

May 7, 2003

Smoking Ban Requires All Boston Employers to Provide Smoke-Free Workplace for its Employees

Effective May 5, 2003, every workplace located in the City of Boston—with a few exceptions—must be free of tobacco smoke. The regulations, issued by the Boston Public Health Commission (BPHC), also place a number of other obligations on Boston employers. The following summary is intended to familiarize you with the obligations under these new regulations.

Who is and who is not covered?

Generally, the Boston smoking ban applies to any individual, business, college or organization that employs more than two employees. Excluded from the ban are:

- ♦ private residences which may serve as a workplace
- ♦ dorm rooms
- ♦ hotel, motel, inn, bed and breakfast and lodging home rooms that are rented to patrons and designated as “smoking rooms”
- ♦ retail tobacco stores that primarily sell tobacco products and paraphernalia
- ♦ smoking bars
- ♦ performers upon a stage
- ♦ religious ceremonies where smoking is part of the ritual
- ♦ office spaces of private or public business entities that primarily provide clerical, professional or business services.

What is prohibited?

The regulations ban smoking in all facilities and enclosed areas of a workplace where one or more employees perform services for an employer. The BPHC defines smoking as any inhaling, exhaling, burning or carrying of lighted tobacco products. Enclosed areas are spaces bounded by walls from the floor to the ceiling, with or without windows. Work areas located outside are not covered by the regulations.

During a recent Breakfast Briefing hosted by Seyfarth Shaw, the BPHC recommended that if smoke from an outside work area leaks into an enclosed work area, the employer may be in violation of the regulations.

What obligations are imposed on employers?

In addition to banning smoking in enclosed work areas and to requiring a smoke-free work environment for employees, the regulations require employers to develop, implement and distribute a written no-smoking policy. Employers must also post signs in conspicuous places stating that smoking is prohibited.

Written No-smoking Policy

Employers must adopt and distribute this policy to all of its employees by June 2, 2003 or within four weeks of the commencement of business operations. Also, employers must post a copy of the policy in a conspicuous place for employees and distribute the policy to employees on an annual basis.

The written no-smoking policy must contain a statement advising all employees that they have a right to work in

a smoke-free environment; information on how to notify the BPHC of violations of the regulations; and information on how to obtain help to quit smoking.

The BPHC has drafted a model no-smoking policy, which can be obtained by contacting the Tobacco Control Program of the BPHC at (617) 534-4718 or from the BPHC's website at <http://www.bphc.org/programs/initiative.asp?i=157&p=23&b=2&d>. If an employer desires to draft a policy that differs from the model policy, it must submit the draft policy to the Tobacco Control Program for approval, along with a processing fee of \$20.00.

Signage

The regulations require that employers conspicuously post "No Smoking" signs at the entrances to all workplaces, restrooms and break rooms. Employers must post "No Smoking" signs in areas visible to its customers and visitors. To satisfy this requirement, the guidelines to the regulations state that employers must post at least one "No Smoking" sign in the following areas: lobbies, hallways, cafeterias, kitchens, supply rooms, locker rooms, lounges, customer service areas, offices where the public is invited, conference rooms, bars, restaurants, retail stores, waiting areas, and elevators.

The "No Smoking" signs must be affixed, at eye level, to a wall or permanent fixture. The sign must be made of a durable material; be red and white; contain the words "NO SMOKING" at least two inches in height; contain the international symbol for no smoking (i.e., a cigarette in a red circle with a red line through it); and contain the words, in any size font, "IT IS ILLEGAL TO SMOKE IN THIS ESTABLISHMENT. TO REPORT A VIOLATION CALL THE BOSTON PUBLIC HEALTH COMMISSION AT (617) 534-4718." Samples of approved signs can be obtained from the Tobacco Control Program or the BPHC's website.

Hotels, motels, inns, bed and breakfasts and lodging homes with "smoking rooms" must post signs clearly designating the room as such. In its non-smoking rooms, such establishments must post a "No Smoking" sign containing the information described above on the inside wall or door of the room and in the bathroom.

Retaliation

Employers are prohibited under the regulations from refusing to hire, disciplining, firing, or retaliating against any employee, applicant, customer or other person who reports a violation of the regulations with the BPHC or exercises his or her right to work in a smoke-free environment.

Based on this language, an employer cannot make as a condition of employment or force an employee to work in an area where smoking *is* allowed. This may pose a problem for hotels, for example, that have designated "smoking rooms," which also serve as work areas for certain employees (e.g., housekeeping, maintenance workers), if employees refuse to perform their duties in those rooms.

The BPHC advises that it expects employers in those circumstances to "reasonably accommodate" its employees who do not wish to be exposed to tobacco smoke. In order to reconcile the employer's interests with the rights of its employees, employers may want to implement a policy that employees do not enter an area where smoking is allowed while it is occupied. An employer may offer premium pay for working in such areas. Employers should have employees sign a form indicating that they consent to performing work in "smoking rooms" and were not coerced in any way to work in smoking areas.

Waivers

While employers have until June 3, 2003, to adopt and distribute a no-smoking policy, employers must comply with all other aspects of the regulations as of May 5. Employers may obtain a one-time, non-renewable 90-day waiver in order to bring their workplace into compliance with the regulations. Employers requesting such a waiver must submit a letter, along with a \$100 non-refundable filing fee, to the Executive Director of the BPHC explaining why a waiver is needed. Waivers are not automatically granted and are issued at the sole discretion of the Executive Director. We understand the BPHC has hired additional staff to enforce the regulations.

Consequences of Violating the Regulation

The regulations impute liability to the employer, business agent, manager, or any other person having control of a workplace in violation of the regulations. Such persons will receive a \$100 fine for the first violation of the regulations; \$500 for the second violation if it occurs within 24 months of the first violation; and \$1,000 for each additional violation if it occurs within 24 months of the second violation. Note that the Boston Public Health Commission will treat each calendar day that an employer is operating in violation of the regulations as a separate violation.

The BPHC considers the following as *prima facie* evidence of a violation of the regulations.

- ◆ statement of a complaint
- ◆ observation of an individual smoking in the workplace

- ◆ ashtrays in the workplace
- ◆ serving individuals smoking in violation of the regulations
- ◆ cigarette butts in the workplace
- ◆ visual smoke in the air
- ◆ odor of tobacco smoke
- ◆ observation of the employer permitting smoking in the workplace or service to a person smoking in the workplace

Further Information

Please contact the Seyfarth Shaw attorney with whom you regularly work if you would like more information about the Boston workplace smoking regulations.

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ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON

700 Louisiana Street, Suite 3850
Houston, Texas 77002-2731
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

101 California Street, Suite 2900
San Francisco, California 94111-5858
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32) (2) 647.60.25
(32) (2) 640.70.71 fax