

SMOKING REGULATIONS PLAN FOR THE BAN

- The Government has now finalised plans to ban smoking in public places in England from 6am Sunday 1 July 2007. Detailed rules regulating the treatment of enclosed and semi-enclosed areas, signage, exemptions and enforcement are currently before Parliament and will shortly be approved.
- This note summarises the key proposals, setting out the implications for licensed retailers. It concludes by providing advice to members considering how best to plan operations post-ban.

Treatment of external areas

- The Health Act will require all “enclosed” and “semi-enclosed” public places to be smoke-free. Although the final regulations provide some detail as to how this will be applied, there are still considerable areas of uncertainty which may only be clarified through individual discussions with planners and ultimately appeal and court action.
- Premises will be considered to be **enclosed** if they have a **ceiling or roof** and except for doors, windows or passageways, are **wholly enclosed** whether on a **permanent or temporary** basis.
- Premises will be considered to be **substantially enclosed** if they have a ceiling or a roof which covers all or part of the area and **less than half** of the total area of the walls is permanently open – no account is taken of windows or doors.
- The key issue for operators will be to ensure that existing or planned external areas do not fall foul of the “substantially enclosed” definition. Outside areas can only be smoke-free if they are either unroofed or the walls, windows and doors take up less than half of the outside. The key thing to bear in mind for roofed facilities is that at least half the perimeter must be open to the elements.
- There are, however, many grey areas which are open to interpretation. The regulations state that a **roof** includes any **fixed or moveable** structure which covers **all or part** of the area. Canvas awnings are specifically mentioned but large umbrellas could also be included. It is also not clear how much of an area must be roofed to bring it within the definition. Contrary to recent trade press speculation, there is no requirement for a smoking shelter or structure to be a specific distance from the building.
- No definition is provided for walls, but it is likely that 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.
- It is not clear whether the requirement to be smoke free could change according to the way in which a space is used. For example, an awning would be required to be smoke-free if the sides were in place but could it then be designated as a smoking space if the sides were removed? Equally could smokers use a courtyard space when a sun awning or parasol was removed or would the ability to have such a covering automatically mean that the space was designated as smoke free at all times?

Operational Implications and Interpretation

- If you are going to invest in providing external facilities for smokers, then try to ensure that they are dual use facilities rather than smoking ghettos. Ideally, you should seek to extend normal trading areas for all customers to improve investment return. The following are points to bear in mind, but you should also seek advice from planning and licensing specialists – we can put you in touch with the WLA advisers.
- Temporary: Table umbrellas or portable canopies – don't normally require planning permission. The key test is whether they are truly portable, can and are removed at the end of trading or permitted hours. However, umbrellas with logos will require advertising consent – and hence planning consent too.
Cheap and flexible but you do get what you pay for - lots of umbrellas are designed as sun shades so opt for designs built for the Northern European climate
In the rain, awnings or jumbrellas may be better option and are unlikely to fall foul of 50% rule unless erected in confined space eg. a walled courtyard.
- Permanent: awnings, shelters and smoking barns
Always require planning permission. Potential for noise nuisance is a key factor
Awnings must be deep and low to provide protection during bad weather.
Check awnings for wind tolerance, mould, stain and sun fade resistance
Part walls and grilles can help make them secure – check the 50% rule
- Licensing: check your licensing conditions carefully. If you already have a beer garden or licensed forecourt, then you are likely to have restrictions on the hours of use and may have restrictions on the licensable activities you can carry out there. You may need to apply to vary these to allow smokers outside later. However, think carefully about what you actually need – it may be easier to extend the hours for only a small part of the garden and only for smokers. Applications for general use of an external facility past 10pm are likely to fall foul of residents and the council
If you have not previously used your external areas, then you may need to vary your plan to show new areas of consumption. Whilst consumption is not a licensable activity, plans submitted on conversion were required to show areas where drink is to be consumed.
However, you may find it easier to get extended hours for an external area if no consumption is allowed.

The Workplace

- In the rush to protect your bottom line and accommodate smoking customers, it is all too easy to overlook your obligations as an employer. However, the Act will also apply to back of house areas, offices and other work areas.
- All workplaces are required to be smoke free at all times. That means no smoking front of house out of hours, even if there are no customers present. It also means an end to staff smoking rooms. If staff want to smoke they too will have to go outside.
- As an employer, you will need to ensure that back of house work areas and offices display no-smoking signs and that employees are made aware of the ban at work. You will also need to talk to your staff, update staff handbooks and induction programmes to ensure that you have a due diligence defence if a member of staff is found to be smoking on company premises. Acclimatise staff by banning smoking at work ahead of 1 July to get them used to the new arrangements.

