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## Indoor Smoking Ban Takes Effect July 5, 2010 – Guidance for Employers

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### Background

The statewide indoor smoking ban - Wisconsin Statute § 101.123 - takes effect July 5, 2010. The new statute prohibits smoking in all "enclosed places" that are "places of employment" or public places. The "person in charge" is required to enforce the smoking ban in all locations where smoking is prohibited by the statute.

- Smoking means "burning or holding, or inhaling or exhaling smoke" from a lighted cigarette, cigar, pipe or any other lighted smoking equipment containing tobacco.
- An "enclosed place" is defined as an area or structure with a roof and "more than two substantial walls." A substantial wall is "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." In other words a substantial wall is:
  - o a wall with no opening;
  - o a wall with an opening but the opening does *not* allow in air from the outside (e.g., a plate glass window); or
  - o a wall with an opening that is less than 25 percent of the wall's surface area (e.g., a window that is 24 percent or smaller).

If a roofed area has three or more substantial walls, then the smoking ban will apply.

- A "place of employment" is defined by the statute as "any enclosed place that employees frequent during the course of employment" including offices, lobbies, conference rooms, meeting rooms, classrooms, common areas, elevators, stairways, hallways, restrooms, lounges, the employee cafeteria and vehicles.
- A "person in charge" means "the person, or his or her agent" (including employers) who controls the activities where smoking is prohibited by the statute.

This means that starting on July 5, 2010 smoking will be banned inside all enclosed places of employment. Employers are required to comply with the new ban or the employer can be fined.

### Application to Vehicles Used In Employment

The statute specifically identifies vehicles as a "place of employment." The Wisconsin Legislative Council has authored two question and answer documents that discuss the application of the law to vehicles. In one document, the Legislative Council notes that the interior sides of a vehicle must be considered the equivalent of "walls" for purposes of the legislation.

The Legislative Council then went on to note: "However, most vehicles will not be covered since the two sides will have doors and windows that exceed 25% of the surface area of the side and those sides would therefore not be substantial walls. If only the front and back of the interior of the vehicle are substantial walls, the vehicle is not an enclosed place and therefore not subject to the prohibition on smoking."

Ten months later, the Legislative Council issued a second question and answer document. In that document (which was drafted after a revision to the law), the tone had changed with respect to vehicles: 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."

Based on the language of the statute, vehicles that are "normally frequented" in the course of employment are "enclosed places" in which smoking is prohibited, but only if the windows

The following is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

in the vehicle are less than 25% of the surface area of the sides of the vehicle.

Employers can take proactive steps with respect to vehicles that are used in the course of employment by having employees sign an acknowledgement form that is attached to a policy making clear that smoking is not permitted in vehicles that meet the statutory definition of an "enclosed space." Employers can also remove the cigarette lighter and ashtray from any company-owned vehicles.

### Designated Outdoor "Smoking Areas"

Employers may provide outdoor smoking areas where employees may smoke, but the outdoor smoking area must be a "reasonable distance" from any entrances or enclosed common areas. "Reasonable distance" is not defined, nor are local municipalities allowed to designate a "minimum measured distance" (such as a certain number of feet from a place of employment) through local ordinances. As the statute does not provide a distance, common sense is the best guide.

Therefore, employers may designate outdoor smoking areas that are a reasonable distance from common employee entrances. Any outdoor area where smoking is permitted cannot be in an "enclosed place" as defined by the act. For example, any covered smoking area cannot be a roofed structure with three or more substantial walls.

### Consequences for Violating the Ban

A person who violates the smoking ban is subject to a forfeiture of not less than \$100 nor more than \$250 for each violation. Any "person in charge" who violates the mandate (including employers) is subject to a forfeiture of \$100 for each violation. However, the law 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.

### Next Steps for Employers

The statute requires employers to enforce the prohibitions by taking steps to ensure compliance.

Employers must enforce the ban with everyone: employees, visitors, guests and customers.

First, employers may not give anyone permission to smoke in an enclosed place, nor can the employer designate an enclosed place as a smoking area. The statute specifically prohibits employers from providing matches, ashtrays or any equipment for smoking in places where smoking is prohibited. Therefore, any enclosed places where people were previously permitted to smoke should be repurposed to reflect the new ban: ashtrays, matches and smoking equipment should be removed from any and all enclosed areas.

Second, employers must post no-smoking signs and provide "appropriate notification and information concerning the prohibition." The signs must display the international no-smoking symbol (a burning cigarette enclosed with a red circle with a red bar across the cigarette). The no-smoking signs should be prominently posted in all enclosed places to remind employees, visitors, customers and guests that the smoking ban is in effect.

Third, employers must take reasonable efforts to enforce the ban, which includes: asking anyone who is smoking in an indoor area to stop, asking the person to leave if he or she does not stop smoking, and notifying local law enforcement of the violation if the person refuses to leave. Employers are also permitted to take additional steps, such as disciplining employees who violate the ban, to ensure the employer's compliance with the statute.

Finally, employers may take additional proactive measures. For example, employers may amend their employee handbook to reflect the indoor smoking ban and to clearly define where outdoor smoking will be permitted. Employers should also post and distribute notices as soon as possible to inform employees about the upcoming changes.

For more information, contact Tom O'Day or another member of the Godfrey & Kahn Labor, Employment and Immigration Team.

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