

“ Plain speaking legal advice ”

**The Health Act 2006 & The Smoke Free
(Premises and Enforcement) Regulations 2006**

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These Regulations come into effect in England on the 1st July 2007.

The National Heart Forum estimates that second hand smoke in the workplace causes at least 600 premature deaths a year, nearly three times the number killed in industrial accidents. The British Medical Journal published a paper in April 2006 indicating that second hand smoking could increase the risk of developing type 2 diabetes.

The UK has lagged behind many other countries that have had smoking bans in enclosed public places for some time;

- The Irish Republic banned smoking in public places in March 2004
- Sweden went smoke free on 1st June 2005.
- Scotland went smoke free on 26th March 2006
- Wales & Northern Ireland go smoke free in April 2007

Existing H&S legislation has gone a long way to reducing smoking in the workplace and many employers have operated smoke free offices or provided a “smoking room” for those employees who are unable or unwilling to go through a working day without a cigarette. However around 2 million people in Britain still work in workplaces where smoking is permitted throughout the premises and another 10 million in places where smoking is permitted somewhere on the premises.

So what is new about this legislation?

It will have the effect of making virtually all workplaces and enclosed public places smoke free. It creates a criminal offence of smoking in public places and for permitting smoking in such public places. The penalty will be a fine and likely to be up to £200 for smoking in a public place, although that will probably be dealt with by a system of a fixed penalty notice of £50 reduced to £30 if paid promptly. The penalty for permitting however will be up to £2,500 with no fixed penalty notice option.

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For employers it is important to get to grips with this quickly; for those who have members of the public accessing their premises on a regular basis, it is not just important it is vital.

Put simply the Act bans smoking in all enclosed or substantially enclosed work places and vehicles as well as places open to the public, subject to some exemptions.

Note that premises are “open to the public” for these purposes if the public or any section of it has access to them. There is no requirement that the access is dependant upon payment or invitation. Note also that “work places” includes those where voluntary and intermittent work is carried out.

Premises must be smoke free if they are enclosed - they have a ceiling or roof and except for doors, windows and passageways, are wholly enclosed either permanently or temporarily.

- OR -

If they are substantially enclosed; they have a ceiling or roof and the opening in the walls or the aggregate area of openings in the walls is less than 50% of the area of the walls or other structures that serve the purpose of walls and constitute the perimeter of the building.

For the purposes of calculating the 50% you must ignore the spaces created if you open the doors and windows.

There will be problems since arguably a lot of bus shelters and train station platforms are not going to meet the 50% requirement and will technically fall outside the ban but nonetheless be subject to it.

Roof means any fixed or moveable structure or device, which is capable of covering all or part of the premises as a roof. It therefore includes a canvas awning. This is also going to cause some confusion, as e.g. technically speaking the Millennium Stadium would be exempt when the roof is open but not when the roof is closed.

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Effectively we are talking about bans in.

- Workplaces – so all “smoking rooms” will have to go.
- Pubs – but not pub gardens
- Private clubs
- Cinemas
- Public transport.
- Restaurants – but not outside terraces
- Museums
- Churches
- Theatres
- Conference Centres
- Halls available for hire by the public
- Public lavatories
- Telephone kiosks
- Taxis
- Company cars – unless only one identified employee uses it and does so exclusively.
- Company owned lorries, vans and Trucks
- Airports
- Hospitals

Interestingly exemptions to the ban includes

- Prisons
- Residential Care Homes
- Hotel bedrooms
- Hospices
- Residential Mental Health institutions
- Students’ rooms in halls of residence
- All Crown properties
- Army barracks – The Army will be looking at whether it should impose its own ban in due course
- Ministry of Defence property – although a ban on smoking in submarines and on surface ships (save on the “weather deck”) will be imposed by the MOD by 2008

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It is of course also the case that private residences and private cars are not caught by the smoking ban. Also remember that it is not just the traditional nicotine tobacco cigarette that is caught by the ban. Pipes, cigars and herbal tobacco (even if non addictive) are too.

The rationale behind the exemptions seems to be that the ban should not apply where a person's workplace is also theirs or someone else's home. The regulations will thus not cover employees visiting customers/clients in their own homes.

