitability); see also *555-565 Assocs., LLC v. Kearsley*, 18 N.Y.S.3d 578 (Table), 2015 WL 4401562, 2015 N.Y. Slip Op. 51093(U) ("There is legal authority to support the claim that the presence of secondhand smoke can be the basis for a breach of warranty of habitability and /or constructive eviction."); *Reinhard v. Connaught Tower Corp.*, No. 602503/08, 2011 WL 6119800 (Sup. Ct. Nov. 30, 2011).
- 26 *Small Claims*, Jud. Branch Cal., <https://www.courts.ca.gov/selfhelp-smallclaims.htm> (last visited Feb. 24, 2020), see also CAL. CIV. PROC. CODE § 116.220.
- 27 CAL. DEP'T OF CONSUMER AFFAIRS, *The Small Claims Court: A Guide to Its Practical Use*, https://www.dca.ca.gov/publications/small_claims.
- 28 *Small Claims*, Judicial Branch of Cal., <https://www.courts.ca.gov/selfhelp-smallclaims.htm>.
- 29 *Gunert v. City of Stockton*, 55 Cal.App.3d 131, 139-40 (Cal. Ct. App. 1976).
- 30 *Andrews v. Mobile Aire Estates*, 125 Cal.App.4th 578, 589-90 (Cal. Ct. App. 2005).
- 31 *Chauncey v. Bella Palermo Homeowners' Ass'n*, No. 30-2011-00461681 (Orange Cty. Sup. Ct. 2013).
- 32 *Id.*
- 33 See, e.g., *Cty. of Fresno v. Fair Employment & Hous. Comm'n*, 226 Cal. App. 3d 1541, 1550 (1991) (finding respiratory disorder that leads to hypersensitivity to tobacco smoke a physical handicap under Fair Employment and Housing Act).
- 34 42 U.S.C.A. § 3602 (h)(1).
- 35 See 42 U.S.C. § 3602(h); CAL. GOV'T CODE § 12926(m).
- 36 See, e.g., *Powers v. Kalamazoo Breakthrough Consumer Hous. Co-op.*, No. 1:07-CV-1235, 2009 WL 2922309, at *8 (W.D. Mich. Sept. 9, 2009).

- 37 ChangeLab Solutions, *How Disability Laws Can Help Tenants Suffering from Drifting Tobacco Smoke* (2018), <https://www.changelabsolutions.org/product/how-disability-laws-can-help-tenants-suffering-drifting-tobacco-smoke>.
- 38 Public Health Law Center, *Smoke-free Public Housing: Reasonable Accommodations* (2017), <https://www.publichealthlawcenter.org/sites/default/files/resources/Smoke-Free-Public-Housing-Reasonable-Accommodations-2017.pdf>.
- 39 CAL. CIV. CODE § 3479.
- 40 See *Babbitt v. Superior Court*, 2004 WL 1068817, at *2 (Cal. App. 4th Dist. 2004) (finding that “[i]ntrusions by smoke and noxious odors are traditionally appropriate subjects of nuisance actions” and that “the dangers of ‘secondhand smoke’ are not imaginary, and the risks to health of excessive exposure are being increasingly recognized in court.”).
- 41 See *Merrill v. Bosser*, 2005 WL 5680219 (Fla. 17th Cir. Ct. 2005) (finding nuisance where “plaintiff and her family had recurring illnesses as a result of the smoke, and on several occasions had to vacate the premises”).
- 42 *Birke v. Oakwood Worldwide*, 169 Cal.App.4th 1540, 1552 (Cal. Ct. App. 2009).
- 43 *Birke v. Oakwood Worldwide*, 2013 WL 2322888 at *6-11 (Cal. Ct. App. 2013).
- 44 See *Schuman v. Greenbelt Homes, Inc.*, 2010 WL 8654560 at (Md. Cir. Ct. 2010) (finding that a neighbor smoking in an adjacent townhouse was not a nuisance because the resident could shut windows or turn on a fan to avoid the smoke); see also *Ewen v. Maccherone*, 32 Misc.3d 12, 927 N.Y.S.2d 274, 276 (N.Y. Sup. App. 2011) (“[T]he law of private nuisance would be stretched beyond its breaking point if we were to allow a means of recovering damages when a neighbor merely smokes inside his or her own apartment in a multiple dwelling building”).
- 45 *Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC*, 192 Cal.App.4th 1183, 1191 (Cal. Ct. App. 2011).
- 46 See *Dworkin v. Paley*, 93 Ohio App.3d 383, 638 N.E.2d 636, 639 (1994) (reversing summary judgment dismissal because reasonable minds could reach different conclusions on whether level of smoke breached covenant of quiet enjoyment).
- 47 *Poyck v. Bryant*, 13 Misc.3d 699, 820 N.Y.S.2d 774 (N.Y. City Civ. Ct. 2006); see also *Herbert Paul, CPA, PC v. 370 Lex, L.L.C.*, 7 Misc.3d 747, 794 N.Y.S.2d 869 (N.Y. Sup. Ct. 2005) (finding triable issues of fact for breach of covenant of quiet enjoyment where tenant moved out due to smoke impact), *Merrill*, 2005 WL 5680219 (finding breach of covenant of quiet enjoyment where smoke “once caus[ed] the smoke detector to sound and several times caus[ed] the Plaintiff’s family to have to sleep elsewhere”).
- 48 *Poyck*, *supra* note 45, at 702 (“it is axiomatic that secondhand smoke can be grounds for a constructive eviction”).
- 49 *Green*, *supra* note 18, at 630.