

# WISCONSIN LEGISLATURE

---

July 8, 2010

Debbie Galeazzi, WCMC, City Clerk  
City of Menasha  
140 Main Street  
Menasha, WI 54952

RECEIVED

JUL 12 2010

CITY OF MENASHA  
BY dg

Dear Debbie:

Thank you for recently contacting our offices regarding implementation of the state wide workplace smoking ban, which went into effect July 5, 2010.

As you may know, the new law generally prohibits smoking in enclosed public places and places of employment including restaurants and taverns. Sheriffs and municipal police officers may issue citations if they observe someone smoking where it is not permitted and they may respond to citizen complaints or when notified by the person in charge of a facility. Likewise, municipalities still have the authority to adopt an ordinance to regulate smoking locally if it applied and enforced in ways that comply with the state law. As with any other ordinance or legal question, the Common Council should consult with its legal counsel for guidance.

For further information and guidance, we are enclosing the following documents: 1) an Information Memorandum prepared by the Wisconsin Legislative Council; 2) a Legislative Brief prepared by the Legislative Reference Bureau; 3) an Advisory Memorandum prepared by the Department of Justice; 4) a notice from the Department of Commerce regarding its minimal involvement in implementation of the law; 5) a Legal Note from the League of Municipalities; and 6) an informational letter to its members from the Wisconsin Tavern League.

Thanks again for contacting us on this matter. We hope you find the enclosed information helpful.

Sincerely,



MICHAEL G. ELLIS  
State Senator  
19<sup>th</sup> Senate District



DEAN R. KAUFERT  
State Representative  
55<sup>th</sup> Assembly District

Enclosures



---

---

## 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](http://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](mailto:leg.council@legis.state.wi.us)

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



---

# Legislative Briefs

from the Legislative Reference Bureau

---



Legislative Brief 09-1

May 2009

## INDOOR SMOKING BAN IN WISCONSIN

Beginning July 5, 2010, smoking will be generally prohibited in public places and workplaces, whether publicly or privately owned, including taverns and restaurants. Until then, Wisconsin's current Clean Indoor Air Act will remain in effect, as well as ordinances restricting workplace smoking which have been enacted in 35 state municipalities, including Eau Claire, Kenosha, La Crosse, Madison, and Oshkosh.

2009 Wisconsin Act 12, which was signed into law by Governor Doyle on May 18, 2009, addresses the growing concern in the state and nationally over the health hazards associated with tobacco use and the effects of secondhand smoke. Wisconsin joins 32 other states with indoor smoking bans, including the neighboring states of Illinois, Iowa, and Minnesota.

### CURRENT CLEAN INDOOR AIR LAW

Under the current Clean Indoor Air Act [Section 101.123, Wisconsin Statutes], originally created by 1983 Wisconsin Act 211, smoking is generally completely prohibited in hospitals, motor buses, day care centers where children are present, and a few other places. Smoking is also prohibited, except in designated areas, in indoor locations such as government buildings, offices, restaurants, schools, retail establishments, movie theaters, community-based residential facilities, and nursing homes. Exempted from the ban are places such as taverns, bowling centers, rooms where the main occupants are smokers, and manufacturing facilities. Persons who illegally smoke after being warned by an official or employee of a facility are subject to a \$10 fine.

### 2009 WISCONSIN ACT 12

Act 12 generally prohibits smoking in enclosed public places and places of employment. Key definitions in the law:

- "Smoking" means burning or holding, or inhaling or exhaling smoke from a lighted cigarette, cigar, pipe, or any other lighted smoking equipment.
- "Enclosed" means a structure that has a roof and more than two substantial walls.
- A "public place" is defined as a 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.
- A "place of employment" is any indoor place that employees normally frequent during the course of employment, including an office or work area, an employee lounge, a restroom, a conference or meeting room, a classroom, or a hallway.

The following questions and answers explain the details of the new smoking ban [s. 101.123], which will take effect on July 5, 2010.

### Where is indoor smoking banned?

Smoking will not be allowed in any of the following enclosed places: places of employment, public places, state or local government buildings, taverns, restaurants, bowling centers, theaters, lodging establishments, retail establishments, day care centers, educational facilities, correctional facilities, state institutions, college residence halls or dormitories, hospitals and clinics, assisted living facilities, common areas of multiple-unit residential properties, sports arenas, bus shelters, public conveyances, and private club facilities (those used by an organization that limits its membership and is organized for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose.)

In addition, persons may not smoke in the immediate vicinity (within six feet) of the State Capitol, on the premises of an in-use day care center, on the grounds of juvenile correctional facilities, or within 25 feet of a University of Wisconsin System residence hall or dormitory.

