



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

Smoking Ban

The Wisconsin Legislature, in the 2009-10 Legislative Session, enacted 2009 Wisconsin Act 12, which prohibits smoking in several enclosed places and other places, and specifies exceptions to the prohibition. Act 12 included several definitions, one of which, "substantial wall," was later modified by 2009 Wisconsin Act 276. Summaries of Acts 12 and 276 are available at the Legislative Council website at: www.legis.state.wi.us/lc. This Information Memorandum summarizes the provisions of Act 12, with the definition change made by Act 276. In addition, it addresses a number of frequently asked questions.

DESCRIPTION OF THE SMOKING BAN LAW

AREAS WHERE SMOKING IS PROHIBITED

As of July 5, 2010, smoking is prohibited in the following enclosed places:

1. The State Capitol.
2. Residence halls or dormitories owned or operated by a college or university.
3. Day care centers.
4. Educational facilities.
5. Inpatient health care facilities (includes hospitals, county homes and county infirmaries, nursing homes, hospices, the Wisconsin veteran's home, and treatment facilities).
6. Theaters.
7. Correctional facilities.
8. State institutions.
9. Restaurants.
10. Taverns.

11. Private clubs (a facility used by an organization that limits its membership and is organized for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose).
12. Retail establishments.
13. Common areas of multiple unit residential properties.
14. Lodging establishments (a bed and breakfast, hotel, or tourist rooming house).
15. All enclosed places, other than those listed above, that are places of employment or public places.
16. Government buildings.

An “enclosed place” is a structure or area that has a roof and more than two substantial walls. 2009 Wisconsin Act 276 amended the definition of “substantial wall” to be a wall with no opening or with an opening that either does not allow air in from the outside or that is less than 25% of the wall’s surface area.

A “place of employment” is any enclosed place that employees normally frequent during the course of employment, such as an office, a work area, an elevator, an employee lounge, a restroom, a conference room, a meeting room, a classroom, a hallway, a stairway, a lobby, a common area, a vehicle, or an employee cafeteria.

A “public place” is an enclosed place that is open to the public, regardless of whether a fee is charged or a place to which the public has lawful access or may be invited.

PROHIBITION ON SMOKING IN OUTSIDE AREAS

Act 12 makes no changes to the specific prohibitions in the law on smoking outside. These places are as follows:

1. Within six feet of the State Capitol.
2. On the premises of a day care center when children are present.
3. On the grounds of a Type 1 juvenile correctional facility.
4. Within 25 feet of any University of Wisconsin (UW)-System residence hall or dormitory.

Act 12 also specifically prohibits smoking in sports arenas, bus shelters, and public conveyances regardless of whether they meet the definition of “enclosed place.”

DESIGNATION OF SMOKING AREAS

Act 12 eliminates the ability to designate smoking areas in enclosed indoor locations.

EXEMPTIONS

The statutes do not prohibit smoking in the following areas:

1. Private residences.
2. Certain residence rooms in assisted living facilities, if occupied by one person, or by two or more people if each person living in the room smokes and has made a written request for permission to be placed in a smoking room. Assisted living facilities are community-based residential facilities, residential care apartment complexes, and adult family homes.
3. A retail tobacco store or tobacco bar that is in existence as of June 3, 2009, and in which only the smoking of cigars and pipes is allowed.

A tobacco bar is a tavern that generates 15% or more of its annual gross income from the on-premises sale of cigars and tobacco for pipes. Vending machine sales are not included in this percentage.

A tobacco store is a retail establishment that does not have a Class B liquor or beer license and generates 75% or more of its gross annual income from the sale of tobacco products and accessories. Cigarette sales are not included in this percentage.

REQUIREMENTS PLACED ON PERSONS IN CHARGE

Act 12 requires that persons in charge of places where smoking is prohibited enforce the prohibitions by taking certain steps to ensure compliance, such as not providing ashtrays and matches; posting “no smoking” signs; asking a person to stop smoking; asking a person who is smoking to leave; refusing to serve the person if the place is a restaurant, tavern, or private club; and notifying law enforcement if the person does not leave after being requested to do so.

LOCAL AUTHORITY TO REGULATE SMOKING

Under Act 12, counties, cities, villages, and towns retain their authority to enact ordinances, and school districts retain authority to adopt policies that, complying with the purpose of the Act, protect the health and comfort of the public. The Act makes one new change to this local authority. Under the Act, if a county, city, village, or town enacts any ordinance regulating or prohibiting ***outside*** smoking, the ordinance may apply ***only*** to public property under the entity’s jurisdiction. In addition, the ordinance ***must*** provide that the person in charge of a restaurant, tavern, private club, or retail establishment location in an area subject to the ordinance may designate an outside area that is within a reasonable distance from any entrance to the establishment where customers, employees, and other associated persons may smoke. The ordinance may not define the term “reasonable distance” or set any specified measured distance as being a “reasonable distance.”

RULE-MAKING

The Department of Commerce must promulgate rules that specify uniform dimensions and other characteristics of the signs that are required to be posted by persons in charge of places where smoking is prohibited. The department must also arrange with the Department of

Administration to have no smoking signs prepared and made available for use by state agencies.

