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Indiana Imposes Statewide Smoking Ban

By Jane Ann Himsel and Emily Yates

Indiana's statewide smoking ban takes effect July 1, 2012. Indiana House Enrolled Act No. 1149 (soon to be Indiana Code, title 7.1, article 5, chapter 12) ("the Act") prohibits smoking in:

- Public places;
- Places of employment; and
- Within eight feet of a public entrance to a public place or place of employment.

"Smoking" is the use of cigarettes, cigars, pipes, or other lighted tobacco smoking equipment. A "public place" is "an enclosed area of a structure in which the public is invited or permitted." The Act defines "place of employment" as any "enclosed area of a structure where people are employed," but "[t]he term does not include a private vehicle."

The Act exempts from its coverage freestanding bars and taverns, horseracing facilities, off-track betting facilities, casinos, riverboats, certain private and fraternal clubs, certain businesses located in private residences where all the employees also reside, cigar and hookah bars (cigarettes are banned from these facilities), retail tobacco stores, cigar manufacturing facilities, and cigar specialty stores. But most Indiana employers, including all restaurants and the bars located in them, must comply.

What the Act Requires of Employers

All employers must:

- Inform each current and prospective employee of the smoking ban applying to the place of employment.
- Remove all ashtrays or other smoking paraphernalia from the public place or place of employment.
- Post conspicuous signs at each public entrance that read "State Law Prohibits Smoking Within 8 Feet of this Entrance" or other similar language.

If a “place of employment” is also a “public place” – and many are – the owner, operator, manager, or official in charge must also:

- Post conspicuous signs in the public place that read “Smoking is Prohibited by State Law” or other similar language.
- Ask anyone smoking in violation of the Act to cease smoking.
- Cause anyone who refuses to cease smoking “to be removed from the public place.”

The Penalties for Non-Compliance

The Act gives the Indiana Alcohol and Tobacco Commission primary enforcement authority. State and local health departments, health and hospital corporations, the division of fire and building safety, and law enforcement agencies will also be involved in enforcement efforts. Agents from any of these entities may enter and inspect premises “to ensure that the person responsible for the premises is in compliance with” the Act.

Violators will have committed a Class B infraction and may be fined up to \$1,000 per violation. Having three or more unrelated violations will be considered a Class A infraction, exposing the violator to a maximum of \$10,000 in penalties.

The Act also prevents employers from discharging, refusing to hire, or retaliating in any way against an individual for reporting a violation of the Act or exercising any right under the Act. The penalties in the preceding paragraph would apply. The Act does not create a private right of action for an employee who feels his or her rights have been violated.

More Restrictive Policies Are Permitted

The Act explicitly states that it neither supersedes any more restrictive smoking ordinance a county, city, town, or other governmental unit has already enacted, nor prohibits governmental entities from enacting more restrictive laws in the future.

Indeed, after the Act passed, Marion County, Indiana – where Indianapolis is located – modified the Marion County Smoke Free Ordinance to go beyond what the Act requires by mandating that freestanding bars and taverns be smoke-free effective June 1, 2012, and expanding the definition of “smoking” to include the use of electronic cigarettes (e-cigarettes).

Nothing in the Act or the Marion County Ordinance prohibits an employer from adopting or enforcing a more restrictive anti-smoking policy than the laws require. For example, employers may still create a wider than eight feet smoke-free perimeter around their entrances or designate all areas of company property to be completely smoke-free.

What Indiana Employers Should Do Now

- Ensure that any designated smoking areas are outside the 8-foot radius around doors to the facility.
- Obtain and post the required posters at doors, and, if the workplace is also a public place, inside the facility. State-approved signs for the entrances are available on the Indiana Alcohol and Tobacco Commission’s website at <http://www.in.gov/atc/>. The Commission has advised that it is acceptable for the entrance signs to include additional language directing persons as to where they can or cannot smoke.
- Determine how current and prospective employees will be informed of the smoking ban. The Act does not require a specific form of written notice. One option is to develop a modification to existing policy and require an acknowledgement of receipt from current employees. Employers who use written application forms may consider modifying them to include notice that the workplace is smoke free.
- Remember that Indiana Code sections 22-5-4-1 to -4 still prohibits employers from discriminating against employees and applicants due to off-duty tobacco use.

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