### Where is indoor smoking allowed?

The ban on smoking does not apply in:

- A private residence;
- A retail tobacco store or tobacco bar in existence on June 3, 2009;
- A room used as a residence by only one person in an assisted living facility or such a room in which all occupants have requested in writing to be allowed to smoke; and
- Tribal casinos or facilities (due to tribal sovereignty provided under federal law).

### May indoor smoking areas be set aside?

**No.** Act 12 repeals the authority of a person in charge of a building to designate rooms or parts of rooms as smoking areas.

### May local governments enact smoking ordinances?

**Yes.** Counties, cities, villages, and towns may enact ordinances, and school districts may adopt policies that, complying with the purpose of the law, protect the health and comfort of the public. Any such rule regulating or prohibiting outside smoking in certain areas may apply only to public property under the jurisdiction of the governmental unit.

### May businesses provide outdoor smoking areas?

**Yes.** Outdoor smoking areas may be designated by taverns, restaurants, private clubs, or retail establishments that are a "reasonable distance" from any entrance to the facility so that customers, employees, and others associated with the business may smoke. A municipal smoking ordinance may not define the term "reasonable distance," nor may it specify a minimum measured distance.

### What is the penalty for illegal smoking?

A person who smokes where it is prohibited is subject to a forfeiture of not less than \$100 nor more than \$250 for each violation.

If the person in charge of a facility fails to take any required action to stop illegal smoking, he or she is subject to a forfeiture of \$100 for each violation, but no more than one penalty per day. If the person in charge has not pre-

viously received a warning notice, then the law enforcement officer must issue a warning for the first violation in lieu of a citation.

### Who enforces the law?

The person in charge of a facility is responsible for making reasonable efforts to prohibit persons from illegally smoking. For example, a bartender may not provide matches, ashtrays, or other smoking-related equipment, and must take all of the following steps:

- Post warning signs or provide other appropriate notification;
- Refuse to serve a person who is smoking in a tavern, restaurant, or private club;
- Ask a person who is smoking to refrain from doing so;
- Ask a person to leave if he or she refuses to stop smoking; and
- Immediately notify an appropriate law enforcement agency if a smoker refuses to leave after being asked to do so.

A person in charge may take other measures to prevent a person from being exposed to secondhand smoke.

Sheriffs and municipal police officers may issue citations if they observe someone smoking where it is not permitted, or they may respond to citizen complaints or when notified by the person in charge of a facility. The Wisconsin Department of Justice is also authorized to enforce the antismoking law.

An arrest or conviction for a violation of the law may not be considered in any action to revoke, suspend, or refuse to renew an alcohol beverage license or permit.

### FOR MORE INFORMATION

For additional information about current laws relating to smoking and tobacco, see Wisconsin Brief 01-8, "Wisconsin's Clean Indoor Air Act and Other Smoking and Tobacco Regulation," available at: <http://www.legis.wisconsin.gov/lrb/pubs/wisbriefs.htm>. Among various topics, this brief discusses the prohibition against children possessing tobacco products [s. 254.92 (2)].

## THE SMOKING BAN

---

### A WISCONSIN DEPARTMENT OF JUSTICE ADVISORY MEMORANDUM ON 2009 WI ACT 12 (July 2, 2010)

#### I. INTRODUCTION

This Wisconsin Department of Justice (DOJ) memorandum (the "Advisory") is intended to assist law enforcement and other groups in addressing the new requirements established by 2009 Wisconsin Act 12 that relate to smoking in public places. The Advisory summarizes the requirements of Act 12 and how the Act is enforced. Finally, the Advisory concludes with some frequently asked questions about the Act.

#### II. SUMMARY OF THE LAW

Act 12, which takes effect July 5, 2010, amends the current law restricting smoking under Wis. Stat. § 101.123. Act 12 expands the breadth of the prohibition against smoking and limits the exceptions where smoking is prohibited. In particular, Act 12 lists fifteen specific enclosed places where smoking is prohibited and then includes a catch-all provision that prohibits smoking in all other "enclosed places" that are "places of employment" or that are "public places." Act 12 removes the general exception for designated smoking areas. It also retains from current law the four specific outdoor areas where smoking is prohibited. Additionally, Act 12 specifically prohibits smoking in sports arenas, bus shelters and public conveyances, even if those places don't meet the definition of "enclosed place."

Act 12 provides that any local ordinance regulating or prohibiting outside smoking must comply with Act 12, applies only to public property under the municipality's jurisdiction, and must allow a "person in charge" of restaurants, taverns, private clubs, or retail establishments to designate an outside smoking area within a reasonable distance from any entrance to the establishment.

Finally, Act 12 requires a "person in charge" of a place subject to Act 12 to take the necessary steps to ensure compliance with the Act. Act 12 creates a legal obligation on smokers and persons in charge of places where smoking is prohibited and increases the penalty for violations of the Act. The Wisconsin Department of Justice and local law enforcement are authorized to enforce Act 12.