However the fact premises are exempted from the ban is not carte blanche to ignore the issue. Employers still have a duty to protect workers, and designated smoking areas should be the exception rather than the rule. Smoking should still not be permitted in rooms where others will congregate, e.g. rooms for TV, games, eating etc. If there is a designated room for smoking, whether communal or individual such as hotel bedrooms, then it must have mechanically closing doors and preferably separate ventilation.

In respect of home visits by employees, employers may want to consider inserting smoke free conditions into any service agreements with their customers/clients to reduce the exposure to second hand tobacco smoke.

The 2006 Regulations tell you almost nothing beyond the definition of enclosed and substantially enclosed and the fact that the enforcement will be the responsibility of the local authorities (in practice Environmental Health Officers) rather than the police. As a consequence the DoH is to carry out a three-month consultation to try and sort out some of the more difficult issues.

All smoke free premises must carry signage which must be prominently visible, show the internationally recognised symbol for no smoking (lit cigarette inside red circle with a red bar across it), be not less than A5 in size and situated at each public entrance to the premises. Clearly signage will also have to be displayed in those vehicles that are caught by the ban.

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If smoking is to be permitted outside premises of employment or in areas available to the public that are not enclosed, (e.g. pub gardens) there has to be provision for ash and cigarette ends.

Employers should not get too carried away either. The new legislation should not be used as an opportunity to ban outside workers from smoking on duty. There is nothing in the legislation preventing them from smoking. The mere fact that the employer can be identified because the employee is wearing a uniform is not a reason for such a ban either – at least not for H&S reasons. If the employer could justify it on some other ground it may be a permissible policy but the employer would need to be on very strong ground.

An employer who wants to adopt a blanket policy not to employ anyone who smokes is unlikely to get much support from staff and Unions alike. As long as the individual only smokes outside working hours there is no reason why it should affect their work or their ability. Until it does, e.g. chronic illness, his/her individual life style choice to smoke is of no business of the employer.

In dealing with staff, a detailed smoking policy (if not already in place) will have to be devised and implemented using a process of consultation and education. Make it clear that breaches will initially be dealt with through education and counseling and allow people time to get used to the ban if there has been no attempt to limit smoking in the workplace before. However it should also be made clear that the policy is to enable legislation to be complied with and employees who refuse to observe the policy on smoking will be subject to the normal disciplinary process.

What about your clients/customers?

That is a more difficult issue in a number of ways. You can put up the required signage, notify your regular customers/clients about the imminent implementation date and brief your staff to politely remind customers/clients that they cannot any longer smoke on the premises. However not everyone is going to be cooperative and reasonable in their response.

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Sometimes it will be another customer/client who gets involved, hoping to be helpful but possibly escalating the problem.

Staff should not be expected to cope with difficult situations alone. The staff likely to be in the immediate firing line is generally those lowest on the pecking order; the waiter, bartender, cinema/theatre usher, receptionist etc. Those industries who routinely deal with the public in the provision of food, alcohol and entertainment etc will have existing policies about how to deal with difficult customers and adding the smoking scenario to those policies should not cause a problem.

Staff cannot be expected to put their personal safety at risk (unless that is part of their job description – e.g. Club bouncer), but neither should they simply ignore the smoker.

Make sure you have a clear policy and training programme to help staff to understand exactly what they should do. Make it clear that a request to stop must be made and who they should notify if the polite request is ignored or met with abuse. The next in line should also understand the extent of their responsibility and what to do if the situation looks as though it will get out of hand.

It is to be hoped that although the police will probably not be too interested in calls that someone is smoking where they should not, - they will be prepared to attend if the caller makes it clear there is a concern that a breach of the peace or violence is about to occur unless they intervene.

Can I work round the rules?

Unless you have premises open to the public that are not enclosed or substantially enclosed or which fall into one of the exemptions, the answer is no. If you choose to ignore the rules then be prepared for prosecutions, fines and complaints to come up when you want to renew necessary licences about your fitness to have such a licence.

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From an employment legislation point of view, a refusal to enforce the ban in enclosed or substantially enclosed work premises is likely to lead to grievances being raised by staff, prosecutions and fines under the legislation by the local authority and possible claims under H&S legislation in employment tribunals.

If you wish to discuss the issues above further in relation to your particular circumstances please contact Frankie Tierney on 01276-686222

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