



Countdown to the Smoking Ban – Impact on Employers

The ban on smoking in the workplace will come into force on 1 July 2007, mirroring similar bans in Scotland, Northern Ireland and Wales. This landmark ban will have a significant impact on the legal obligations of employers.

How does the ban apply to the workplace?

Under the legislation all 'premises' must be smoke free if they are enclosed or 'substantially enclosed' (i.e. with a ceiling and at least 50% surrounded by walls) which are open to the public, used as a place of work by more than one person or where members of the public might attend for the purpose of receiving goods or services.

The smoking ban also applies to work vehicles used by more than one person, or vehicles used by members of the public.

Employers should also note that a cigarette or other smoking substance need only be lit, rather than inhaled, for an offence to have occurred.

Are there any exemptions to the smoking ban?

Yes, but the majority of the exemptions relate to places of work which have a residential purpose, for example prison cells, rooms in residential care homes etc. All licensed premises, however, must be smoke free i.e. pubs, bars and membership clubs.

Do I have to ensure that No-Smoking Signs are displayed?

Yes. Signs (no smaller than A5 size) with the no-smoking symbol and the words '*No Smoking. It is against the law to smoke in these premises*' **must** be displayed in all smoke-free premises in a prominent position at each entrance to the premises. No-smoking signs must also be displayed in no-smoking vehicles.



What are the penalties if I don't comply?

If you fail to display a no-smoking sign you will receive a fixed penalty notice of £200 (the maximum fine on conviction being £1000). If, as an employer, you fail in your duty to stop a person smoking in a smoke-free premises the maximum fine is £2,500. Moreover, since an offence is technically committed each time a cigarette is lit, the potential financial liability for an employer who fails to prevent smoking in the workplace is substantial!

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Are there any defences to Employers?

Yes, this is because the duty is not one of strict liability. There are three possible defences an employer can rely on:

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

The question of what is 'reasonable' will therefore be crucial in determining liability. To this end, the steps that an employer has taken to alert staff of the ban and clear policies on smoking with defined sanctions will certainly assist an employer in any defence.

What about outdoor smoking areas?

The legislation makes no provision with regard to smoking in places which are not enclosed or 'substantially enclosed'. Some employers may decide to erect a smoking shelter, but such a shelter must not be more than 49% covered by walls otherwise it will amount to 'substantially enclosed'. Others may decide to introduce a total smoking ban. The employer is entitled to exercise its own discretion.

But my employees smoke at work, do they have the right to continue to smoke?

No. The Employment Appeal Tribunal have held that there is no implied right in an employee's contract entitling an employee to facilities to enable them to smoke. Moreover, an employer is entitled to unilaterally ban smoking. However, employers should be aware that the method of implementing a ban could potentially give rise to a constructive dismissal claim as a breach of the implied term of trust and confidence. Consultation and advance warning should therefore be adopted!



What about smoking breaks?

This is perhaps the most divisive issue between smokers and non-smokers since smokers usually take longer breaks! Save for the employers' obligations under the Working Time Regulations, breaks are largely governed by the employment contract. Employers, at this juncture, may want to introduce contractual provisions or policies relating to how frequently employees may take smoking breaks. A key factor is that non-smokers are unlikely to be happy with smokers taking more breaks. Employers may decide to ban smoking breaks altogether (subject to advance warning and consultation). The most prudent way, however, could be to ensure smoking breaks do not give smokers an advantage over non-smokers. For example, employers may allow smoking breaks but require smokers to make the time up at the end of the day. Whatever approach an employer decides to take, it is essential that a clear smoking policy be put in place which includes reference to disciplinary sanctions for breaching the smoking policy!

**If you would like to discuss any issues raised in this Update or any other employment related matter please do not hesitate to contact our Employment Team on:-
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