



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-5000

OFFICE OF PUBLIC AND INDIAN HOUSING

SPECIAL ATTENTION OF:

Regional Directors; State and Area Coordinators; Public Housing Hub Directors; Program Center Coordinators; Troubled Agency Recovery Center Directors; Special Applications Center Director; Administrators; Resident Management Corporations; Public Housing Agencies; Healthy Homes Representatives

Notice PIH-2017-03

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This Notice remains in effect until amended, superseded or rescinded

Cross Reference:

SUBJECT: HUD Guidance on Instituting and Enforcing Smoke-Free Public Housing Policies

A. Purpose

This Notice provides regulatory guidance for “Instituting Smoke-Free Public Housing” (FR-5597-F-03) (the “Smoke-Free Rule” or “Rule”). The Rule is intended to improve indoor air quality, benefit the health of public housing residents and PHA staff, reduce the risk of fires, and lower overall maintenance costs. The Rule becomes effective 60 days after publication in the Federal Register. Once effective, PHAs will have 18 months to implement their smoke-free policies. PHAs must design and implement a policy barring the use of **prohibited tobacco products** in all public housing living units, **interior common areas** and outdoor areas within 25 feet from public housing and administrative office buildings (collectively, “restricted areas”). The Rule does not prohibit smoking by residents; rather, it requires that residents who smoke do so at least 25 feet away from the buildings.

- **Prohibited tobacco products** are defined as items that involve the ignition and burning of tobacco leaves, such as: cigarettes, cigars, pipes and water pipes¹ (also known as hookahs)
- **Interior common areas** include but are not limited to: hallways, rental and administrative offices, community centers, day care centers, laundry centers, and similar structures

PHAs should begin the process of implementing smoke-free policies as soon as possible. PHAs are strongly encouraged to work with resident councils, provide residents with information on cessation assistance, post notices, and distribute information to residents about the smoke-free

¹ Water pipes (hookahs) are smoking devices that use coal or charcoal to heat tobacco, and then draw the smoke through water and a hose to the user. Both the heating source and burning of tobacco are sources of contaminant emissions.

policy. Waiver requests of Rule requirements will be considered with appropriate justification, pursuant to 24 CFR 5.110.

B. Applicability

The Smoke-Free Rule applies to all public housing units other than dwelling units in mixed-finance buildings. Under this Rule, “public housing” means low-income housing, such as, community facilities, public housing offices, day care centers, and laundry rooms assisted under the U.S. Housing Act of 1937 (the 1937 Act), other than assistance under section 8 of the 1937 Act.

C. Implementation

1. Amendments to PHA Plans

PHAs are required to:

- obtain board approval when creating their individual smoke-free policies and document their smoke-free policies in their PHA plans, and
- determine whether an adoption of their smoke-free policies constitutes a significant amendment or modification to the PHA Plan. If it is determined to be a significant amendment, the PHA must conduct public meetings according to standard amendment procedures.

2. Lease Amendments

PHAs are required to:

- amend individual resident leases; all residents must sign the lease amendment as a condition of their continuing occupancy,
- incorporate the requirement that residents in public housing, members of a resident's household, resident's guest, or other person under the resident's control must not engage in any smoking of specified prohibited tobacco products (including any ENDS products) in restricted areas, or in other outdoor areas that the PHA has designated as smoke-free, and
- notify a resident of a written revision to an existing lease at least 60 days before the lease revision is to take place, and give residents a reasonable amount of time for the resident to accept the revision

Additionally, PHAs may provide a specific date that the policy will take effect. Lease amendments may be processed anytime during the 18-month required timeframe; lease amendments should note the availability and location of any designated smoking areas (DSAs).

PHAs will have flexibility as to how the lease amendment process occurs during the 18-month implementation period after the Rule's effective date.

3. *PHA Flexibility*

The Smoke-Free Rule allows PHAs the flexibility to implement their smoke-free policies. PHAs are encouraged to utilize their flexibility as appropriate; however, they should be aware that adoption of stricter smoke-free policies may expose them to legal risk under State or local law. The following list, while not exhaustive, contains some examples of PHA flexibilities:

- Prohibition on Electronic Nicotine Delivery Systems (ENDS)
- Limitation on smoking to DSAs only
- Requirement of a smoke-free perimeter greater than 25 feet
- Requirement for an entire campus to be smoke-free

4. *Signage*

PHAs are strongly encouraged to post signs that reference the new smoke-free policy. These signs must be accessible to all residents and visitors (including persons with disabilities), and must be posted in multiple languages consistent with the Department's current guidance on Limited English Proficiency, issued in accordance with Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency, signed August 11, 2000, and published in the Federal Register on August 16, 2000, at 65 FR 50121) (24 CFR 5.2005(a)(3)). PHAs are also encouraged to use various communication methods (e.g., letters, flyers, seminars, etc.) to share this information.