### III. IMPORTANT DEFINITIONS

**“Smoking”** – burning or holding, or inhaling or exhaling smoke from, any of the following items containing tobacco:

- A lighted cigar.
- A lighted cigarette.
- A lighted pipe.
- Any other lighted smoking equipment.

Wis. Stat. §101.123(1)(h)

**“Enclosed place”** – a structure or area that has all of the following:

- A roof.
- More than 2 substantial walls.

Wis. Stat. §101.123(1)(ak)

**“Place of employment”** – any enclosed place that employees normally frequent during the course of employment, including

- 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.

Wis. Stat. §101.123(1)(dj)

**“Public place”** – any 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.

Wis. Stat. §101.123(1)(eg)

“**Person in charge**” – the person, or his or her agent, who ultimately controls, governs or directs the activities aboard a public conveyance or at a location where smoking is prohibited or regulated under this section.

Wis. Stat. §101.123(1)(d)

“**Substantial wall**” – a wall with no opening or with an opening that either does not allow air in from outside or is less than 25 percent of the wall’s surface area.<sup>1</sup>

Wis. Stat. § 101.123(1)(id)

#### IV. THE PROHIBITION ON SMOKING

Starting July 5, 2010, smoking is not permitted in “enclosed places” that are “places of employment” or “public places.” Wis. Stat. § 101.123(2)(a)(9). Additionally, smoking is specifically prohibited in the following enclosed places and outdoor areas:

- State Capitol and immediate vicinity;
- Residence halls of colleges and universities (including any location 25 feet or less from a residence hall or dormitory owned or operated by the Board of Regents of the University of Wisconsin System);
- Day care centers (including outdoor premises when children are present);
- Educational facilities;
- Correctional facilities (and anywhere on the grounds of a Type 1 juvenile correctional facility);
- State institutions (mental health, developmentally disabled persons);
- All restaurants and taverns;
- All retail establishments;
- Private clubs (any facility used by an organization that limits membership and is organized for recreational, social, political etc. purposes);
- Common areas of multi unit residential properties;
- Hotels, motels, bed & breakfasts, and tourist rooming houses;
- All municipal buildings;
- Sports Arenas of all kinds including Lambeau Field, Miller Park, stadiums, pavilions, gymnasiums, swimming pools, or other buildings where spectator sporting events are held (whether or not they fit the definition of an enclosed space);
- Health and medical centers including hospitals, physician’s offices, treatment centers;
- Inpatient health care facilities (county home, nursing homes, hospice, veteran’s home); and
- Theaters.

---

<sup>1</sup> Originally the Act defined “substantial wall” as “a wall with an opening that may be used to allow air in from the outside that is less than 25 percent of the wall’s surface area.” However, this definition was revised on May 11, 2010, by 2009 Wis. Act 276.

whether the ordinance logically conflicts with state legislation; whether the ordinance defeats the purpose of the state legislation; or whether the ordinance violates the spirit of state legislation. *Id.* at 651-652.

#### FREQUENTLY ASKED QUESTIONS:

**Q1:** *Can a municipality enact an ordinance that defines the term “enclosed place” or “substantial wall” in a manner that allows it to prohibit smoking in places that are not subject to the prohibitions in Act 12?*

**A:** A municipality may not restrict outside smoking except on public property under its jurisdiction and so long as such ordinances allow a restaurant, tavern, private club, or retail establishment to designate an outside smoking area that is a “reasonable distance” from any entrance. With respect to indoor smoking prohibitions, Act 12 does not limit a municipality’s authority to enact an ordinance that protects the health and comfort of the public. Wis. Stat. §101.123(4m). Act 12 does not expressly define “outside smoking” or “inside smoking.” To the extent a local ordinance defines “enclosed place” or “substantial wall” in a manner that is expressly preempted by the state law, logically conflicts with state law, defeats the purpose of the state law, or violates the spirit of the state law, it would be preempted.

**Q2:** *Does a wall with a window or door that makes up more than 25% of the surface area of the wall constitute a “substantial wall” if the window or door is closed?*

**A:** Yes. Act 12 defines “substantial wall” as “[1] a wall with no opening or [2] with an opening that either does not allow air in from outside or is less than 25 percent of the wall’s surface area.” Thus, the opening must be larger than 25% of the wall’s surface area *and* allow in air from the outside if the wall is not to be considered a substantial wall. Closing all openings or partially closing some or all openings, such that less than 25% of a wall’s surface area is allowing in air from the outside, makes the wall a “substantial wall” for purposes of the Act.

**Q3:** *Can a municipality regulate outside smoking?*

**A:** To a limited degree. Under Act 12, municipal ordinances regulating or prohibiting outside smoking would need to satisfy the following requirements:

- Comply with the purpose of Act 12 and protect the health and comfort of the public;
- Apply only to public property under the jurisdiction of the county, city, village, town, or school district;
- Allow a restaurant, tavern, private club, or retail establishment to designate an outside area that is a “reasonable distance” from any entrance for smoking; and

- Refrain from defining the term “reasonable distance” or setting any specified measured distance as being a “reasonable distance.”