ENFORCEMENT

Local police and sheriff's departments have the power and duty to enforce the smoking ban. In addition, the state Department of Justice is authorized to enforce the smoking ban and is invested with the powers conferred by law upon sheriffs and local police officers to enforce the law.

In addition, state or local officials or any affected party may institute an action in any court with jurisdiction to enjoin repeated violations of the smoking prohibition.

PENALTIES

Act 12 establishes a forfeiture for violation of the smoking prohibition of not less than \$100 nor more than \$250 for each violation.

Act 12 provides that anyone in charge who violates the "person in charge" provisions is subject to a forfeiture of \$100 for each violation. However, the Act requires that a warning notice be issued for the first violation, and provides that no forfeitures may exceed \$100 in total for all violations occurring on a single day.

Act 12 also provides that neither a municipality nor the Department of Revenue may consider an arrest or conviction for a violation of the law setting forth the responsibilities of persons in charge in any action to revoke, suspend, or refuse to renew a Class B liquor or beer license or permit.

FREQUENTLY ASKED QUESTIONS

WHAT IS CONSIDERED AN ENCLOSED PLACE UNDER THE LAW?

Act 12 prohibits smoking in a number of specified places that are enclosed and in other enclosed places that are places of employment or public places (with certain limited exceptions). The Act also prohibits smoking in limited outdoor areas, such as near dormitories or the State Capitol, and in sports arenas, bus shelters, and public conveyances.

For purposes of this prohibition, “enclosed place” is defined as a structure or area that has a roof and more than two substantial walls. Under Act 12, as modified by Act 276, a substantial wall is a wall with no opening or an opening that either does not allow air in from the outside or that is less than 25% of the wall’s surface area.

HOW DOES THE LAW TREAT LOCAL ORDINANCES?

The new law does not change the current general authority of a local unit of government to enact ordinances regarding smoking other than to limit its ability with respect to outdoor smoking. Local units of government will have the same authority to regulate indoor smoking that they had prior to Act 12. Namely, they can enact ordinances (or school districts can adopt policies) that, complying with the purposes of the state law, “protect the health and comfort of the public.”

The new law allows local ordinances or school district policies that regulate smoking outside to apply only with respect to public property under the jurisdiction of the county, city, village, town, or school district. However, a restaurant, tavern, private club, or retail establishment may designate an outside area that is such public property that is a reasonable distance from the entrance as an area where customers, employees, or persons associated with the facility may smoke. An ordinance may not define “reasonable distance” or set any specified measured distance as being a reasonable distance.

Local units of government may determine the amount of forfeitures for violations of their ordinances, as long as the ordinance, complying with the purpose of the state law, protects the health and comfort of the public.

HOW ARE VEHICLES THAT ARE USED IN EMPLOYMENT TREATED UNDER THE LAW?

“Place of employment” is defined by the Act as any enclosed place that employees normally frequent during the course of employment, and then lists several places that are included in the definition. The definition explicitly includes vehicles, so vehicles are considered to be a place of employment if employees are using them during employment.

The term “enclosed place” means a structure or area that has a roof and more than two substantial walls. While the interior sides, front, and back of a vehicle are not typically referred to as walls, the only way to give meaning to the listing of vehicles in the definition of “place of employment” is to treat them as walls. Even if the windows on both the driver’s side and the passenger’s side are fully open, it is possible that they are less than 25% of the walls’ surface area in most vehicles. If that is the case, then the sides would be substantial walls of the vehicle, and smoking would not be permitted in the vehicle.

DOES THE LAW REQUIRE RULE-MAKING BY A STATE AGENCY?

The only rule-making provided for in current law and Act 12 are: (1) the requirement that the Department of Commerce promulgate a rule that specifies uniform dimensions and other characteristics of the signs relating to smoking; and (2) the requirement that the Department of Administration promulgate a rule that specifies what constitutes the area directly adjacent to the State Capitol for purposes of the prohibition on smoking in that area.

WHAT TYPES OF LODGING ESTABLISHMENTS ARE COVERED BY THE SMOKING BAN?

Act 12 prohibits smoking in several enumerated enclosed places, including lodging establishments. The term “lodging establishment” is defined to mean a bed and breakfast establishment, a hotel or motel, or a tourist rooming house, all of which are defined in current law. All of these types of facilities are regulated by the Department of Health Services (DHS). Rental cabins are regulated by DHS since they fall within the current definition of “hotel” or “tourist rooming house” and are therefore “lodging establishments” under Act 12.

HOW ARE OUTDOOR SPORTING VENUES TREATED UNDER THE LAW?

While Act 12 specifies several enclosed areas in which smoking is prohibited, it also prohibits smoking in a sports arena, regardless of whether all or part of the arena is enclosed. The term “sports arena” is defined as any stadium, pavilion, gymnasium, swimming pool, skating rink, bowling center, or other building where spectator sporting events are held.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Laura Rose, Deputy Director, and Richard Sweet, Senior Staff Attorney, on June 4, 2010 (revised July 1, 2010).

WISCONSIN LEGISLATIVE COUNCIL

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536

Telephone: (608) 266-1304 • Fax: (608) 266-3830

Email: leg.council@legis.state.wi.us

<http://www.legis.state.wi.us/lc>