



CLIENT ALERT

“Up in Smoke – Smoking at Work”

At 6am on 26 March 2006, the Smoking, Health and Social Care (Scotland) Act 2005 and Regulations come into force banning smoking in almost all workplaces. Except for a very few exceptions smoking will be banned in all premises which are “wholly or substantially enclosed” if: -

- (a) a public or a section of the public has access to them;
- (b) they are used wholly or mainly as a place of work;
- (c) they are used by or for the purposes of a club or other unincorporated association; or
- (d) they are used wholly or mainly for the provision of education or of health or care services.

Apart from exempted premises, this will cover all workplaces including recreational clubs such as golf clubs, bowling clubs, etc. It will also cover premises where people work for no financial gain, e.g. charities. Only a small number of premises are exempted, including residential premises, adult care homes, adult hospices, psychiatric hospitals or psychiatric units, oil rigs, private vehicles, designated hotel bedrooms and designated police rooms. All other premises which are wholly or substantially enclosed are covered.

What does “wholly or substantially enclosed” mean?

Premises are “wholly” enclosed if they have a ceiling or roof and, except for doors, windows and passageways, are wholly enclosed either permanently or temporarily. Premises are “substantially” enclosed if the opening in the premises has an area (or if there is more than one opening they have an aggregate area) of less than half the area of the walls.

What will this mean for businesses?

The legislation means that businesses which previously provided rooms or designated areas for smokers will no longer be able to do so as they will be enclosed premises. They will be able to provide “shelters” for smokers provided they comply with the requirements. Businesses are also under an obligation to ensure that “no smoking” notices are displayed prominently in their premises.

All businesses should ensure that “no smoking” signs - which must be a minimum of 230mm by 160mm - are displayed at all entrances and throughout the premises including toilets, staff rooms, etc. The sign must include the international “no smoking” symbol which consists of a burning cigarette in a red circle with a red bar across it. This must be at least 85mm in diameter.



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Notices must also display the name of the individual (the “designated person”) to whom people can complain if individuals are smoking on the premises. Businesses will also have to ensure that these signs cannot be tampered with, damaged, removed or concealed (and if they are that they are immediately replaced).

The offences

There are 3 offences created in terms of the Smoking, Health and Social Care (Scotland) Act 2005:-

1. *Knowingly permitting someone to smoke in no-smoking premises by someone who has the management or control of the premises.*

This will include managers, directors and members of staff who are in control of particular premises. It will be a defence that the management took all reasonable precautions and exercised all due diligence not to commit the offence or that there were no lawful and reasonably practicable means by which they could prevent the other person from smoking in no-smoking premises. This means that if someone repeatedly refused to stop smoking, you would not need to use force to remove them where this may constitute an assault. A helpline is also to be set up by the Scottish Executive where businesses can report such incidents.

2. *It is an offence to smoke in no-smoking premises.*

There will be a defence that the individual did not know and could not reasonably be expected to have known that the premises were no smoking premises. This ties in with the obligation on businesses to ensure that there are adequate numbers of prominently displayed “no-smoking” notices.

3. *It is an offence to fail to conspicuously display notices at and on no-smoking premises.*

If someone is found guilty of this they can be found liable on summary conviction of a fine up to a maximum of £1,000. However, it is anticipated that most breaches will be dealt with by environmental health officers who will have the ability to impose fixed penalty fines of £50 for an individual smoking on premises and £200 for permitting someone to smoke on the premises or failing to display notices.

What steps can businesses take now?

Businesses should:

1. Inform all employees of the forthcoming changes, particularly those who will be responsible for enforcing them.
2. Consider removing all ashtrays prior to 26 March 2006.
3. Ensure that they have notices placed prominently around their premises including at all entrances, toilets and staff rooms.
4. Consider providing external stubbing bins outside premises.



5. Update disciplinary procedures for employees to ensure that smoking or permitting someone to smoke in no-smoking premises constitutes a disciplinary offence.
6. Consider whether there is any support they can give to employees who may wish to give up smoking, including contact details for bodies who can assist employees.
7. Draw up no-smoking policies covering employees and other people coming onto their premises, detailing what steps they expect employees to take to enforce the law, without putting employees at risk.

Questions and Answers

- Q. *I only have one employee. Both myself and my employee smokes. Will the legislation still apply?*
- A. Yes, it applies regardless of size and whether all employees smoke.
- Q. *I have already made most of the workplace smoke free but do provide a smoking room. I presume this complies with the legislation.*
- A. No, only a total ban is acceptable even if you already provide separate areas for employees who smoke. The only exception is if you provide a shelter which is not “wholly” or “substantially” enclosed.
- Q. *We are a golf club where members pay annual fees. If our members vote to allow them to continue to smoke in the clubhouse is this allowed?*
- A. No. The legislation applies regardless of whether you are a private club or association. The aim is to protect employees in their working environment and the clubhouse will have to be made “no smoking”.
- Q. *Will we still be liable if we ask someone smoking on our premises to stop and they refuse?*
- A. How you deal with it will depend on whether the individual is an employee or not. For employees you should put in place a smoking policy and amend your disciplinary policy so that employees are aware that smoking will be a disciplinary offence. Where the individual is not an employee it may be more difficult but you should request that they stop smoking. If they repeatedly refuse to do so you should ask them to leave. If they still refuse and you have taken all lawful and reasonable measures to have them stop it is unlikely you will be liable. There is also to be a national call-line that you can phone to report the incident.
- Q. *I am concerned that this new law will lead to employees congregating round entrances smoking. What can I do?*
- A. You could provide shelters further away from the door or make the perimeter of your premises also “no smoking”. You should also take steps now to ensure that employees know of the changes.



Want to know more?

If you require any advice or information on this or any other employment issue please contact a member of the Thorntons Employment Law Unit:

Noele McClelland, Partner
Derek J Reid, Partner
Celia Müller, Senior Solicitor

Email employmentlaw@thorntons-law.co.uk

Tel 01382 229111

50 Castle Street, Dundee DD1 3RU

www.thorntons-law.co.uk



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