*Q4: Who has the authority to enforce the smoking ban pursuant to Act 12?*

**A:** Both local law enforcement personnel and the Wisconsin Department of Justice have authority to enforce Act 12. Prosecution of forfeiture actions rests with the district attorneys; though local officials may prosecute municipal ordinances that are not preempted. All affected individuals may bring a civil action to enjoin violations of the Act.

*Q5: Can a municipality adopt an ordinance giving authority to a person or agency other than the police department to enforce a smoking ban?*

**A:** Act 12 does not prohibit municipalities from enacting local ordinances that vest enforcement authority in an agency other than law enforcement. However, no ordinance may regulate subject matter preempted by state law.

*Q6: Who is a “person in charge” and does such a person include any employee of a bar or restaurant who is working at the time of the smoking incident?*

**A:** Act 12 defines “Person in charge” as the person, or his or her agent, who ultimately controls, governs or directs the activities aboard a form of public transportation or at a location where smoking is prohibited or regulated. Because an employee of a restaurant is an agent of the restaurant owner, an employee may be a “person in charge.” Enforcement authorities have discretion when determining who should be referred to a district attorney for a forfeiture action.

*Q7: Can enforcement be done through a citation?*

**A:** Act 12 does not authorize the use of citations by law enforcement as a mechanism to enforce the state smoking ban. District attorneys, therefore, will have to use a civil complaint when bringing forfeiture actions to enforce Act 12.

Citations may be used to enforce local ordinances that are not preempted by state law, should the ordinance provide for such an enforcement mechanism.

*Q8: Who provides the smoke-free signage required by Act 12?*

**A:** Persons in charge are obligated to comply with the signage provisions of Act 12. However, the Department of Commerce shall, by rule, specify uniform dimensions and other characteristics of the signs required under Act 12. Resources for businesses and employers, including signs, are already available at: [www.WIBetterSmokeFree.com](http://www.WIBetterSmokeFree.com)

*Q9: Are bleachers used for watching softball games and tournaments at village, city and county parks to be smoke-free?*

**A:** It will depend on the circumstances, but Act 12 does not prohibit smoking in such places unless the bleachers are in a sports arena or some enclosed place. Act 12 defines "sports arena" as any stadium, pavilion, gymnasium, swimming pool, skating rink, bowling center, or other building where spectator sporting events are held.

*Q10: Are there any guidelines as to how local law enforcement should deal with complaint calls and letters?*

**A:** No. Local law enforcement must use its discretion as to how to handle complaints and what resources and protocols it will establish to enforce Act 12. This is no different than enforcing laws (and often complementary ordinances) that provide for forfeitures in other circumstances.

*Q11: Will someone else (other than local law enforcement) be coming out to tell an operator if their structure is in compliance with the Act or not? Or will that be the role of local law enforcement?*

**A:** It is an operator's responsibility to comply with state law. Nothing in Act 12 imposes a duty on law enforcement to inform an operator whether smoking is permitted at a facility, except that a forfeiture action for certain violations of the Act may not be initiated against a "person in charge" unless that person has received a prior warning notice.

*Q12: Where do complaints get collected?*

**A:** Individuals wishing to report violations shall be directed to local law enforcement for follow-up. A statewide complaint phone line (1-800-NO-SMOKE) and website ([www.WIBetterSmokeFree.com](http://www.WIBetterSmokeFree.com)) will also be available through the Department of Health Services to collect and forward complaints to local law enforcement. When a complaint is received through the phone line or through the website, a letter will be sent to local law enforcement with a copy going to the establishment about which the complaint was filed. Local law enforcement will have to use its discretion in responding to complaints.

Prepared by:  
Abigail C. S. Potts, Assistant Attorney General

# Commerce involvement with “No Smoking” law will be minimal

As developed by the legislature and signed by the governor, 2009 Wisconsin Act 12 sets forth statewide restrictions on smoking in places of employment and other spaces. The act, which is effective July 5, 2010, will stand on its own and will not be the subject of further rules from Commerce, except for specifications related to “No Smoking” signs.

Smoking and related restrictions are not governed by the Wisconsin Commercial Building Code. Therefore, while Commerce has the authority to review construction plans for building code purposes, the department does not have the authority to perform any smoking-ban interpretations, inspections, plan reviews or enforcement. Commerce staff will not be defining terms in the law or providing consultation on the law.

Enforcement, according to Act 12, can be done by the state Department of Justice or by local law enforcement officials.

Municipalities will have the ability to create ordinances or policies related to smoking. These ordinances or policies may be more stringent than set forth in Act. 12. Questions concerning restrictions on smoking in public spaces can be directed to local officials.

