

Law Trends

A Publication by Eastman & Smith Ltd.

Attorneys at Law since 1844

Smoking Ban Update

By Thomas A. Dixon and A. Brooke Phelps



On November 7, 2006, Ohio adopted a law to ban smoking in public places and places of employment. The measure effectively prohibits smoking indoors in all public places and in all places of employment. The law went into effect on December 7, 2006, although final rules explaining the ban were not enforced until May 3, 2007. While opponents of the ban are continuing to mount efforts to contest the ban, the enforcement mechanisms for the ban are in place and individuals and employers should be aware of the potential civil liability for smoking or permitting smoking in prohibited areas.



One interested group is attempting to place proposed legislation on the November '07 ballot exempting certain businesses from the ban. The group, which is comprised of an organization representing bars, bowling alleys and private clubs, is asking that smoking be permitted in bars where no more than 10% of the establishment's income is derived from food sales as well as non-profit private clubs and bowling alleys (but only after 6 p.m.). The group has submitted preliminary applications and petitions and, if approved, would have until August to submit more than 400,000 signatures to get the issue on the ballot.

Part of the law is also being challenged by Gov. Strickland. Recently, a Franklin County judge held that the Ohio Department of Health's regulations could not exclude private clubs from the ban. Gov. Strickland has instructed Attorney General Marc Dann to appeal that ruling because, in the Governor's opinion, many people voted for the statewide ban thinking that private clubs (e.g. VFWs, Elks, etc.) were excluded from the ban.

In the meantime, the ban is in full effect and the Department of Health is in the process of issuing thousands of notices of violation to employers. The following is designed to provide a basic overview of the new law and the regulations that will be used to enforce the law.

Where *can't* I smoke?

The statewide ban prohibits proprietors of "public places" from permitting smoking in "enclosed areas" under the control of the proprietors. A public place is an enclosed area to which the public is invited or permitted. The term enclosed area is defined as "an area with a roof or other overhead covering of any kind and walls or side coverings of any kind, regardless of the presence of openings for ingress and egress, on all sides or on all sides but one." Furthermore, all areas immediately adjacent to avenues of ingress or egress to the public place are also

June 2007

Main Office:

One SeaGate, 24th Floor
P. O. Box 10032
Toledo, Ohio 43699-0032
Telephone: 419-241-6000
Fax: 419-247-1777

Columbus Office:

100 East Broad St., Ste. 1300
Columbus, Ohio 43215
Telephone: 614-280-1770
Fax: 614-280-1777

Findlay Office:

725 South Main St.
Findlay, Ohio 45840
Telephone: 419-424-5847
Fax: 419-424-9860

Web Site:

www.eastmansmith.com

subject to the ban. This essentially prohibits smoking in any area in which a member of the public using the enclosed area might come into contact with smoke, either directly or by “migration.”

The new statewide ban also prohibits an employer from permitting smoking in any “places of employment,” which is defined as “an enclosed area under the direct or indirect control of an employer that the employer’s employees use for work or any other purpose, including but not limited to offices, meeting rooms, sales, production and storage areas, rest-rooms, stairways, hallways, warehouses, garages, and vehicles.” The definition of places of employment extends to any area that an employer might use for “any” purpose, not just work areas. This effectively eliminates any opportunity for “smoking rooms” designed to be used exclusively for or by smokers.

Where *can* I smoke?

The statewide ban does not extend to:

- Private residences (except during hours of operation as a business if non-residents or non-relatives are present);
- Designated rooms in hotels and motels (no more than 20% of sleeping rooms may be designated as “smoking” rooms);
- Separately enclosed areas within nursing homes (for the use of residents, not employees, and employees may not be required to enter these areas);
- Retail tobacco stores (under very limited conditions);
- Not-for-profit private clubs without employees when only members are present (currently being litigated);
- The burning of incense in religious ceremonies;
- Family-owned and operated businesses (where only family members are employed and present);
- Outdoor patios physically separated from enclosed areas and from which migration of smoke into enclosed areas does not occur. For all practical purposes, any area under the direct or indirect control of and surrounding the business which is not an enclosed area is an outdoor patio.

Can I prohibit smoking in unregulated areas of my property?

