



Louisiana Legislature Enacts Broad Ban on Smoking

Insights

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During its 2006 regular session, the state legislature voted to replace the Louisiana Office Indoor Clean Air Law with laws that do not merely regulate smoking in office environments, but which also regulate or ban outright smoking in many places open to the public such as hotels, restaurants, and retail establishments. The Louisiana Smokefree Air Act, as the legislature dubbed the new collection of laws, became effective January 1, 2007.

Regulatory Change In The Air

The former law governed workplaces with twenty-five or more employees, and its regulation of smoking largely depended on whether anyone within the workplace complained about smoking. Upon receiving a complaint, an employer had a duty to try to accommodate employees by setting up non-smoking areas, but no structural changes to the workplace or expenditures were required. Under the new Smokefree Air Act, businesses with even one employee must ban smoking within any enclosed workplace. The Act defines enclosed workplaces broadly. Examples of enclosed workplaces where smoking is banned by the Act include:

- work areas;
- employee lounges;
- restrooms;
- conference rooms;
- meeting rooms;
- classrooms;
- employee cafeterias;
- hallways; and
- vehicles.

When enacting the Smokefree Air Act, the legislature jettisoned an exception available under the former law, which had allowed smoking within an office occupied exclusively by a smoker. Therefore, even if a manager/supervisor has an office area assigned to him or her, if employees regularly visit that area, the manager/supervisor's office must now be a non-smoking area.

As suggested by its title, the Smokefree Air Act not only aims to ban smoking in places where people happen to be working. The Act also targets smoking within a "public place," another term which is broadly defined. Examples include restaurants, reception areas, shopping malls, retailers, retail service providers, and theatres.

Compliance generally requires removal of all ashtrays from any area where smoking is banned, and mandates the conspicuous placement of no smoking signs. Under the Smokefree Air Act, smoking is generally permitted outdoors. But businesses are permitted to ban even outdoor smoking on their premises by posting non-smoking signs to that effect.

Eating, Drinking And Smoking

Certain industries are subject to special rules which may present unique compliance questions nowhere is this more pronounced than for the state's hospitality industry. For example, when is a bar a bar, and not a restaurant? The answer to this question determines whether an establishment is exempt from the Act, and hence can permit smoking. To qualify for exemption under the Act as a bar, an establishment must:

- hold a Class A-General retail liquor permit;
- have as its *primary* business purpose the serving of alcoholic beverages on premises; and
- if serving food, serve food only incidentally to the consumption of alcoholic beverages.

Additionally, hotels and motels must ban smoking outright in their lobbies and cannot configure more than fifty percent of their rooms as designated smoking rooms. Even if a room is designated as a smoking room, smoking is only allowed when it is actually "rented to a guest." Thus, maintenance workers and cleaning staff are apparently prohibited from smoking in a designated smoking room.

Gaming establishments, such as casinos and video poker licensees, are permitted to have designated smoking areas. But restaurant and snack bar areas, whether or not separated from gaming areas, must be non-smoking areas.

Even though restaurants unconnected to the gaming industry are specifically cited as places where smoking is prohibited, one exception at least appears to allow restaurants to create smoking areas. Specifically, the Smokefree Air Act permits smoking at "[a]n outdoor patio, whether or not food is served."

Penalties

Employers must gear their compliance efforts to the Smokefree Air Act's two-pronged approach to enforcement. First, it is unlawful for an employee to smoke in an area where smoking is prohibited under the Act. Second, it is also unlawful for an employer to *permit smoking* in a prohibited area. Though not explicitly defined in the Smokefree Air Act, the use of the term "permit" appears to require an employer to halt both employees and patrons alike from smoking.

A first time offense subjects an employer to a \$100 fine. Fines to employers increase for subsequent offenses, to a maximum of \$500 per occurrence. Employees and other individuals who smoke where prohibited are subject to fines ranging from \$25 to \$100.

Just Blowing Smoke vs. Blowing the Whistle

The Smokefree Air Act contains its own non-discrimination and non-retaliation provisions, protecting individuals who complain of smoking violations or who furnish information to law enforcement, and those protections are not specifically limited to employees. Louisiana already has a whistleblower protection statute which prohibits employers from retaliating against employees who complain of violations of law. This leaves open the question of whether an employee who complains of smoking in the workplace is protected by the whistleblower statute, the Smokefree Air Act, or both. Liability is drastically higher for retaliation under the whistleblower statute.

Conclusion

The Louisiana Smokefree Air Act greatly increases the number of places where smoking is banned. Additionally, employers are now responsible for ensuring that both their employees and patrons observe the smoking ban. Compliance requires not only the one-time tasks of removing ash trays and posting non-smoking signs, but also requires continued vigilance against violations. Accordingly, employers seeking to avoid the Act's penalties and the spectre of retaliation claims should also consider the further steps of disseminating written policies and conducting supervisor training regarding this new regulation.

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