## WISCONSIN'S NEW SMOKE-FREE LAW

# FREQUENTLY ASKED QUESTIONS

by Anita T. Gallucci, Attorney and  
Rhonda R. Hazen, Attorney

### Q WHAT DOES WISCONSIN'S NEW SMOKE-FREE LAW REGULATE?

On May 18, 2009, Governor Jim Doyle signed 2009 Wisconsin Act 12 into law ("Act 12"). Act 12 amended Section 101.123 of the Wisconsin Statutes (Wisconsin's Smoke-Free Law), which codified Wisconsin's prohibitions on smoking. The amended Wisconsin Smoke-Free Law applies statewide and expands the smoking prohibition to include "enclosed places" that are either public places or places of employment. Act 12 also impacts to a certain degree how much authority local units of government have to prohibit and regulate smoking through their local laws.

### Q WHEN DOES THE AMENDED WISCONSIN SMOKE-FREE LAW GO INTO EFFECT?

The amendments to the Wisconsin Smoke-Free Law will become effective on July 5, 2010.

### Q MUST A LOCAL UNIT OF GOVERNMENT ADOPT AN ORDINANCE TO COMPLY WITH THE NEW SMOKE-FREE LAW?

If a local unit of government does not have a local ordinance regulating or prohibiting smoking, it does not need to do anything with its ordinances to remain in compliance with Wisconsin's Smoke-Free Law. The statute allows a local government to regulate smoking locally, but does not require an ordinance to be enacted. In the absence of a local ordinance, the state prohibitions on smoking will still apply and may be enforced by state and local law enforcement and the Wisconsin Department of Justice as violations of state law.

The authors are attorneys with the Boardman Law Firm. They may be reached as follows: Anita T. Gallucci <agallucci@boardmanlawfirm.com> and Rhonda R. Hazen <rhazen@boardmanlawfirm.com>.

Boardman Law Firm is a trade name for Boardman, Suhr, Curry & Field LLP, a limited liability partnership. The information contained in this article is for informational purposes only and should not be construed as legal advice on any subject matter. Recipients of this information should not act upon it without consulting legal counsel as individual situations and facts vary.

### Q WHAT IMPACT WILL THE NEW WISCONSIN SMOKE-FREE LAW HAVE ON EXISTING LOCAL SMOKE-FREE ORDINANCES?

If a local unit of government currently has an ordinance regulating or prohibiting smoking, officials will want to review the ordinance and ensure that it is applied and enforced in ways that comply with the new Smoke-Free Law. Effective July 5, 2010, local ordinances will still be able to prohibit or regulate smoking indoors and on public property under the municipality's jurisdiction, but there will need to be specific exceptions for outdoor, private property. For these areas, a person in charge of a restaurant, tavern, private club, or retail establishment must be able to designate an outside smoking area that is a reasonable distance from the establishment's entrance. Municipal officials are therefore urged to review existing ordinances with counsel to assess whether they comply with and are being enforced consistent with the new Smoke-Free Law.

### Q CAN A LOCAL UNIT OF GOVERNMENT MODIFY THE PENALTY PROVISIONS OF THE NEW SMOKE-FREE LAW?

*Smoking Ban FAQs  
continued on page 200*

*Smoking Ban FAQs  
from page 199*

Act 12 establishes that violations of portions of Wisconsin's Smoke-Free Law could carry a forfeiture penalty of "not less than \$100 nor more than \$250 for each violation." A municipality could potentially increase these forfeiture amounts. For example, most municipal ordinances have general penalty provisions that apply to their ordinance violations. Violations of a local Smoke-Free ordinance could therefore be made subject to these same general penalty provisions. This decision should also be reviewed with local counsel to ensure the penalties remain reasonable in light of the state Smoke-Free Law.

⊙ CAN A LOCAL UNIT OF GOVERNMENT MODIFY THE DEFINITION OF "ENCLOSED PLACE" SET FORTH IN THE NEW SMOKE-FREE LAW?

Wisconsin's new Smoke-Free Law prohibits smoking in "enclosed places" that are either places of employment or public places. The statute defines "enclosed place" as a structure or area that has a roof and more than two "substantial walls." Wis. Stat. sec. 101.123(1)(ak). Municipalities may wish to provide a more specific definition of the term, such as the following definition that the Wisconsin Department of Commerce (DOC) was considering adopting as an administrative rule: 2 "Enclosed indoor area," means all space between a floor and a ceiling that is bounded by walls, doors, or windows, whether open or closed, covering more than 50 percent of the combined surface area of the vertical planes constituting the perimeter of the area. A wall includes any retractable divider, garage door, or other physical

barrier, whether temporary or permanent. A 0.0 11 gauge screen with an 18 by 16 mesh count is not a wall."

