

SMOKING REGULATIONS

- The Government has published draft regulations setting out plans to implement the smoking ban in England. The draft regulations provide more detail on how the ban will be applied in practice, and in particular the treatment of external areas.
- This note summarises the key proposals, setting out the implications for licensed retailers and recommending an industry response to them. It concludes by providing advice to members considering how best to plan operations post-ban.

The Law

- The Health Act will require all workplaces and enclosed public places to be smoke free. The draft regulations set out how this is to be applied in practice – the definition of an enclosed space, the implications for vehicles, private accommodation at work and guest accommodation – as well as the proposed requirements for compliance and enforcement.
- **Enclosed space:** the Government has opted to mirror the Scottish ban in requiring all wholly enclosed premises to be smoke free. Smoking will also be banned in premises or parts of the premises which are “substantially enclosed” – that is areas which are roofed and where less than half of the wall space is open.
- **Guest accommodation:** operators will be free to allow smoking in designated guest bedrooms, provided that they meet certain minimum requirements. Smoking is not permitted in common parts or corridors and the exemption only applies to guest bedrooms – you cannot designate a smoking lounge in a hotel, for example. The regulations also state that staff cannot smoke in these rooms as smoking at work is banned
- **Private accommodation:** the ban does not apply to private accommodation, such as company flats, unless the premises as a whole or a room within it is used solely for working in and is shared with other workers. This is particularly relevant for traditional ‘over the shop’ accommodation as it will depend upon how the premises is used as to whether smoking may be permitted.
- **Vehicles:** pool cars and other vehicles which are used for work and which are shared by more than one person will be required to be smoke free at all times. They will also be required to display a no smoking sign. Smoking will be allowed in company cars which are provided for the sole use of an individual driver.
- **Signage:** the operator/manager will be required to ensure that they display at least one “no smoking” sign at the entry to the premises which meets minimum signage requirements - flat, rectangular sign at least A5 in size, displaying the “no smoking” symbol and carrying the words “No smoking. It is against the law to smoke in these premises”.
- **Enforcement:** the ban will be enforced by local authorities – most likely EHOs and police/council licensing teams. A light touch is envisaged, with most offences being handled by means of a fixed penalty notice:

Smoking in a smoke-free place £30 fixed penalty
notice

Failure to display no-smoking sign £150 fixed penalty
notice

Failing to prevent smoking in a smoke free place fine of up to £2500

The penalty for operators failing to prevent smoking cannot be dealt with via a fixed penalty notice, but would only be applied to repeat offenders knowingly allowing smoking.

What does it mean for operators?

- Although the draft regulations provide some detail, there are still considerable areas of uncertainty. These grey areas are open to interpretation and may only be determined once the new regime is tested in the courts. However, the following is our interpretation of what the regulations mean for operators.
- **Enclosed space:** the key issue will be to ensure that existing or planned external areas do not fall foul of the “substantially enclosed” definition. An external area which is unroofed but which has solid walls or perimeter boundaries eg a small courtyard would not be considered to be enclosed, but it is a moot point as to what constitutes a roof and how much of the area must be roofed to bring it within the definition. The draft regulation makes clear that a “roof” includes fixed or moveable structures or devices such as canvas awnings, which are capable of covering all or part of the premises as a roof but it is unclear whether umbrellas would be included if they only covered a small part of the roof area.

In respect of wall space, again temporary structures such as canvas windbreaks which form the perimeter of the premises or smoking area would be included within the calculation of wall space. If smoking is to be allowed, then half of the wall area must be open – windows and doors are not considered to be open spaces for this purpose.

Operators wishing to provide external smoking areas will need to ensure that their facilities

meet these tests. If a structure falls foul of the regulations then smoking will not be allowed even in external areas. Operators with existing external structures should reassess them to see whether they comply with the requirements.

- **Guest accommodation:** operators can continue to have “smoking” bedrooms, but these must be specifically designated and clearly marked. Operators should maintain a list of bedrooms where smoking is permitted and have this available for inspection. Rooms should be clearly marked so that guests are aware that smoking is permitted, but operators will be free to determine how to do this. Most hotel accommodation already meets these two requirements, but if smoking bedrooms are to be retained then operators must fit mechanical closers on bedroom door.
- **Private accommodation:** the Act will not ban smoking in the home, even in private accommodation which is provided as part of the job and where an employee may, from time to time, carry out work-related activities. Smoking would only be banned in private accommodation if it was solely used for work purposes and other members of staff worked there as well. This is not likely to apply to the whole of the residential area, but could apply to a room within the dwelling set aside as an office.

In terms of traditional pub accommodation, tenants and managers would be free to smoke in any wholly residential area. However, smoking will be banned in any shared parts of the premises where people may work such as common parts, internal stairways or shared kitchens. In most cases, the pub office will not be located within the residential area but if it is, then that room should be designated as smoke free. If a manager or tenant decides to turn a bedroom within the flat into a home-office, they will be free to smoke in there provided no other members of staff use the room for work purposes.

- **Signage:** the draft regulations set out minimum legal requirements, but operators will be free to vary the size and wording. The Government will be providing basic signage for premises and smoking bedrooms free of charge, but this is only likely to be electronic.

Next Steps

- The proposals are subject to public consultation and will not be finalised until the Autumn. Final regulations will need to be formally tabled and are likely to be approved by Parliament in the New Year. They must then be formally tabled and are likely to be approved by Parliament in the New Year. No implementation date has been confirmed at present, but the Government continues to favour Spring/Summer 2007.
- Whilst some of the details may change as a result of the consultation, the broad thrust of the legislation is unlikely to be altered significantly. Operators should therefore now start considering their strategic response to minimise the likely downsides to any ban:
 - **review:** look at your existing external facilities to determine whether they meet the “enclosed” tests or whether they need altering to comply eg a large canopy over a courtyard will probably mean the space must be smoke free. Review planned developments to ensure that you maximise smoking space
 - **planning:** talk to your local planning office now in general terms to determine what type of external structures they consider require planning permission – not all temporary structures will require full planning permission and you may be able to get applications in now before the local authority has had an opportunity to consider and adopt a specific policy on smoking shelters or take account of licensing implications
 - **smoking policy:** consider developing or revising internal smoking policies. Existing Charter activity could be modified. Move incrementally towards banning smoking at work and ensuring that this is included in staff handbooks. Begin to revise training programmes for staff to include reference to dealing with customers who smoke post-ban. This would be helpful in demonstrating due diligence should you find yourself in a position of being penalised for allowing smoking on the premises
 - **alterations:** if you have guest accommodation, make sure that you take the necessary steps to designate them as “smoking” bedrooms. In particular, you must fit automatic door closers.