5. *Funding*

Costs of implementing smoke-free policies may be covered through operating reserves and eligible capital fund activities. All PHAs may request insurance premium allowances from their insurance providers after implementing smoke-free policies due to decreased fire risk. Budget flexibility is also permitted to the extent provided under arrangements such as the Moving to Work program.

6. *ENDS*

The use of ENDS in public housing is not prohibited. However, research on ENDS is emerging and evidence has revealed that the aerosol exhaled by ENDS users contain nicotine and potentially harmful ingredients but generally at much lower levels than tobacco smoke. PHAs have the flexibility to prohibit ENDS in their individual smoke-free policies as they deem appropriate. For example, PHAs may prohibit ENDS in all developments and common

areas or PHAs may allow the use of ENDS, within the unit, but prohibit ENDS in common areas or campus-wide. Residents should always be considered prior to adopting stricter smoke-free policies than the standards in the Rule.

7. *DSAs*

PHAs may provide DSAs to accommodate smoking residents. All DSAs must be outside of restricted areas, and may include partially enclosed structures. DSAs should include suitable wellness and safety features, such as appropriate seating and shade and must be accessible for persons with disabilities, in accordance with section 504 of the Rehabilitation Act of 1973 (and HUD's implementing regulations at 24 CFR part 8), Title II of the Americans with Disabilities Act, and the Fair Housing Act. This may include a flat or paved pathway, ramp, and adequate lighting. DSAs are not required under the Rule, however if provided, PHAs are encouraged to include DSA funding in future capital needs planning. PHAs without sufficient space may work with their local municipalities to identify nearby public areas where residents may smoke safely. If available, PHAs may provide smoking residents the option to move to an alternate site with greater access to outdoor smoking.

D. Enforcement and Monitoring Tools

Lease and appropriate PHA Plan amendment(s) are the primary policy enforcement mechanisms. PHAs must enforce smoke-free policies when a resident is violating the policy. When enforcing the lease, PHAs must provide due process and allow residents to exercise right to an informal settlement process and a formal hearing, pursuant 24 CFR § 966 Subpart B. PHAs may not evict for a single incident of smoking, in violation of a smoke-free policy.

1. *Graduated Enforcement Approach and Monitoring Tools*

PHAs are encouraged to adopt a graduated enforcement framework that includes escalating warnings with documentation to the tenant file. Under this approach PHAs would take specific, progressive monitoring and enforcement actions, while educating tenants and providing smoking cessation resources or referrals, prior to pursuing tenant eviction for smoke-free policy violations. A graduated enforcement framework may include the following:

- lease amendment by the PHA that identifies the actions that constitute a policy “violation”
- agreement between the PHA and Resident Council that quantifies the number of documented, verified violations that warrant enforcement action
- pursuit by PHA of one or more monitoring and enforcement actions in combination or in sequence that allows the tenant time to address violation
- documentation of noncompliance if there are repeated violations, persistent non-responsiveness, or non-compliance with disciplinary actions. The PHA Plan should note

how many non-compliances with the Smoke Free policy would constitute a violation of the lease.

- eviction proceedings initiated by the PHA, though tenancy termination and eviction should only be pursued as a last resort.

PHAs have the discretion to employ a range of techniques and tools to monitor and enforce compliance with their smoke-free policies. The following monitoring and enforcement tools appear below in the order of increasing severity.

a. Intensified Compliance Monitoring

Increased Inspection Frequency. Upon issuance of a written warning from the property manager and/or a documented complaint, the PHA may increase the frequency of unit inspections for a suspected policy violator.

Violator Rehabilitation. To the extent a violation has been confirmed, the PHA may provide information and resources on smoking cessation. PHAs may consider a policy that automatically clears or resets the record of a resident if they do not have any new policy violations for a specified period of time.

b. Lease Terminations/Transfers

Termination of Tenancy. The PHA may terminate the tenancy at any time—including violations of the Lease Addenda and failure otherwise to fulfill household obligations if resident behaviors disturb other residents' peaceful enjoyment of their accommodations and are not conducive to maintaining the property in a decent, safe and sanitary condition.