⊙ CAN A LOCAL UNIT OF GOVERNMENT OPT OUT OF THE STATE-WIDE SMOKE-FREE LAW?

No. A local unit government can not opt out of Wisconsin's Smoke-Free Law by "legalizing" smoking within its boundaries. A local unit of government may choose not to enforce the law as a local ordinance violation, but the state prohibitions and requirements will still apply within the municipality's boundaries. The law can still be enforced by local police officers, county sheriff officials or Wisconsin's Department of Justice, but it would be enforced as a state matter, not a local ordinance violation.

⊙ WHO IS RESPONSIBLE FOR ENFORCING THE LAW?

The Wisconsin Smoke-Free Law can be enforced as a state matter by the Wisconsin Department of Justice, county sheriffs or local police officers or constables. If a violation occurs, any of these officials could write a citation just as if they were addressing a violation of another state law. The matter would be addressed through the county circuit court. In addition, if a local ordinance is enacted, it could be enforced through the local court as well.

⊙ DOES A LOCAL UNIT OF GOVERNMENT HAVE TO ADD ANYTHING TO THEIR LOCAL ORDINANCE OR CODE TO ENFORCE THE LAW?

Local units of government do not need to add to their ordinances to be able

to enforce the smoking prohibition as a state law matter. If the local unit of government wishes to enforce the law as a local matter (i.e., a violation of a local ordinance) it will need to enact an ordinance that complies with Wisconsin's Smoke-Free Law.

⊙ CAN ANYTHING BE DONE IF A LOCAL ENFORCEMENT AGENCY REFUSES TO ENFORCE THE LAW?

Wisconsin statutes contain mandatory language requiring sheriffs and local officers to enforce Wisconsin's Smoke-Free Law. Section 165.60 of the Wisconsin Statutes states that the officers "shall likewise enforce those sections." Thus, there is an obligation to enforce the law. In reality, however, it may be that one or more local officers or sheriffs do not focus on or strictly enforce the Smoke-Free Law. If this occurs, a citizen or municipal official may present their concern to the municipal governing body or police commission and request more strict regulation or potentially disciplinary action of the officials involved. Alternatively the citizen or municipal official could request enforcement by the Department of Justice or a different officer. Further, a citizen or municipal official could file a civil action seeking an injunction to stop repeated violations of the law.

Finally, interested persons may also access an on-line complaint form <<http://www.wibettersmokefree.com>>. Also, the Wisconsin Department of Health Services has a hot-line to call for enforcement and compliance issues with the law. The number is posted on the League website, <[www.lwm-info.org](http://www.lwm-info.org)>.

Powers of Municipalities 914

## Municipal Ordinances Can Clear up Ambiguity

Municipal officials should consult their legal counsel if the municipality is interested in adopting a no smoking ordinance that provides an unambiguous definition of “enclosed place” or uses different language to describe indoor areas subject to the smoking ban.

### POSSIBLE SOLUTIONS

One option would be to adopt language similar to what the Department of Commerce was considering as part of a rulemaking on the smoking ban. While the agency has decided not to proceed with the rulemaking, the language they were considering could serve as a model for municipalities. The proposed rule would have prohibited smoking in any “enclosed indoor areas.”

An “enclosed indoor area” was defined to mean “all space between a floor and a ceiling that is bounded by walls, doors, or windows, whether open or closed, covering more than 50 percent of the combined surface area of the vertical planes constituting the perimeter of the area. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent. A 0.011 gauge screen with an 18 by 16 mesh count is not a wall.”

This definition is clearer and easier to apply than the definition of “enclosed place” in Act 12.

Another option would be to adopt language similar to the City of Verona’s no smoking ordinance. That ordinance prohibits smoking in “any enclosed area of a place of employment.” “Enclosed area” is defined as “all space between a floor and ceiling that is enclosed on all sides by permanent or temporary walls or windows (exclusive of doorways), which extend from the floor to the ceiling.”

A municipality may adopt an ordinance clarifying application of the no smoking law to indoor areas in their community at any time before or after the state law takes effect on July 5th.

### LOCAL REGULATION OF OUTDOOR AREAS PREEMPTED.

Bear in mind that Act 12 greatly limits municipal authority to regulate smoking outside of buildings. Under the Act, municipalities only have authority to prohibit outdoor smoking on municipally owned property. This means, for example, that municipalities may not prohibit smoking in outdoor seating areas of restaurants.

*Smoking ban  
continued on page 198*

“  
P  
PURSUANT  
TO THIS GRANT  
OF AUTHORITY,  
A MUNICIPALITY  
CAN ADOPT AN  
ORDINANCE THAT  
CLARIFIES WHAT  
INDOOR AREAS ARE  
SUBJECT TO THE  
SMOKE-FREE LAW.”