Yes. The new law permits a proprietor of a public place, an employer or other person to prohibit smoking in areas on the property not specifically covered by the law. In other words, the new law prohibits smoking where the area is designated as “non-smoking.” The most obvious example of such a regulation is unenclosed parking areas. The property owner need only post a “No Smoking” sign to effectively bring the area under the new law.

Can I permit smoking in unregulated areas of my property?

Yes.

Can my employees smoke in Company-owned vehicles?

Maybe. Smoking is prohibited in all places of employment, which extend to all enclosed areas under the direct or indirect control of an employer. The law specifically describes a vehicle as such an enclosed area. However, the regulations define a “vehicle” subject to the ban as one registered by the Ohio Bureau of Motor Vehicles and: 1) occupied by one or more non-smoking persons at the same time and used for a business purpose; 2) is part of a motor pool and shared by non-smoking employees; or 3) used for public mass transit. Company vehicles assigned only to a smoker would not be covered by the smoking ban when the smoker is the only person in the vehicle. Truck drivers without non-smoking passengers similarly do not fall under the purview of the new law.

I’m a family owned business. Can I and my employees smoke on the job?

While the law permits smoking in family-owned and operated places of employment, this exception only extends to such business when “*all employees are related to the owner.*” Even when this requirement is met, smoking is permitted in

only where the enclosed area of the place of employment is: (1) not open to the public; (2) a free standing structure occupied solely by the place of employment; **and** (3) smoke from the place of employment can not migrate into an enclosed area where smoking is otherwise prohibited.

How do I comply with the new law?

Places of employment and other public places must prohibit smoking in the areas described. In addition, such businesses they must:

- Post “No Smoking” (or the “No Smoking” symbol) signs in areas where smoking is prohibited, including at each entrance. Under the regulations, “entrance” only includes doorways where pedestrians, including the public and/or employees, enter places of employment. Each sign must also include the Department of Health’s telephone number for reporting violations (866-559-OHIO).;
- Remove all ashtrays/receptacles from any area where smoking is prohibited (the regulations exempt affixed ashtrays of “historic or architectural significance” and permit ashtrays and receptacles solely used for the "purpose of disposing of smoking materials prior to entering a place of employment or public place");
- Ensure that tobacco smoke does not enter any area in which smoking is prohibited.

Any suggestions for implementation?

Businesses should implement non-smoking policies by:

- Identifying areas in which smoking is not permitted.
- Posting signs indicating there is no smoking inside the employer’s building and providing the complaint line phone number (and possibly the employer’s phone number).
- Carefully evaluate prior smoking areas for compliance, re-designation and relocation.
- Revise existing Company policies on smoking.

Who enforces the new statewide smoking ban?

The Ohio Department of Health has established a system for receiving reports of violation, investigating violations and enforcing the law, including the use of civil penalties. Once a complaint of a smoking violation is made, the complaint is referred to the local health department. The local health department sends a notice to the alleged offender and the alleged offender has 30 days after receipt of the notice to respond. The local health board investigates and determines if there is a violation. The alleged offender has 30 days from receipt of the proposed findings to respond to that determination. If it is a first offense, the offender receives a written warning. If it is not a first offense, the alleged offender may seek administrative review with a final decision made by the local board of health. The regulations specifically provide that businesses must be represented by a licensed attorney in the proceedings. After a decision by the local board of health, an appeal may be filed to the Franklin County Common Pleas Court within 15 days.

What penalties might I incur for violating the new law?

The regulations provide different penalties depending upon whether the violator is an individual or a business. For individuals, after a warning, the fine is \$100 for each violation. Businesses also receive one warning but for the second violation the fine is \$100, third is \$500, fourth is \$1,000 and subsequent violations are \$2,500. There are no criminal penalties.

Employers who wish to discuss this legal development may contact either Mr. Dixon or Ms. Phelps by calling 419-241-6000. Mr. Dixon, who is a member of the Firm, focuses his practice on the areas of employment and workers’ compensation law. Ms. Phelps is an associate of the Firm who represents employers in labor matters, employment discrimination and workers’ compensation.

Disclaimer: The articles in this newsletter have been prepared by Eastman & Smith Ltd. for informational purposes only and should not be considered legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney/client relationship.