

## **Last Gasp for Smoking at Work**

On 1<sup>st</sup> July 2007, workplaces in England will follow Scotland, Wales and Northern Ireland and become smoke free. This article covers the remit of the smoking ban and a number of its practical and legal implications for employers and employees.

### **THE BAN**

The smoking ban is set out in the Health Act 2006 (the Act). Section 1 of the Act bans smoking tobacco, anything with tobacco in it or any other substance. To breach the ban, you only need to light a cigarette; you do not have to actually smoke it.

The ban covers premises that are enclosed or substantially enclosed (up to 50% surrounded by walls) and that are open to the public or used as a place of work by more than one person. Work includes voluntary work. The smoking ban also applies to vehicles that are used by the public or by more than one employee. So if you provide pool vehicles, the ban applies to the vehicles even if a vehicle is only shared between two smokers.

The ban also applies to designated smoking areas. This means that you are no longer permitted to provide a smoking room. The only safe haven you can provide for smokers is a substantially not enclosed shelter outside your building.

There are some exemptions to the ban, for example where a room is also residential, for example a prison cell, but in the majority of cases the ban will apply.

### **Offences under the Act**

#### **Failure to display no smoking signs (Section 6).**

This carries a fine of £200 on the spot or up to £1,000 in the magistrates' court. The requirement is to display no smoking signs at each entrance to your premises. The sign must be no smaller than A5 in size, have the no smoking symbol on it and also state "No

smoking. It is against the law to smoke on these premises”. Rather than drawing your own signs, you can download a pdf version of the signs for free from [www.smokefreeengland.co.uk](http://www.smokefreeengland.co.uk)

You must also display no smoking signs in relevant vehicles. There are no requirements on the size of the sign, but the sign must be displayed in a prominent position in each compartment of the vehicle. If you have a van with separate compartments, it would be advisable to have a sign in the cab and in the back.

### **Smoking in a smoke free place (Section 2).**

This offence is committed by anyone who lights up in a smoke free place. There is a fixed penalty of £50 on the spot or up to £1,000 in the magistrates’ court.

### **Failing to prevent smoking in a smoke free place (Section 8(4)).**

This is the most relevant offence to you as an employer. According to the Act, it is the duty of any person who controls or is concerned with the management of smoke-free premises to stop anyone there who is smoking. Failure to do so carries a maximum fine of £2,500 each time the offence is committed, i.e. each time you do not stop someone smoking on your premises.

There are three possible defences to the offence of failure to prevent smoking in a smoke free place. These are:

- 1 that you took reasonable steps to cause the person to stop smoking; or
- 2 that you did not know, or could not reasonably be expected to know, that the person was smoking; or
- 3 that on other grounds, it was reasonable for you not to comply with the duty.

As you will appreciate, the crux of the defences is what amounts to ‘reasonable’.

Updating your disciplinary and health and safety procedures to reflect the smoking ban is likely to be necessary as a reasonable step defence.

## **Enforcement**

The role of enforcing the ban is given to local authorities. Council officers will be able to enter premises without needing to identify themselves to monitor compliance with the ban.

## **PRACTICAL ISSUES**

### **Smoking Breaks**

Smokers are generally in the habit of taking a cigarette break during the working day. This has always caused irritation with non smokers. As the smoking ban will mean that smokers have to go outside to smoke, the cigarette breaks are liable to take longer. If this is going to be an issue for you, you may want to consider taking a line that does not give smokers an advantage. For example, by agreeing to smoking breaks but requiring that smokers make up time at the end of the day or take shorter lunch break.

### **Smoking Outside your Premises**

One of the most striking results of the smoking ban elsewhere in Britain has been the rise of the gangs of smokers hanging around right outside the entrance to offices. If you do not want your visitors to have to walk through a haze of smoke, you will also have to consider extending the smoking ban to an area outside your office entrance.

### **No Smoking Policy**

As the defence to the section 8 offence relies on what was reasonable in the circumstances, it will be prudent to ensure that all your employees are aware of the introduction of the smoking ban and its implications. A clear policy with defined sanctions in your disciplinary procedure will help. You should also include any rules that you want to set about smoking breaks and smoking right outside your office entrance.

It is unlikely that an employee will be able to object to the smoking ban. There does not appear to be anything such as a right to smoke. These rules will be treated as works rules,

they will not be considered as a breach of any individual employee's contract of employment, even if the new rules are difficult for the employee to bear.

### **Dismissing your Smokers**

You are unlikely to be able to dismiss employees who breach the ban after a first offence and will be expected to give warnings before doing so. Things may be different if the smoker simply refuses to put out his cigarette as this could amount to gross insubordination.

Businesses may consider only recruiting non smokers. Whilst the right to smoke is not a human right, it is uncertain whether dismissing an employee for being a smoker will amount to a fair dismissal.

### **Conclusion**

A smoking ban is seen as a good thing for the health of the nation. Many businesses have already gone smoke free as the tolerance for smoking has disappeared. However, while the ban was inevitable, don't forget if you have permitted smoking at work (even if it was in a designated smoking room), your smoker employees are liable to take a while to adapt to the new rules so a bit of sympathy and encouragement will be welcome, particularly if they decide to give up.

For more specific information or to discuss your no smoking policy please call either Amanda Galashan or Julie Calleux at EmployEase on 0207 831 5052, or email us at [info@employease.co.uk](mailto:info@employease.co.uk).

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