## LEGAL NOTE

*Smoking Ban  
from page 197*

The state law explicitly provides that the person in charge of a restaurant, tavern, private club, or retail establishment 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. A local ordinance may not define what qualifies as a "reasonable distance" from the establishment and bars.

### CONCLUSION

The new state smoking ban that takes effect July 5 has some holes in it that could be filled by adopting a local ordinance. The new state law prohibits smoking in enclosed places of employment, including bars and restaurants. The definition of enclosed place is confusing and open to interpretation. Municipalities may want to adopt a no smoking ordinance that provides an unambiguous definition of "enclosed place" or uses different language to describe indoor areas subject to the smoking ban.

Smoke-Free Wisconsin has published a helpful FAQ on the state smoking ban written by the Boardman Law Firm. It appears on the next page of this issue of *the Municipality*. We have posted the FAQ and other information on the smoking ban on our Website: <<http://www.lwm-info>>.

Powers of Municipalities 913

## Smoke-Free But Still Not Clear?

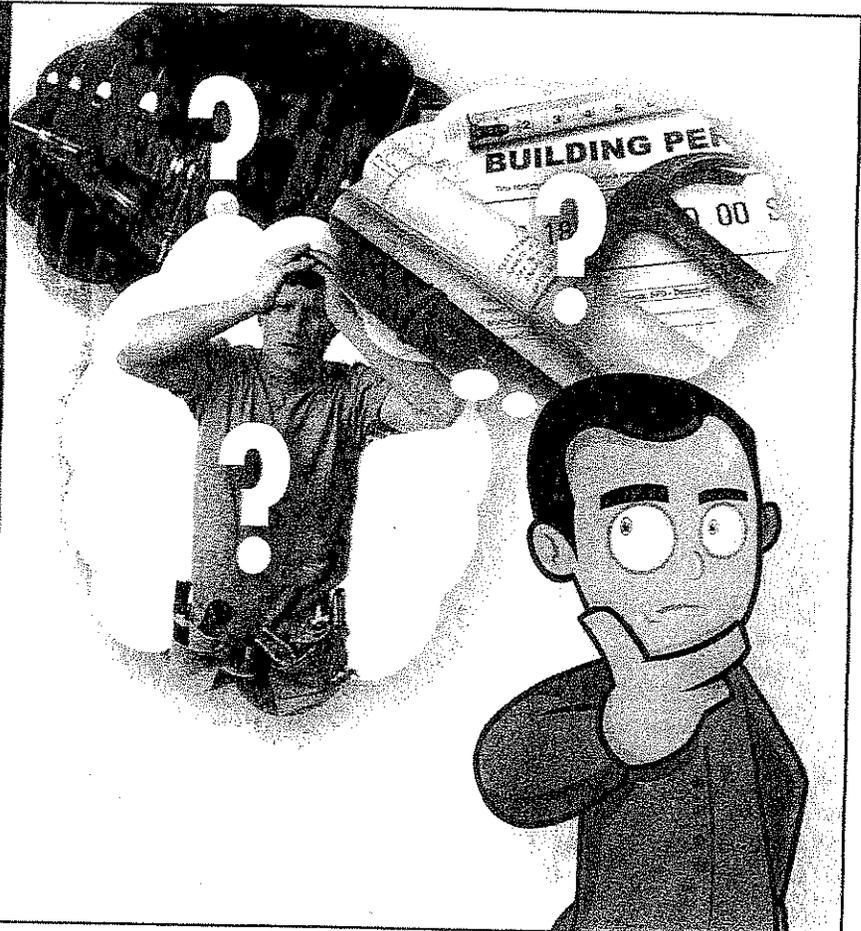
Will you be ready to answer questions from local businesses?

Bar & Restaurant owners are bound to have questions about what is permitted for outdoor smoking areas. Do you have the answers?

- Indoor smoking will be prohibited beginning July 5, 2010
- Outdoor smoking areas may not be 100% enclosed (no smoking rooms)
- Designated outdoor smoking areas must be a reasonable distance from entrances

SmokeFree Wisconsin is your resource for information on regulations, requirements & more.

For more information visit  
[WWW.SMOKEFREEWI.ORG](http://WWW.SMOKEFREEWI.ORG)  
& click on implementation  
or call Erich at (608) 268-2620





April 28, 2010

Dear TLW Member:

As a Member of the Tavern League of Wisconsin I wanted to provide you with the most recent and accurate information relating to the implementation of the statewide smoking ban on July 5<sup>th</sup>. As you know, the Tavern League of Wisconsin successfully defeated the smoking ban for a number of years. However, Governor Jim Doyle made it a top priority in his budget bill and he was successful in securing its passage. We worked hard to amend the law to make it fair and reasonable for small business. We believe we accomplished that goal and have one of the most reasonable smoking bans in the nation.