Signage

- All premises that are to be smoke-free under the above regulations will also be required to display **no-smoking signs at each public entrance**. The signs must meet minimum legal requirements:
 - at least A5 in size, although can be any shape
 - display the international no smoking symbol at least 70mm in diameter
 - contain the following words *“No smoking. It is against the law to smoke in these premises/this pub/this bar/this restaurant etc”*
- Outlets which are located within other smoke-free premises eg a bar in a railway station or indoor leisure complex such as the Trocadero need only display a no smoking symbol at their entrance. The no-smoking symbol can also be used at entrances to premises which are not for public use eg staff entrances.
- The Department of Health will make available signs to businesses free of charge.

Exemptions

- Whilst the Act introduces a general ban on smoking in public places, there are certain areas within the licensed retail estate where it will remain legal to smoke. Specific exemptions exist for hotel and guest bedrooms, company flats and vehicles.
- **Guest accommodation:** hotels, members' clubs and other accommodation providers will be able to designate certain bedrooms as smoking accommodation providing they have mechanical door closers and do not ventilate into other parts of the property. These rooms should be permanently designated, a central list of all bedrooms in which smoking is allowed should be retained and each room specifically signed. Even though the rooms are smoking rooms, staff should not be permitted to smoke in them whilst cleaning or serving them – at this point in time they are workplaces. The exemption only applies to bedrooms, not guest lounges. In addition, it does not apply to dormitories.
- **Private Accommodation:** the ban does not apply to private accommodation, even company owned property provided as part of the job. In terms of traditional pub accommodation, tenants and managers would be free to smoke in any wholly residential area, but not in communal areas such as stairways between the flat and the bar. However, if any room within the flat was used solely for work purposes by more than one person who does not live there, then that room will be classified as a work place and must be designated as smoke-free. The key test is the use to which the room is put and its use by people other than those living there. If a manager or tenant decides to turn a bedroom within the flat into a home-office for their own use, they will be free to smoke there provided no other members of staff use it for work purposes. In this instance, cleaning does not count as work
- **Company vehicles:** cars and other vehicles which are used by more than one person will be required to be smoke free. The key test is whether the vehicle is shared with another driver or person paid to work in enclosed vehicles eg a pool car or delivery vehicle. However, cars provided by the company for sole use or primarily for private purposes will not be covered by the ban, even if another person travels in them. In respect of convertible cars, they will only be covered by the ban when the roof is in place and is in use. If the roof is stowed away, then a person can smoke in the car even if it is shared

with another driver or would otherwise be covered by the ban. Smoke free cars must display a no-smoking sign and it will be an offence for the driver or individual with management responsibility for the vehicle to allow smoking within it.

Penalties

There are penalties for operators, employers and individuals who breach the ban:

- Failure to display proper signage: £1,000 fine upon conviction or fixed penalty notice of £200 reduced to £150 for prompt payment
- Failure to prevent employee or customer smoking: maximum fine of £2500 for repeat offenders, prosecutable through courts
- Employees or customers caught smoking would also be subject to a fine of £200 or fixed penalty notice of £50 reduced to £30 for prompt payment.

Next Steps

- The Government has undertaken to provide detailed advice and Guidance to businesses on these and other provisions by Easter. Register at www.smokefreeengland.co.uk for further information. Westminster City Council will also be producing guidance for businesses. They will also be hosting a series of information seminars and members should contact Deirdra Hayes (dhayes@westminster.gov.uk) to request a place.

- **In the meantime, operators should:**

review: look at your existing external areas to determine whether they can accommodate smokers and/or meet the “enclosed” tests or whether they need altering to comply
Review planned developments to ensure that you maximize smoking space

planning: talk to your local planning office now in general terms to determine their likely views on applications for external areas, tables and chairs etc. Check hours restrictions on planning consents

consent: as well as planning consent you may need to consider listed building and landlord consent before making alterations.

licensing: check your liquor licence to see whether you need to submit variations. Plans submitted on conversion were required to identify areas of consumption – if you want to allow smokers to drink in previously unused external areas you may need to submit variations. Existing outside areas will probably have conditions governing their time of use which may need to be varied. Other conditions to check include re-admission policies and queue requirements.