



Woolley Bevis Diplock LLP

- Employment -

Are you smoke free compliant?

Smokefree England - what you need to know

- When?

The legislation for the English smoking ban is contained in the Health Act 2006. The smoking ban was introduced at 6am on Sunday 1 July 2007.

- Why?

The new legislation has been introduced to protect employees and the public from the harmful effects of second-hand smoke.

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- Where?

It is now against the law to smoke in virtually all enclosed or substantially enclosed public places, workplaces and in public and work vehicles. There are some limited exemptions. Under the regulations "substantially enclosed" is defined as covering premises which have a roof or ceiling and which are at least 50% surrounded by walls. In particular all licensed premises must be smoke free.

- Compliance

No smoking signs

Under section 6 of the Health Act 2006 any person who occupies or is concerned with the management of smoke free premises is obliged to ensure that no smoking signs are displayed in a prominent position at each entrance to the premises. The regulations

specify that these signs should be no smaller than an A5 piece of paper; display the no smoking symbol; and display the words "No smoking. It is against the law to smoke in these premises". Such no smoking signs must also be displayed in all smoke free vehicles.

Smoking offences

1. Failure to display signs (fixed penalty notice of £200 discounted to £150 if paid within 15 days from the issue of a notice).
2. Smoking in a smoke free place (fixed penalty fine of £50 discounted to £30 if paid within 15 days from issue of a notice).
3. Failing to prevent smoking in a smoke free place (a fine by a court not exceeding level 4 on the standard scale up to £2,500).

There are 3 possible defences for someone charged with failure to prevent smoking in a smoke free place -

- That he or she took reasonable steps to cause the person in question to stop smoking;
- That he or she did not know, or could not reasonably be expected to know, that the person in question was smoking; or
- That on other grounds it was reasonable for him or her not to comply with the duty.

NB. Clear policies with defined sanctions will assist an employer on the question of what reasonable steps were taken.

Smoking in outdoor areas of the workplace

The Health Act 2006 makes no provision with regard to smoking in places which are not enclosed or substantially enclosed. However, if an employer wishes to restrict smoking to a designated area outside the workplace then such employer is strongly advised to have a

clear policy setting out where and when smokers may smoke.

Smoking breaks

Under the Working Time Regulations 1998, which provide for a minimum 20 minute break in any period of work lasting 6 hours or more, the employer will need to consider the policy to be adopted in relation to smoking breaks. In particular the employer is strongly advised to settle on an approach to smoking breaks that does not give smokers an advantage over non-smokers.

Disciplinary action and dismissal

As employers have a statutory obligation to prevent smoking in enclosed or substantially enclosed workplaces, disciplinary action needs to address any problems arising from breaches of the smoking ban. A workplace smoking policy is essential and such policy should set out whether smoking in a smoke free place amounts to gross misconduct. In broad terms an approach of giving a final written warning for the first offence with dismissal if it is repeated would seem to be a much better approach than a single instance of smoking warranting a dismissal without notice. The attached flowchart sets out reasonable steps that could be taken to deal with smoking in any smoke free premises or vehicle.

Responsibility for enforcing the smoke free law

This will be enforced by local Councils and Port Health Authorities within their area of jurisdiction. Environmental Health Officers are likely to visit premises considered to be at high risk of non-compliance. In addition members of the public can call a smoke free compliance line. This can be done anonymously. It is thought that employers will have nothing to fear in the unlikely event that false calls are made.

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