

Pennsylvania Clean Indoor Air Act to Take Effect September 11, 2008

July 28, 2008

Pennsylvania Governor Edward G. Rendell recently signed into law the Clean Indoor Air Act (Act) prohibiting smoking in most public areas, including workspaces, across the state. Pennsylvania now joins 32 other states in enacting antismoking laws designed to protect their residents from passive, secondhand smoke. As a result, employers that operate in Pennsylvania should begin to take important steps to ensure compliance by the law's September 11, 2008 effective date.

By way of background, the Act prohibits smoking in a "public place," broadly defined as any "enclosed area which serves as a workplace, commercial establishment, or an area where the public is invited or permitted." This includes any "indoor area serving as a place of employment, occupation, business, trade, craft, professional, or volunteer activity." Given this broad definition, we anticipate that the vast majority of Pennsylvania employers are covered by the new law.

For unionized employers that currently allow smoking and that will be required to ban smoking in the workplace as a result of this legislation, there will likely be an obligation to bargain with the union before making any changes to current smoking policies. Failure to do so can lead to an unfair labor practice charge. When the final regulations are released, they may provide a basis for an argument that bargaining is not required, but we recommend employers seek legal counsel before deciding to unilaterally implement a no-smoking rule.

The Act directs the Pennsylvania Department of Health (Department) to develop regulations to implement the Clean Indoor Air Act, and Governor Rendell stated the Department will provide businesses with additional guidance on compliance in the next 90 days. The Department has not yet published those regulations, but the Act itself outlines several initial requirements:

- **Notification:** Employers must prominently display and maintain "No Smoking" signs in areas regulated by the legislation. If an exception applies, the employer also must post "Smoking Permitted" signs at all entrances.
- **Retaliation Prohibited:** Employers may not make decisions regarding termination or hiring, or otherwise retaliate, based on an employee's decision to file a complaint under the Act. The legislation does not specify whether there is a private right of action granted to the employee, so it is not yet clear whether there might be liability for damages.

- **Enforcement:** The Department has primary responsibility for investigating and enforcing the Act, although law enforcement agencies also may investigate complaints. The complaint process is a straightforward one, allowing individuals to report violations by (1) writing to the Department, (2) calling the Department, or (3) submitting a complaint via the Department’s website. The Act places culpability for any violation on *both* the individual that opts to smoke in a regulated area and the business or employer that permits the individual to act in such a manner. Businesses that are found to have violated the Act may receive administrative fines from \$250 for the first infraction, \$500 for the second, to \$1,000 for the third violation. Individuals face similar penalties vis-à-vis a summary offense citation.
- **Exceptions:** The Act contains more than a dozen exceptions. In addition to those pertaining to tobacco-related businesses, the exceptions range from full-service truck stops and certain lodging quarters to private clubs and fundraisers where cigars are a feature of the event. Residential adult care facilities and drug and alcohol treatment facilities are also exempt. Many of the exceptions require specific threshold and reporting requirements, involving written statements reviewed by the Department of Revenue or the Department of Health. A licensed gambling facility, for example, may allow smoking in 25% of the gaming floor but may expand smoking facilities up to 50%, pending a showing that the “average gross terminal revenue per slot machine unit in the designated smoking area” is at least equal to revenue generated in the nonsmoking area.

Conclusion

While the Act clearly represents a major change for those employers that currently allow smoking in their workplaces, it is important that employers not overlook that the Act requires employer action even for those with some type of smoking ban already in place. At minimum, employers should ensure adequate signage on their facilities, and consider with counsel whether written anti-smoking policies would inure to their benefit going forward.

In addition, employers that operate within the city limits of Philadelphia should note that the Act allows Philadelphia to keep intact its more expansive smoking ban. The Philadelphia prohibition, unlike the state counterpart, extends the smoking prohibition to the outside of buildings, up to 20 feet from entrances.

If you would like further information regarding the issues raised in this Morgan Lewis Law Flash, please contact any of the following Morgan Lewis attorneys:

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