New York Anti-Smoking Law Imposes Obligations On Employers and Other Entities

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Effective July 2003, New York's Clean Indoor Air Act amended Article 13-E of the New York Public Health Law, and banned smoking in virtually all indoor areas state-wide. The law was designed to prohibit exposure to second hand smoke in the workplace and in other indoor areas.

Which Employers are Affected?

The Act applies to all employers with one or more employees and without regard to the nature of the enterprise. It covers sole proprietors, partnerships, associations, limited liability companies, corporations, and non-profits. There are however a few exceptions for tobacco-related businesses.

What Conduct is Prohibited?

The Act banned smoking in the indoor areas of many different types of places. The Act defines smoking as "the burning of a lighted cigar, cigarette, pipe or other matter or substance which contains tobacco." The places where indoor smoking is prohibited include: places of employment; bars; food service establishments; public transportation; youth centers; child care centers; other homes and institutions for children; colleges and universities; hospitals and health care facilities; commercial establishments; indoor arenas; zoos; and bingo facilities. The prohibitions contain some overlap. For example, to the extent a hospital is a place of employment, it is covered by the provisions governing both employers and hospitals. The application of the smoking ban on several of these types of facilities is discussed below.

Places of Employment

The Act prohibits smoking in indoor areas of places of employment. A place of employment is any indoor area or portion thereof under control of the employer in which employees of the employer perform services. These areas include, but are not limited to, company vehicles, offices, hallways, rest rooms, employee cafeterias and lounges, and copy rooms. In short, all

indoor areas controlled by the employer are now no-smoking areas. The Act does not ban smoking in outdoor areas of places of employment.

Bars and Restaurants

Bars and restaurants are, of course, places of employment. As a result, smoking is prohibited in bars and restaurants for that reason alone. However, a few extra rules and exceptions apply to bars and restaurants which should override any contrary direction from the employment provisions. For example, smoking is permitted in cigar bars existing as of December 31, 2002, that meet certain other tobacco revenue requirements. Likewise, although smoking is permitted without restriction in outdoor areas of places of employment, it is only permitted in outdoor dining areas of restaurants if those areas have no roof or other ceiling enclosure. If those areas have such enclosures, additional rules apply to designating a portion of the area as a smoking area.

Colleges and Universities

The Act prohibits smoking in all indoor areas of all public and private colleges, universities, and other educational and vocational institutions. Prior to the most recent amendment, the statute only banned smoking in <u>public</u> indoor areas of colleges and universities. By eliminating the public dimension of the indoor areas ban, the statute has expanded the ban significantly. As a result, any indoor area of a college and university not otherwise covered as a place of employment is covered by the broader prohibition on smoking indoors anywhere on campus. By its terms, the prohibition would appear to cover residence halls and other college residences. While, as discussed below, private residences are exempt from the ban, there is no legislative or regulatory guidance on whether university-provided housing would qualify as a private residence. The place of employment provision prohibits smoking in residence halls in those areas where university employees perform services.

Health Care Facilities

The Act prohibits smoking in indoor areas of hospitals, residential health care facilities and other health care facilities licensed by the state in which persons reside. It contains an exception,

however, that permits patients of residential health care facilities, adult care facilities, community mental health residences and day treatment programs to smoke in separate enclosed rooms designated for that purpose.

Schools

The Act also amended Section 409 of the Education Law to prohibit the use of tobacco on school grounds. Section 409 does not define the term tobacco use, but that term would appear to encompass more than just the smoking of tobacco. Previously, tobacco use by faculty and staff in designated smoking areas during non-school hours was permitted. This proviso has been eliminated. In addition, smoking anywhere on school grounds is prohibited, both indoors and outdoors. The Act defines school grounds as any building and the surrounding outdoor areas within the school's legally defined property boundaries. The prohibition applies to any person, not just school employees.

Exceptions

The Act's smoking ban does not apply to private homes, private residences, and private automobiles. Nor does it apply to hotel or motel rooms rented to one or more occupants. Most significantly, as we noted above, the Public Health Law's primary ban on smoking only applies to "indoor areas" of covered entities, not to outdoor areas, although there are some restrictions on outdoor smoking in restaurants and a complete ban on outdoor smoking on school grounds. There are certain other narrow exceptions for membership associations that have no employees and for tobacco-related meetings and conventions.

Enforcement and Penalties

The Act makes it unlawful for any covered entity to permit smoking in areas where smoking is prohibited by the Act. It also makes it unlawful for any person to smoke in an area where smoking is prohibited by the Act. An employer may defend an alleged violation by proving that it made a good faith effort to ensure employees complied with the law. Non-employer owners or managers may establish an affirmative defense to an alleged violation by showing that they did

not exercise active control of the premises, but rather that a lessee, sublessee or other person exercised actual control.

In general, the law will be enforced at the local level by the county board of health. If after a hearing, a violation is found, a civil penalty of up to one thousand dollars may be imposed.

Enforcement officers are permitted to grant waivers from a provision of the statute, if the applicant for a waiver establishes that compliance would cause an undue financial hardship; or that other factors exist which would render compliance unreasonable. The statute does not explain what facts might establish grounds for a waiver under either alternative.

If a waiver is granted, the enforcement officer is required to impose conditions and restrictions necessary to minimize the effects of the waiver on persons who are involuntarily exposed to second hand smoke and to ensure the waiver is consistent with the general purposes of the statute.

Compliance

Employers and other covered entities should have policies prohibiting all indoor smoking. In addition, the Act requires covered entities to post no-smoking signs in all non-smoking areas and to designate an agent responsible for informing individuals who smoke in prohibited areas that they are violating the law. In order to take advantage of the good faith compliance defense to any alleged violation, covered entities should at a minimum complete these three measures. In addition, employers should conduct training sessions for employees and keep a record of when and how violators of the policy are warned or otherwise disciplined.

While the Act requires employers to prohibit all indoor smoking, Section 201-d of the New York Labor Law continues to protect employees from being disciplined or otherwise discriminated against for engaging in legal activities (including smoking) away from the employer's premises during non-working hours.

As noted above, the amended statute may require changes in existing employer policies. For employers with collective bargaining agreements, changes in policy raise the issue of whether

collective bargaining is required. While bargaining over such policies would normally be required prior to implementation, no bargaining is required if the policy change simply mirrors the statute.

Prior to the amendment, the statute recognized that any employer smoking policy that was more restrictive than the statute was subject to bargaining. That provision has been eliminated. Bargaining may still be required, however, to the extent an employer's policy is more restrictive than the statute. For example, if an employer were to ban outdoor smoking, bargaining would be required.

The information contained in this column is not a substitute for professional counseling or advice.

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