"Other good cause" Termination. Repeated violations of the Smoke Free Rule could rise to the level of other good cause for termination of tenancy pursuant to 24 CFR § 966.4(1)(2)(iii). For instance, the PHA might determine that it is in the best interest of all the parties to offer a resident other assistance under the PHA's control (e.g., section 8) and allow the resident to move from the property.

c. Eviction

Eviction. The PHA may pursue resident eviction after unsuccessfully pursuing resident compliance with the policy over a reasonable period of time, and subject to grievance procedures.

2. Reasonable Accommodation Requests

Addiction to nicotine or smoking is not a disability. A PHA must still provide reasonable accommodations to persons with disabilities who smoke that are in compliance with the requirements of the PHA's smoke-free policies. Under section 504 of the Rehabilitation Act

of 1973 (and HUD's implementing regulations at 24 CFR part 8), Title II of the Americans with Disabilities Act, and the Fair Housing Act, PHAs are prohibited from discriminating, excluding from participation in a program, or denying the benefits of a program on the basis of disability and must make reasonable accommodations in their rules, policies, practices, and services. A reasonable accommodation is a change, adaptation or modification to a policy, rule, program, service, practice, or workplace which will allow a qualified person with a disability to participate fully in a program, take advantage of a service, or perform a job. In order to show that a requested accommodation may be necessary, there must be an identifiable relationship, between the requested accommodation and the individual's disability. This relationship must be determined on a case-by-case basis by the PHA.

When a reasonable accommodation is requested the PHA must make the accommodation unless the recipient can demonstrate that doing so would result in a fundamental alteration in the nature of its program or an undue financial and administrative burden. For example, an individual with a mobility disability may request a reasonable accommodation in order to move to a floor which provides close proximity to the door. This would allow the resident easier access to a smoking area as required by the rule. Such a request would need to be evaluated on a case-by-case basis in order to make a determination. However, a PHA may not permit continued smoking in restricted areas.

General guidance on the reasonable accommodation process can be found at <http://go.usa.gov/cJBBC>. The Department also issued reasonable accommodation guidance entitled, "Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Accommodations under the Fair Housing Act," which can be found at http://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf. The Department's guidance, "Change is in the Air," (see Resources below), provides examples of how PHAs have approached and managed smoke-free policies for residents with disabilities. For instance, PHAs have allowed residents to move to the first floor or closer to an exit door, and provided designated smoking areas with an accessible walkway, cover, lighting, and seating. The Smoke-Free Rule does not require that reasonable accommodation language be contained in the lease amendment, but HUD encourages PHAs to include this information. Public housing residents who suspect they are victims of housing discrimination can call (800) 669-9777. Smokers with certain health conditions (e.g., cognitive impairment) may require special attention to ensure they understand the policy and available cessation resources, as well as reasonable accommodation request procedures; however, these residents must comply with the policy.

E. Community Building

PHAs are strongly encouraged to engage residents early in the development of smoke-free policies. Best practices have indicated that resident engagement in policy development, implementation, and enforcement are less likely to result in evictions. The Resources section (below) provides best practices and examples on resident engagement.

F. Resources

1. Best Practices

- Change is in the Air can be found at <http://portal.hud.gov/hudportal/documents/huddoc?id=smokefreeactionguide.pdf>
- Toolkits for Owners/Management Agents and Residents can be found at <http://portal.hud.gov/hudportal/HUD?src=/smokefreetoolkits1>

2. Smoking Cessation

PHAs are encouraged to partner with outside organizations for cessation support. Medicaid recipients may be eligible to receive financial assistance for cessation services and prescription cessation medications depending on the state Medicaid program. Cessation resources are currently available at http://www.cdc.gov/tobacco/quit_smoking/index.htm. Residents and PHAs may also contact national quit lines (1-800-QUIT-NOW) and community health centers to ask what services are available through them.

3. PHA and Resident Training

Training resources on Smoke-Free Rule strategies and effective enforcement of smoke-free policies are available in the form of video- and print-based materials, as well as in-person training for select PHAs. PHAs are responsible for providing resident training.

G. Further Information

PHAs are reminded that, with good cause, they may request waivers. For further information about this Notice, please contact Leroy Ferguson, Housing Program Specialist, Office of Public Housing Programs, Management and Occupancy Division, 202-402-2411.

/s/
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for Public and Indian Housing