There has been recent confusion and rumors relating to the role of the Department of Commerce and proposed changes to outdoor smoking areas. The Department of Commerce will not be pursuing any changes relating to outdoor smoking areas. The Legislature passed a technical change to the definition of a substantial wall and as a result the Department of Commerce dropped their proposal for regulation of outdoor smoking areas. The Department of Commerce can not change the law to regulate outdoor smoking areas.

The following are the facts and statutory references relating to the new smoking ban. This is a state law and will pre-empt local ordinances that are in conflict with the law regulating smoking at licensed establishments effective July 5<sup>th</sup>. If you have problems with your local municipality or have specific questions please contact us. We want to help assist you through any problems you may experience with local officials. In short, local municipalities must follow the state law and may not regulate outdoor smoking areas of licensed establishments.

### The FACTS About the Smoking Ban

#### Local Government Regulation

1. Local government cannot regulate outdoor smoking at taverns or restaurants which have a "Class B" or Class "B" on premise license. Wis. Stat. § 101.123(4m).

The law passed by the legislature will replace all local existing municipal ordinances relating to smoking bans regulating Class B licensed establishments. Under the new law, no county, city, village or town may enact an ordinance prohibiting smoking outside of a licensed tavern or

restaurant. Instead, a local government's authority over regulating "outside smoking" is limited and "may apply only to public property under the jurisdiction." Wis. Stat. § 101.123(4m).

### **July 5<sup>th</sup> – Smoking Prohibited in Enclosed Places**

2. Effective July 5<sup>th</sup>, smoking **IS NOT** permitted in an enclosed place. Effective July 5, all existing local ordinances relating to regulation of smoking at a licensed premise are in conflict with the requirements under the statewide smoking ban (unless they mirror the state law), and, as a result, are likely unenforceable. Instead, the state law is the law all local governments and licensed premises must follow. An "enclosed place" must have all of the following: Wis. Stat. § 101.123(1)(ak)

- 1) A roof.
- 2) More than 2 substantial walls.

A substantial wall means a wall with no opening or with an opening that either does not allow air in from the outside or is less than 25 percent of the wall's surface area. Wis. Stat. § 101.123(1)(id) – as amended by Senate Amendment 1, to Assembly Bill 720.

A municipality may not pass an ordinance to restrict smoking on private property outside of a licensed establishment. Instead, the municipality is limited to regulating "outside smoking" only on "public property under the jurisdiction" of the municipality. Moreover, under the law, a licensee may designate an outside smoking area that is a reasonable distance from any entrance to the establishment. However, a local ordinance "may not define the term 'reasonable distance' or set any specified measured distance as being a 'reasonable distance.'" Wis. Stat. § 101.123(4m).

Smoking is permitted in any outside smoking structure which does not meet the definition of an enclosed place. This is a state law and a municipality **can not** pass any ordinance making the law more or less restrictive because it is an outside smoking location on private property.

### **Uniform Statewide Penalties**

3. Effective July 5, the following are penalties for violation of the statewide smoking ban. Any existing municipal penalties relating to outdoor smoking areas of a licensed establishment are likely unenforceable. The law can only be enforced by local or state law enforcement. All licensees shall receive a written warning notice for the first smoking violation and any subsequent smoking violations may not exceed \$100 for all violations occurring on a single day. Wis. Stat. § 101.123(8).

A municipality can not revoke, suspend or refuse to renew a "Class B" or Class "B" license or permit for any violations of the smoking ban. Wis. Stat. § 125.12(1)(c).

A person ticketed for smoking in an enclosed place may be fined between \$100 and \$250. Wis. Stat. § 101.123(8)

There are sure to be questions as we move closer to July 5<sup>th</sup> but we wanted to make sure you had the facts relating to the state law and the smoking ban. This is the state law which takes effect July 5<sup>th</sup> and if you or your local municipal officials have questions please contact us. We have retained a lawyer well versed in the law and he will help assist our Membership through the implementation of the smoking ban.

First and foremost we want to make sure to protect our Members and provide you with the information you will need to prepare for the smoking ban. As you can see the law allows for you to have outdoor smoking areas and will eliminate all existing local smoking ban ordinances and fines and replace it with one statewide law. Further, your license may not be revoked, suspended or not renewed as a result of any violations of the smoking ban. We worked very hard to make sure if a ban was going to pass it would be reasonable and one that could accommodate our Membership. Thank you for your Membership.

Sincerely,

Rob Swearingen

TLW President

Contact TLW Office: Toll free 1-800-445-9221 or Email:

For more information go to: [www.tlw.org](http://www.tlw.org) click on smoking ban link

Follow us on Facebook:

<http://www.facebook.com/pages/Tavern-League-of-Wisconsin/110005838667>

Follow us on Twitter: <http://twitter.com/TavernLeague>

You have received this message because you have subscribed to a mailing list of Tavern League of Wisconsin. If you do not wish to receive periodic emails from this source, please click below to unsubscribe.