



Employee Consent or Waiver Provisions in Smoke-free Workplace Regulations

As smoke-free workplaces proliferate across the U.S., state and local policymakers are sometimes asked to consider legislation that allows employees to opt out of a smoke-free work environment if all employees consent to smoking. This Tobacco Control Legal Consortium Fact Sheet examines a few typical employee consent/waiver provisions in smoke-free laws, legal and policy difficulties that can result from such provisions, and provides mitigating language to protect employee rights if these provisions are enacted.

Q. What are *employee consent/waiver provisions* in smoke-free workplace policies?

A. These provisions exempt workplaces or parts of workplaces from smoke-free regulations if all employees consent to smoking. The provisions are typically set up in one of three ways:

1. *Yes or no.* Allows smoking in the entire premises if all employees agree.
2. *Yes or no.* Allows smoking in certain areas of premises. Nonconsenting employees are not required to enter such areas.
3. *Yes or no job.* Requires employees or job applicants to provide written consent to working in smoking environment, such as a bar or club.

Q. Why are consent/waiver provisions problematic?

A. The most obvious problem with these provisions is their failure to protect all workers from secondhand tobacco smoke. Although under the two "yes or no" schemes above, an employee theoretically has the right to say "No," many employees will consent out of peer pressure or fear of retaliation, especially in situations where the majority of coworkers or the supervisor want to smoke. Allowing some employees to opt out of smoking areas could create difficulties, especially in smaller venues where managers may not have much flexibility in assigning work at given times.

Making consent to a smoky environment a job requirement clearly discriminates against employees in certain business sectors. The goal of smoke-free laws and policies should be to protect all workers all the time.

Q. What are the potential legal issues of including consent/waiver provisions?

A. Such provisions are rare, and no published cases deal with this issue. Legal questions to consider include:

- The Americans with Disabilities Act and employees with chronic obstructive pulmonary disease or other pulmonary disabilities. For a general discussion of smoking and the ADA, see the Tobacco Control Legal Consortium's *The Americans with Disabilities Act: Effective Legal Protection Against Secondhand Smoke Exposure* at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-disabilities-2004.pdf>.
- Employer liability for secondhand smoke-related injuries. It is unclear how written consent would change such liability, but see the Tobacco Control Legal Consortium's *Workplace Smoking: Options for Employees and Legal Risks for Employers* at http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-workplace-2008_0.pdf.
- Labor unions and conflicts with rules regarding accommodation, shift work and other issues, including internal rules on workplace smoking. For an overview of legal issues related to the implementation of smoke-free and tobacco control policies in labor unions, see the Public Health Law Center's *Union Guide to Tobacco: Tobacco and Labor Unions* at <http://publichealthlawcenter.org/sites/default/files/resources/ws-guide-union-2004.pdf>

Q. How important is it to include an employee consent/waiver provision in a smoke-free policy? Do public health advocates typically consider this type of provision a deal breaker?

A. Such provisions ask people to choose between their health and their livelihood. The Tobacco Control Legal Consortium and other public health groups view employee consent provisions in the same category as ventilation, red light/green light regulations and others. Public health advocates should strongly contest the inclusion of such a provision in any smoke-free policy.

Q. What if the decision is made to go forward anyway? What sample language could mitigate the damage of consent/waiver provisions?

A. Although it wasn't designed to counter this issue, the Americans for Nonsmokers Rights' model ordinance (2010) includes language to protect employees' rights (<http://www.no-smoke.org/document.php?id=229>):

Sec. 1012. Nonretaliation; Nonwaiver of Rights

- A. No person or employer shall discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, customer, or resident of a multiple-unit residential facility because that employee, applicant, customer, or resident exercises any rights afforded by this Article or reports or attempts to prosecute a violation of this Article. Notwithstanding Section 1014, violation of this Subsection shall be a misdemeanor, punishable by a fine not to exceed \$1000 for each violation.

- B. An employee who works in a setting where an employer allows smoking does not waive or otherwise surrender any legal rights the employee may have against the employer or any other party.

The information contained in this document is not intended to constitute or replace legal advice. We encourage anyone considering the implementation of any tobacco-related law or policy to seek out local legal counsel to obtain legal advice on these issues.

Last updated: August 2010